Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirtieth report of the 44th Parliament

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

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

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Membership of the committee

Members

The Hon Philip Ruddock MP, Chair	Berowra, New South Wales, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Senator Matthew Canavan	Queensland, NAT
Dr David Gillespie MP	Lyne, New South Wales, NAT
Ms Cathy McGowan AO MP	Indi, Victoria, IND
Senator Nick McKim	Tasmania, AG
Senator Claire Moore	Queensland, ALP
Senator Dean Smith	Western Australia, LP
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

Secretariat

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

External legal adviser

Professor Simon Rice OAM

Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 12 to 22 October 2015, legislative instruments received from 18 September to 1 October 2015, and legislation previously deferred by the committee.

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

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

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

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

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Australian Crime Commission Amendment (Criminology Research) Bill 2015;
- Defence Legislation Amendment (First Principles) Bill 2015;
- Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015; and
- High Speed Rail Planning Authority Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015;
- Higher Education Legislation Amendment (Miscellaneous Measures) Bill 2015;
- Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015;
- Migration Amendment (Mandatory Reporting) Bill 2015; and
- Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015.

Instruments not raising human rights concerns

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

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

Deferred bills and instruments

1.11 The committee has deferred its consideration of the following instruments:

- Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464];
- Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]; and
- Military Superannuation and Benefits (Eligible Members) Declaration 2015 [F2015L01527].

1.12 The committee also defers the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422] pending a response from the Minister for Foreign Affairs regarding a number of related instruments.[2]

1.13 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

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

2 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38.

1.14 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.[3]

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

Response required

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

Crimes Legislation Amendment (Harming Australians) Bill 2015

Portfolio and sponsor: Attorney-General and Senator Xenophon
Introduced: Senate, 15 October 2015

Purpose

1.16 The Crimes Legislation Amendment (Harming Australians) Bill 2015 (the bill) seeks to amend the *Criminal Code Act 1995* (the Criminal Code) to extend provisions that make it an offence to, outside of Australia, murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian citizen or resident to conduct that occurred at any time before 1 October 2002.

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

Background

1.18 The *Criminal Code Amendment (Offences Against Australians) Act 2002* (the 2002 Act) inserted a new Division 104 (Harming Australians) into the Criminal Code. This established new offences of murder, manslaughter, and the intentional or reckless infliction of serious harm on Australian citizens or residents abroad. The 2002 Act commenced operation on 14 November 2002 but operated retrospectively, with effect from 1 October 2002.

1.19 Senator Xenophon then introduced the Criminal Code Amendment (Harming Australians) Bill 2013 (the previous bill) on 11 December 2013, which was substantially similar to the current bill, seeking to extend the retrospective application of the above offences. The committee considered the previous bill in its *Second Report of the 44th Parliament*,[1] and sought further information from the legislation proponent as to whether the bill was compatible with the prohibition against retrospective criminal laws. The committee also invited comment from the Attorney-General as the minister responsible for the Criminal Code, and considered this response in its *Fourth Report of the 44th Parliament*.[2]

1.20 The current bill includes a number of amendments to the previous bill, including amended penalty provisions, extension of absolute liability to the new offences, and safeguards relating to double jeopardy. It also provides that in order

1 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 31-35.

2 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014) 39-40.

for an offence to have occurred under the new laws, the conduct constituting the offence must have also constituted an offence against the law of the country in which it occurred, at the time that it occurred.

Extended application of absolute liability

1.21 The bill proposes to amend subsections 115.1(2) and 115.2(2) of the Criminal Code to apply absolute liability to the new elements of the offence provisions, concerning the murder or manslaughter of an Australian citizen or resident of Australia in a foreign country before 1 October 2002. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved as to whether, the victim was an Australian citizen or resident or whether, at the time the conduct was engaged in, the conduct constituted an offence against a law of a foreign country. In addition, the defence of mistake of fact is not available to a defendant.

1.22 The committee considers that as the existing application of absolute liability has been expanded and applied to a new element of the offence, the bill engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

1.23 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.24 Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. However, absolute liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

Compatibility of the measure with the right to a fair trial (presumption of innocence)

1.25 As set out in the committee's Guidance Note 2,[3] absolute liability offences engage the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault.

1.26 The statement of compatibility for the bill does not acknowledge that the presumption of innocence is engaged by these measures, and as such has not set out

3 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2 – Offence provisions, civil penalties and human rights* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en.

to explain how extending the application of absolute liability is a justifiable limit on the right to a fair trial.

1.27 It is the committee's usual expectation that, where absolute liability criminal offences or elements are introduced or expanded, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with the committee's Guidance Note 1.[4]

1.28 **The committee's assessment of the extended application of absolute liability against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial (presumption of innocence)) raises questions as to whether the measure is justifiable.**

1.29 **As set out above, the extended application of absolute liability engages and limits the right to a fair trial (presumption of innocence). The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponents as to whether the measure 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.**

Retrospective application of culpability for offences committed overseas

1.30 The bill extends retrospectively the application of subsections 115.1 and 115.2 of the Criminal Code relating to the murder or manslaughter of Australians overseas. In order for an act to constitute an offence under these amendments, the act must have been an offence against the law in the country where it was committed at the time that it was committed.

1.31 The bill also amends the penalty provisions that would apply to the above offences which occurred before 1 October 2002. The new provisions provide for the maximum term of imprisonment to be no more than what the maximum would be under the law of the foreign country. For countries where a non-custodial penalty would apply to the offence, the Australian maximum penalty would apply.

1.32 The committee considers that the retrospective application of culpability for offences committed overseas in relation to the nature of the offence and the

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4 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf.

relevant penalty provisions engages and may limit the prohibition against retrospective criminal laws.

Prohibition against retrospective criminal laws (nature of the offence)

1.33 Article 15 of the ICCPR prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. This is an absolute right and it can never be justifiably limited. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

1.34 Article 15 requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed. Laws must not impose greater punishments than those which would have been available at the time the acts were done. Further, if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right, where an offence is decriminalised, to the retrospective decriminalisation (if the person is yet to be penalised).

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

Compatibility of the measure with the prohibition against retrospective criminal laws (nature of the offence)

1.36 The statement of compatibility for the bill acknowledges that the prohibition against retrospective criminal laws is engaged. It states that:

> 'While retrospective offences are generally not appropriate, retrospective application is justifiable in these circumstances because the conduct which is being criminalised – murder and manslaughter – is conduct which is universally known to be conduct which is criminal in nature.'[5]

1.37 However, the committee has stated in its previous analysis that while murder, manslaughter and the infliction of serious harm are crimes under the ordinary criminal law of most, if not all, countries, they are not the sort of international crimes understood as falling within the exception in article 15(2) (which applies to breaches of international humanitarian law, such as genocide, war crimes or crimes against humanity).[6] To constitute an exemption from the prohibition against retrospective criminal laws, the conduct must be recognised by the general principles of law recognised by the international community as being criminal, as discussed at [1.35] above.

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5 Explanatory memorandum (EM), Statement of Compatibility (SoC) 4.

6 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014) 40.

1.38 Accordingly, the test for compatibility with article 15 is whether the conduct was criminal under national law at the time it was committed. In the situation envisaged by the bill, the conduct in question occurs in a third country and so it must be that the conduct is already criminal under the national law in that third country. In this regard, the bill provides that the conduct constituting the offence must also have constituted an offence against the law of the foreign country in which the conduct occurred. However, the bill does not require that the conduct was an offence of manslaughter or murder (or its equivalents) in the third country – merely that it is 'an offence'. While it may be that in many cases the construction of the offence provision in the third country is equivalent to that under Australian law, there are also likely to be differences between countries as to what constitutes the offence of murder compared to manslaughter and the specific fault elements that apply to each offence. There are also likely to be differences between countries as to the liability of an individual where a person is killed as part of joint criminal enterprise such as burglary.

1.39 The rationale behind article 15 is that it would be unfair for someone to be found guilty of a criminal act if it was not criminal at the time they committed the act. The UN Human Rights Council has suggested that article 15 may be violated where a person is convicted of an offence that did not exist at the time of the alleged conduct even where the law in force at the time criminalised that conduct under other relevant offences.[7] Accordingly, it would likely be breach of article 15 if a person who committed an offence that would be subject to the charge of burglary in their home country to be subsequently, as a result of this bill, subject to the charge of murder in Australia.

1.40 The statement of compatibility does not deal directly with the possibility that individuals could be charged with a murder or manslaughter offence which is not equivalent to the offence that they allegedly committed in the foreign country.

1.41 **The committee's assessment of the retrospective application of culpability for offences committed overseas against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective criminal laws in relation to penalty provisions) raises questions as to whether the measure is compatible with human rights law.**

1.42 **The committee therefore seeks the advice of the legislation proponents as to how, in light of the committee's concerns raised above, the retrospective application of culpability could be compatible with the absolute prohibition against retrospective criminal laws.**

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7 *Gómez Casafranca v Peru*, Communication No 981/2001, UN Doc. CCPR/C/78/D/981/2001.

Prohibition against retrospective criminal laws (penalty provisions)

1.43 The prohibition against retrospective criminal laws is contained within article 15 of the ICCPR. More information is set out above at paragraphs [1.33] to [1.35].

Compatibility of the measure with the prohibition against retrospective criminal laws (penalty provisions)

1.44 Items 5 and 12 of the bill seek to amend the penalties that would apply to persons convicted of the new offences (relating to murder and manslaughter respectively). If the conduct occurred before 1 October 2002 and is punishable in the country in which the conduct occurred by a term of imprisonment, the maximum sentence that may be handed down by an Australian court may not exceed the maximum imprisonment that would apply in the other country. However, if the conduct is punishable in the other country by a non-custodial sentence, the maximum penalty under the Criminal Code will apply.

1.45 As noted above at [1.34], article 15 of the ICCPR provides that laws must not impose greater punishments than those which would have been available at the time the acts were done. While the amendments in the bill do not seek to impose a higher *custodial* penalty than that which would apply in the country where the offence was committed, it is possible that where a non-custodial sentence would be applicable to the offence in that foreign country, an individual may receive a substantially more severe penalty under the proposed new law than that which applied at the time the conduct was committed.

1.46 The statement of compatibility for the bill acknowledges that the measure engages retrospective criminal laws, and states:

> Due to the difficulty of anticipating all possible punishments which may be applied in foreign jurisdictions for offences of murder and manslaughter, the Bill does not attempt to prescribe all possible punishments. Where a foreign law would impose a non-custodial punishment, particularly those that would not be consistent with other international human rights obligations, such as the prohibition on torture or cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR, these punishments will not be considered lower penalties for the purpose of these offences. As such, the defendant will be liable to the same maximum penalty which would be applicable to the offences if they had been committed on or after 1 October 2002.[8]

1.47 As such, while the statement of compatibility acknowledges other non-custodial sentences may apply in other jurisdictions, it dismisses these as not being considered as lower penalties. It goes on to state that:

8 EM, SoC 5.

> 'as not all possible punishments can be foreshadowed and prescribed, this [the maximum imprisonment penalty] provides a mechanism to ensure that it will be open to the court to impose a term of imprisonment commensurate with the penalty applicable in the foreign jurisdiction.[9]

1.48 The statement of compatibility does not deal with the situation where a person would, in the third country, be liable for a fine, to pay requisite compensation, or community service, yet by the retrospective application of this bill may be liable for a substantial custodial sentence under Australian law. Article 15 of the ICCPR provides that laws must not impose greater punishments than those which would have been available at the time the acts were done, which is an absolute right that can never be justifiably limited.

1.49 **The committee's assessment of the retrospective application of culpability for offences committed overseas against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective criminal laws in relation to penalty provisions) raises questions as to whether the measure is compatible with human rights law.**

1.50 **The committee therefore seeks the advice of the legislation proponents as to how, in light of the committee's concerns raised above, the imposition of higher penalties than previously existed could be compatible the absolute prohibition against retrospective criminal laws.**

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9 EM, SoC 5.

Criminal Code Amendment (Private Sexual Material) Bill 2015

Sponsor: Tim Watts MP; Terri Butler MP
Introduced: House of Representatives, 12 October 2015

Purpose

1.51 The Criminal Code Amendment (Private Sexual Material) Bill 2015 (the bill) seeks to amend the *Criminal Code Act 1995* (Criminal Code) to criminalise what is colloquially referred to as 'revenge porn'. Specifically, the bill would introduce three new telecommunications offences that would make it an offence to:

- use a carriage service to, without consent, publish private sexual material;
- threaten to do so; or
- possess, control, produce, supply or obtain private sexual material for use through a carriage service.

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

Reversal of the burden of proof

1.53 Proposed section 474.24H of the bill provides a number of exceptions to the proposed new offences introduced by the bill, including if the conduct was:

- engaged in for the public benefit;
- in relation to news, current affairs, information or a documentary (and there was no intention to cause harm);
- by a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; or
- in the course of a assisting the Children's e-Safety Commissioner or relating to content filtering technology.

1.54 These exceptions reverse the burden of proof, requiring the defendant to bear an evidential burden if relying on these defences.

1.55 The committee considers that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

1.56 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt

1.57 An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the

existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.58 Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision. Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

Compatibility of the measure with the right to a fair trial

1.59 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures. The explanatory memorandum to the bill also provides little justification for these measures, other than asserting:

> It will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defences apply do in fact exist.[1]

1.60 As set out the committee's Guidance Note 2,[2] reverse burden offences are likely to be compatible with the presumption of innocence where they are shown by the legislation proponent to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

1.61 It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with the committee's Guidance Note 1.[3]

1.62 **The committee's assessment of the reversal of the burden of proof against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial) raises questions as to whether the measure is justifiable.**

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1 Explanatory Memorandum, paragraph 46.

2 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 2 – Offence provisions, civil penalties and human rights (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en.

3 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf.

1.63 **As set out above, the reversal of the burden of proof engages and limits the right to a fair trial. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponents as to:**

- **whether the proposed exceptions 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.**

Health Insurance Amendment (Safety Net) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 21 October 2015

Purpose

1.64 The Health Insurance Amendment (Safety Net) Bill 2015 (the bill) seeks to amend the *Health Insurance Act 1973* to introduce a new Medicare safety net, replacing three existing safety nets.

1.65 The new Medicare safety net will continue to cover up to 80 per cent of out-of-pocket medical costs once an annual threshold is met, however, it will introduce a limit on the amount and type of out-of-pocket costs that can be included in the calculation for the annual safety net threshold.

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

Limitations on the amount of out-of-pocket health costs that can be claimed

1.67 There are currently three Medicare safety nets:

- the Original Medicare Safety Net – which increases the Medicare rebate payable for out-of-hospital Medicare services to 100 per cent of the scheduled fee once an annual threshold of gap costs has been met;
- the Greatest Permissible Gap (GPG) – which increases the Medicare rebate for high cost out-of-hospital services so that the difference between the MBS fee and the Medicare rebate is no more than $78.40; and
- the Extended Medicare Safety Net (EMSN) – which provides a rebate for out-of-pocket medical costs (for out-of-hospital care) so that Medicare pays up to 80 per cent of further out-of-pocket costs once an annual threshold has been met.

1.68 Together these three schemes reduce both the individual costs of high cost out-of-hospital services for all Medicare recipients and provide increased rebates to individuals and families who have high annual medical bills that exceed certain thresholds.

1.69 The bill would replace these three safety nets with a new Medicare safety net.

1.70 The proposed new Medicare safety net would have a lower annual threshold for most people including concession card holders, singles and families.[1] Those

1 Current thresholds for concession card holders and recipients of FTB A is $638.40 and for singles and families is $2 000.

receiving FTB A will have to reach a slightly higher threshold than under current arrangements.[2]

1.71 Currently, all out-of-pocket costs for out-of-hospital Medicare service count towards the Medicare threshold and there are caps on benefits only for certain items.

1.72 The bill would limit the out-of-pocket costs that can accumulate per service to the threshold for all Medicare services and limit the amount of safety net benefits that are payable per service for all Medicare services. This will mean that some patients will incur out-of-pocket costs that are not included in their costs for medical expenses for the purposes of accessing the new Medicare safety net.

1.73 In addition, it would appear that the bill would remove the GPG which would result in some people incurring larger out-of-pocket expenses for individual high cost medical procedures.

1.74 The committee considers that the changes to Medicare engage and may limit the right to social security and the right to health.

Right to social security

1.75 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

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

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

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;

2 The proposed new threshold for concession card holders is $400; for singles is $700; for families is $1 000 and for recipients of FTB A is $700.

- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

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

1.79 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Right to health

1.80 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

1.81 Article 2(1) of the ICESCR imposes on Australia the obligations listed above at paragraph [1.77] and article 4 of the ICESCR allows limitations on the right to health in the manner set out above at paragraph [1.79].

Compatibility of the measure with the right to social security and the right to health

1.82 The statement of compatibility for the bill acknowledges that the bill engages the right to social security and the right to health. It explains that the objective of the bill is 'to ensure that the safety net arrangements for out-of-pocket costs for out-of-hospital Medicare services are financially sustainable'.[3]

1.83 It also notes that the bill seeks to address issues raised by two independent reviews which found that the existing safety net arrangements may have led to some people experiencing higher out-of-pocket costs. This is because there is evidence to suggest that the introduction of the EMSN led to doctors increasing their fees.[4]

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

4 EM, SoC 9.

1.84 The committee considers that better targeting the safety net arrangements and ensuring they are financially sustainable is a legitimate objective for the purposes of international human rights law. The committee considers that the measures are rationally connected, and likely to be effective, to achieve this objective.

1.85 The statement of compatibility addresses whether the proposed changes are proportionate to achieving this objective:

> The Commonwealth will continue to provide an additional rebate for out-of-hospital medicare services once the threshold has been reached…
>
> While the average benefit paid under the new medicare safety net will reduce, the number of people that will receive a safety net benefit will increase compared to the number of people who will receive a benefit under the EMSN in 2015. It is anticipated that benefits under the new medicare safety net will be more equitably distributed between socio-economically advantaged and disadvantaged areas…
>
> The new medicare safety net threshold for people who qualify for a Commonwealth concession card is lower than under the EMSN. Therefore this Bill protects the benefits of individuals that are financially disadvantaged. Commonwealth concession cards are provided to people who meet a range of criteria including qualifying for a Commonwealth Seniors Health Card, Pensioner Concession Card, Low-income Health Care Card or Newstart Allowance.[5]

1.86 Under international human rights law, one of the considerations, in determining whether a limitation on a right is proportionate, is considering whether any affected groups are particularly vulnerable. Lowering the thresholds for certain groups may result in more people being eligible for the safety net. Importantly there is a lower threshold for concession card holders (though noting that recipients of FTB A will have their threshold increased).

1.87 However, the changes to the limits on the medical expenses included in the calculation of eligibility for the safety net threshold and limits on safety net benefits apply to everyone. This will mean a person is likely to incur more out-of-pocket expenses before the threshold is reached. This change does not take into account whether the persons incurring the costs are financially disadvantaged.

1.88 The statement of compatibility states that the bill will mean that the benefits of the safety net will be more equitably distributed between socio-economically advantaged and disadvantaged areas. However it does not explain whether the bill will result in many financially disadvantaged people being worse off as a result of the changes. If this is the case, it is also unclear what safeguards there are to ensure that financially disadvantaged people are not effectively barred from accessing

5 EM, SoC 9-10.

appropriate out-of-hospital healthcare due to a reduction in the benefits payable to them.

1.89 The committee also notes that it would appear that the bill would remove the GPG, which could result in some people incurring larger individual out-of-pocket expenses for high cost medical services. There is no information in the statement of compatibility as to how financially disadvantaged individuals, including concession card holders, will be supported to meet these individual one-off costs.

1.90 **The committee's assessment of the measures limiting the amount of out-of-pocket health costs that can be claimed against articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to health) raises questions as to whether the measures are a justifiable limitation on those rights.**

1.91 **As set out above, the measures engage and limit the right to social security and the right to health. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.**

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 14 October 2015

Purpose

1.92 The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- amend the statutory complementary protection framework standards for equivalency with the new statutory refugee framework, as inserted by Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*;
- amend the reference to 'protection obligations' in subsection 36(3) to specify the source of the obligations;
- amend the definition of 'country' in subsection 5H(1), which outlines the meaning of 'refugee', to be the same country as the 'receiving country' as applies in subsection 5(1) of the Migration Act;
- align the statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution' in section 5J of the Migration Act;
- amend subsection 36(2C), to remove duplication between paragraph 36(2C)(b) and subsection 36(1C) in the Migration Act, which both operate to exclude an applicant from the grant of a protection visa on character-related grounds;
- amend subsection 336F(5), which authorises disclosure of identifying information to foreign countries or entities, to include information pertaining to unauthorised maritime arrivals who make claims for protection as a refugee and fall within the circumstances of subsection 36(1C) of the Migration Act;
- amend subsection 502(1), which allows the Minister for Immigration and Border Protection to personally make a decision that is not reviewable by the Administrative Appeals Tribunal (AAT), to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person; and
- amend subsection 503(1), which relates to the exclusion of certain persons from Australia, to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

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

Changes to the statutory framework for complementary protection – real risk in the entire country

1.94 Currently, under the Migration Act a person will not be considered to be entitled to a protection visa on complementary protection grounds if it would be reasonable for that person to relocate to an area of their home country where they would not be at risk of significant harm. Complementary protection refers to persons who may not satisfy the criteria for recognition as a refugee but who, nevertheless, face a real risk of suffering significant harm if removed from Australia to the receiving country.[1]

1.95 The bill seeks to amend the Act such that a person will not be considered eligible for protection unless the risk they face relates to all areas of their home country. That is, if an individual is found to be able to live without a risk of significant harm in a small part of their home country they would be ineligible for protection regardless if it would be reasonable or practicable for them to travel to that area of their home country.

1.96 The committee considers that this provision engages Australia's non-refoulement obligations as a person who does not meet the statutory criteria under the Migration Act may be subject to return to their home country.

Non-refoulement obligations

1.97 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[2] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

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1 See section 36(2)(aa) of the *Migration Act 1958*.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

3 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

1.99 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[4]

1.100 Australia gives effect to its non-refoulement obligations principally through the Migration Act.

Compatibility of the measure with the right to non-refoulement

1.101 The statement of compatibility acknowledges that Australia's non-refoulement obligations are engaged by the bill, but states that:

> …the UN Human Rights Committee (UNHRC) has described the non-refoulement obligation under the ICCPR as being engaged only if a person faces a risk of harm in the whole of a country. In addition, commentary from the UN Committee Against Torture (UNCAT) has suggested that there must exist a risk [of harm] in the entire territory of the target State and that there must be no internal flight alternative, thus acknowledging the same approach should be applied in the consideration of complementary protection claims regarding torture, as is applied by the internal relocation principle in the consideration of Refugee Convention claims. As such, this amendment is compatible with human rights because it reflects Australia's non-refoulement obligations.[5]

1.102 There are divergent views as to whether or not under international human rights law an 'internal flight option' – the ability to find safety in one part of your home country – negates an individual's claim for protection against refoulement. The weight of evidence would suggest this is not the case.[6] What is clear from the jurisprudence is that such relocation must be reasonable and practicable.[7] In removing the requirement that the minister must be satisfied that it is reasonable for a person to relocate to an area of their home country the bill would result in a person being ineligible for protection even though it may not be reasonable for them

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4 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 513.

5 Explanatory Memorandum (EM), Statement of Compatibility (SoC), paragraph [21].

6 See *Alan v Switzerland*, Merits, Communication No 21/1995, UN Doc CAT/C/16/D/21/1995, UN Doc A/51/44, Annex V, 68, IHRL 3781 (UNCAT 1996), *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (1999) and Manfred Nowak (Former UN Special Rapporteur on Torture) *An Analysis of the various legal issues under Article 3 CAT* (available from http://www.hklawacademy.org/downloads/cat1/d2am/ProfessorManfredNowakAnAnalysisoftheVariousLegalIssuesundeArticle3.pdf). In contrast see *H.M.H.I. (name withheld) v. Australia,* Communication No. 177/2001, U.N. Doc. A/57/44 at 166 (2002).

7 See James C. Hathaway and Michelle Foster, *Global Consultations on international protection*, June 2003, available at: http://www.refworld.org/docid/470a33b70.html.

to relocate internally. This would leave such individuals subject to refoulement in breach of Australia's international legal obligations.

1.103 The statement of compatibility notes that:

> In considering whether a person can relocate to another area, a decision maker would still be required to take into account whether the person can safely and legally access an alternative flight option upon returning to the receiving country.[8]

1.104 However, there is no statutory requirement obliging a decision maker to consider such matters. While such matters may be considered as a matter of departmental policy, this is an insufficiently robust protection for the purpose of international human rights law. The committee has consistently stated that where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation under international human rights law.[9] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.105 **The committee's assessment of the proposed changes to the statutory framework for complementary protection against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.106 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations, in light of the committee's concerns raised above.**

Changes to the statutory framework for complementary protection—behaviour modification

1.107 The bill would also remove Australia's protection obligations in circumstances where an individual could avoid significant harm if the person could take reasonable steps to modify their behaviour. A person would not be required to modify their behaviour if to do so would conflict with a characteristic that is fundamental to the person's identity or conscience including their religion, race, disability status or sexual orientation.

1.108 This provision engages Australia's non-refoulement obligation as an individual, who would otherwise be granted protection in Australia, may be deemed

8 EM, SoC, paragraph [20].

9 See, for example, Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

ineligible if they could modify their behaviour in a way that was considered not to be in conflict with their fundamental identity.

Non-refoulement obligations

1.109 Australia non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measure with the right to non-refoulement

1.110 The statement of compatibility provides that:

> In the complementary protection context, a person may be able to modify their behaviour in a manner that would not conflict with their identity or belief system (for example, by refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation) and could thereby avoid the risk of significant harm. If this is the case, they should not necessarily be provided with protection, as their return would not itself engage *non-refoulement* obligations – the risk of harm would only arise if they chose to undertake certain actions. This amendment is therefore consistent with Australia's *non-refoulement* obligations.[10]

1.111 The jurisprudence does not support the position outlined in the statement of compatibility. The obligation to protect against refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors.[11] The courts have found that persecution does not cease to be persecution simply because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.[12] This principle applies equally in the refugee assessment space as it does in assessing complementary protection under the ICCPR and CAT.

1.112 The bill would require decision makers to assess whether or not a behaviour modification is reasonable and not in conflict with a characteristic that is fundamental to a person's identity or conscience. This measure imposes additional statutory hurdles as part of the assessment of protection status. It requires an assessment of not only whether a person could refrain from certain actions but also take positive actions to conceal aspects of their identity or conscience that are not assessed as fundamental.

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10 EM, SOC, paragraph [31].

11 See *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; *CJEU judgment* in C-199/12, C200/12 and C201/12, *X, Y and Z*, 7 November 2013; CJEU – C-71/11 and C-99/11 *Germany v Y and Z*, 5 September 2012; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [40]-[41] per McHugh and Kirby JJ.

12 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [40] per McHugh and Kirby JJ.

1.113 Under the bill, a person could be required to not attend or participate in any political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's conscience. Similarly, a person who has previously worked as a journalist in their home country could be required to cease work as a journalist if the content of their published work risked attracting persecution.

1.114 **The committee's assessment of the proposed changes to the statutory framework for complementary protection (behaviour modification) against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.115 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Excluded persons

1.116 Currently, section 502 of the Migration Act provides that the Minister for Immigration and Border Protection may declare a person to be an excluded person on character grounds. An excluded person may not seek merits review of a decision at the Administrative Appeals Tribunal to deny their protection visa application. This provision currently only applies to persons who have been denied a protection visa on refugee grounds and not those who have applied for a protection visa on the grounds of complementary protection. This bill would extend the application of section 502 to individuals seeking a protection visa on the grounds of complementary protection.

1.117 This amendment, in removing a person's ability to seek merits review of a decision to refuse a visa on character grounds, engages the protection against refoulement, including the right to an effective remedy. Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Non-refoulement obligations

1.118 Australia non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measure with the right to non-refoulement

1.119 The statement of compatibility explains that:

> While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT that it is required in the

> assessment of non-refoulement obligations. Anyone who is found through visa or Ministerial intervention processes to engage Australia's non refoulement obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by the Minister will remain able to access judicial review which satisfies the obligation in Article 13 [ICCPR] to have review by a competent authority.[13]

1.120 The committee agrees that there is no express requirement specifically for meri*t*s review in the articles of the relevant conventions or jurisprudence relating to obligations of non-refoulement. However, the committee notes its view that merits review of such decisions is required to comply with the obligation under international law, is based on a consistent analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context.

1.121 In formulating this view, the committee has followed its usual approach of drawing on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate.

1.122 In this regard, the committee notes that treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. For example, the UN Committee against Torture in *Agiza v. Sweden* found:

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[14]

1.123 Similarly, the UN Committee against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[15]

1.124 In relation to the ICCPR, in *Alzery v. Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

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13 EM, SoC, paragraph [57].

14 Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7].

15 *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000.

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[16]

1.125 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[17]

1.126 The case law quoted above therefore establishes the proposition that, while merits review is not expressly required, there is strict requirement for 'effective review' of non-refoulement decisions.

1.127 Applied to the Australian context, judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977*, and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

1.128 Accordingly, in the Australian context, the committee considers that judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision. The ineffectiveness of judicial review is particularly apparent when considered against the purpose of effective review of non-refoulement decisions under international law, which is to 'avoid irreparable harm to the individual'.

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16 Mohammed Alzery v. Sweden, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006)) [11.8].

17 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

1.129 In contrast, merits review allows a person or entity other than the primary decision maker to reconsider the facts, law and policy aspects of the original decision and to determine what is the correct or preferable decision.

1.130 In light of the above, the committee considers that, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met by the availability of judicial review, but may be fulfilled by merits review.

1.131 **The committee's assessment of the proposed extension of the Minister's power to exclude a person from merits review against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.132 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Migration and Maritime Powers Amendment Bill (No. 1) 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 16 September 2015

Purpose

1.133 The Migration and Maritime Powers Amendment Bill (No. 1) 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- provide that when an unlawful non-citizen is in the process of being removed to another country and if, before they enter that country, the person is returned to Australia, then that person has a lawful basis to return to Australia without a visa;
- provide that when that person is returned to Australia, bars on the person making a valid visa application for certain visas will continue to apply as if they had never left Australia;
- make further amendments arising out of the enactment of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*;
- confirm that a person who has previously been refused a protection visa application that was made on their behalf cannot make a further protection visa application;
- ensure that fast track applicants can apply to the Administrative Appeals Tribunal for review of certain decisions; and
- correct a referencing error in relation to maritime crew visas, and ensure that visa ceasing provisions operate as intended.

1.134 The bill also seeks to amend the *Maritime Powers Act 2013* to amend the powers that are able to be exercised in the course of passage through or above waters of another country in a manner consistent with the United Nations Convention on the Law of the Sea.

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

Extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia.

1.136 The amendments in Schedule 1 of the bill provide that when an unsuccessful attempt is made to remove a non-citizen from Australia, the non-citizen can be returned to Australia without a visa and will be taken to have been continuously in the migration zone.

1.137 The effect of this amendment is that the person would be ineligible to make further applications for a protection visa because they would be characterised as

being continuously in the migration zone, such that the refusal or cancellation of their visa continues to have effect despite their attempted removal.

1.138 Nevertheless, the fact that the person has been refused entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. The inability of individuals in such circumstances to make a new protection claim means that the person may be subject to indefinite immigration detention (raising the right to liberty) or subject to further attempts at deportation that may engage Australia's non-refoulement obligations.

1.139 These measures would also apply to children and so raise questions as to the compatibility of the measures with the obligation to consider the best interests of the child.

1.140 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Right to liberty

1.141 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

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

Compatibility of the measure with the right to liberty

1.143 The statement of compatibility explains that the measures in Schedule 1 engage the right to liberty. The statement of compatibility further explains that while the right to liberty is engaged, any limitation on the right is otherwise justified. In terms of the legitimate objective of the measures the statement of compatibility notes:

> While this Bill widens the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act, they present a reasonable response to achieving a legitimate purpose under the ICCPR, being the safety of the Australian community and integrity of the migration programme. Further, the re-detention of unlawful non-citizens who are brought back to the migration zone will also

> be for the legitimate purpose of completing their removal from Australia under section 198 of the Migration Act.[1]

1.144 The committee considers that ensuring the safety of Australians is a legitimate objective for the purpose of international human rights law. However, the statement of compatibility does not explicitly explain how the measures are rationally connected to that objective, nor how they are proportionate. In particular, it is unclear whether there are sufficient safeguards to ensure that the detention of persons after their return to Australia following an unsuccessful return to their home country will not lead to cases of arbitrary detention.

1.145 The statement of compatibility notes that:

> The Australian Government's position is that the detention of individuals is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, detention that is not "arbitrary" must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.[2]

1.146 However, the committee notes the UN Human Rights Committee (HRC) decision concerning the continued detention of 46 refugees subject to adverse ASIO security assessments. The HRC found that their indefinite detention on security grounds amounted to arbitrary detention and to cruel, inhuman or degrading treatment, contrary to articles 9(1), 9(4) and 7 of the ICCPR. The HRC considered the detention of the refugees to be in violation of the right to liberty in article 9 of the ICCPR because the government:

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.[3]

1 Explanatory Memorandum (EM), Attachment A [43].

2 EM, Attachment A [43].

3 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

1.147 Accordingly, it is the blanket and mandatory nature of detention for those who have been refused a visa but to whom Australia is unable to remove from Australia and so remain in indefinite immigration detention, that makes such detention arbitrary. In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that invokes the right to liberty in article 9 of the ICCPR.

1.148 The committee agrees that the safety of the Australian community, particularly in the current security environment, may be considered to be both a pressing and substantial concern and a legitimate objective. However, as mandatory detention applies to individuals regardless of whether they are a threat to national security, the measure does not appear to be rationally connected to achieve this objective and may not be proportionate because it is not the least rights restrictive approach to achieve the legitimate objective.

1.149 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measure is justifiable under international human rights law.**

1.150 **As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **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, in particular, is it the least rights restrictive approach that could be taken in order to achieve the stated objective.**

Non-refoulement obligations

1.151 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[4] This means that Australia must not return any person to a

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[5]

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

1.153 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[6]

1.154 Australia gives effect to its non-refoulement obligations principally through the Migration Act.

Compatibility of the measure with the right to non-refoulement

1.155 The statement of compatibility notes that the amendments:

> may lead to an unlawful non-citizen being ineligible to make a further application for a protection visa, however, Australia's implementation of the below obligations are complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Migration Act to grant a visa.[7]

1.156 The statement of compatibility also notes that:

> My department recognises that these non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. However, the form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government.[8]

1.157 The committee's long-standing view is that the minister's non-compellable powers are an insufficient protection against non-refoulement and that international law is clear that administrative arrangements are insufficient to protect against unlawful refoulement.

1.158 The obligation of non-refoulement and the right to an effective remedy require an opportunity for effective, independent and impartial review of the

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5 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

6 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia’s Protection Obligations) Bill 2013, 513.

7 EM, Attachment A [43].

8 EM, Attachment A [44].

decision to expel or remove.[9] In this regard, the committee notes that there is no right to merits review of a decision that is made personally by the minister.

1.159 In relation to this, treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. For example, the UN Committee against Torture in *Agiza v. Sweden* found:

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[10]

1.160 Similarly, the UN Committee against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[11]

1.161 In relation to the ICCPR, in *Alzery v. Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel

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9 See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

10 Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7].

11 *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000.

> in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[12]

1.162 As the committee has noted previously, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[13] The committee notes that review mechanisms are important in guarding against the irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

1.163 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.164 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Obligation to consider the best interests of the child

1.165 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[14]

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

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12 Mohammed Alzery v. Sweden, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006)) [11.8].

13 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament* (2 February 2015), paras 1.89 to 1.99. See also *Fourth Report of the 44th Parliament* (18 March 2014) paras 3.55 to 3.66 (both relating to the Migration Amendment (regaining Control Over Australia's Protection Obligations) Bill 2013).

14 Article 3(1).

Compatibility of the measure with the obligation to consider the best interests of the child

1.167 As set out above, the measures in Schedule 1 of the bill have the effect of denying a person who has been unsuccessfully removed from Australia from making further applications for a protection visa. The fact that the person has been refused entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. These measures would also apply to children. Accordingly, it is necessary to consider how it would be in a child's best interests to be denied the right to make a new protection visa application where they had been refused entry by their home country. The engagement of the measures in Schedule 1 with the obligation to consider the best interests of the child is not considered in the statement of compatibility.

1.168 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[15] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[16] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.169 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with the rights of the child.**

1.170 **As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, limits the obligation to**

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

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

consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child 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.**

Expansion of visa cancellation powers

1.171 Schedule 2 of the bill includes amendments which the Explanatory Memorandum (EM) describes as 'technical and consequential amendments arising out of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (the Character Act).'[17] The Character Act introduced new powers to refuse or cancel visas on 'character' grounds. The Character Act has the effect of automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more, or was convicted of a sexually based offence involved a child. The Character Act also creates new personal ministerial powers to reverse decisions made by the Administrative Appeals Tribunal or an officer of the department. In addition, the Character Act significantly decreased the threshold under which a person would fail the 'character test' and increased the Minister's powers to cancel visas on the basis of incorrect information.

1.172 When considering the bill that became the Character Act, the committee considered that it engaged a number of human rights and related obligations.[18] Schedule 2 of the bill now makes a number of amendments to the new cancellation powers introduced by the Character Act which reduce procedural safeguards, including amendments that:

- do not require a person in detention to be informed that they have only two working days to apply for a visa after they have had their visa cancelled by the minister personally under section 501BA;[19]
- require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or if the visa decision is unlawful;[20]

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17 EM 14.

18 See Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 13-28.

19 Item 8, Schedule 2.

- extends a ban on most further visa applications in cases where the minister has personally cancelled a visa;[21]
- automatically cancel or refuse any other visas in cases where the minister has personally set aside a decision by the Administrative Appeals Tribunal or a departmental officer;[22] and
- exclude a person for a prescribed time from entering Australia who has a visa refused or cancelled personally by the minister under sections 501B, or 501BA.[23]

1.173 The committee considers that the changes in Schedule 2 widen the circumstances in which a person may be subject to immigration detention, visa cancellation and potential refoulement. Accordingly, Schedule 2 engages the following rights and obligations:

- non-refoulement obligations;
- the right to liberty;
- the right to freedom of movement;
- the obligation to consider the best interests of the child; and
- the right to equality and non-discrimination.

1.174 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Right to liberty

1.175 The right to liberty is described above at paragraphs [1.141] to [1.142].

Compatibility of the measures with the right to liberty

1.176 The statement of compatibility explains that the measures in Schedule 2 engage but do not limit the right to liberty. The reasoning behind this conclusion is unclear in the statement of compatibility.

1.177 The statement of compatibility nevertheless goes on to explain why any limitation on the right to liberty is justified. In terms of the legitimate objective of the measures the statement of compatibility notes:

> While this Bill widens the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act, these amendments present a reasonable response to achieving a

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20 Item 9, Schedule 2.

21 Item 18, Schedule 2.

22 Item 19, Schedule 2.

23 Item 20, Schedule 2.

> legitimate purpose under the ICCPR – the safety of the Australian community and integrity of the migration programme.[24]

1.178 The committee considers that ensuring the safety of Australians is a legitimate objective for the purpose of international human rights law. However, it is unclear whether these amendments are rationally connected to that objective. In terms of proportionality the statement of compatibility states that:

> questions of proportionality are resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a non-citizen's visa, or whether to revoke a mandatory cancellation decision.[25]

1.179 However, there is no discretion once a visa is cancelled or if it is cancelled automatically by operation of the provisions of the Migration Act. Moreover, a decision to revoke mandatory cancellation can only be made by the minister using his personal, non-compellable, discretionary powers.

1.180 The statement of compatibility notes that:

> The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law. The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[26]

1.181 However, none of these mechanisms entail a statutory requirement for periodic review of the necessity of immigration detention in each individual case. As noted above at paragraphs [1.146] to [1.147], it is the blanket and mandatory nature of detention for those who have been refused a visa but who remain in immigration detention that makes such detention arbitrary. In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that invokes the right to liberty in article 9 of the ICCPR.

1.182 The statement of compatibility also notes that:

> The United Nations Human Rights Committee has expressed a view that Article 9(2) of the ICCPR requires all persons deprived of their liberty to be informed of the reasons for their detention. This Bill proposes provisions to the effect that a non-citizen who has had a visa cancelled by the

24 EM, Attachment A [43].

25 EM, Attachment A [48].

26 EM, Attachment A [49].

> Minister personally under section 501BA does not need to be informed of sections 195 and 196 of the Migration Act, which provide that they may only apply for a visa within 2 working days and their detention will continue until they are removed, deported, or granted a visa. However, a non-citizen who has their visa cancelled under section 501BA will have previously had their visa cancelled under section 501, and so will have been detained under section 189 and informed of sections 195 and 196 at that point. Further, the Department complies with Article 9(2) through the Very Important Notice (Form 1423) that is given to all non-citizens on their detention under section 189 of the Migration Act. This form provides comprehensive information to detainees about their detention, visas they may apply for, their personal property and where to find more information.[27]

1.183 The committee notes that no specific explanation is provided for why the bill includes amendments that a non-citizen who has had a visa cancelled by the minister personally under section 501BA does not need to be informed that they may only apply for a visa within 2 working days. Moreover, given the time critical nature of a person's response to cancellation, no justification is provided as to how it is sufficient that such information will have been provided previously in a different context, particularly given the very serious consequences for the individual concerned and given their pre-existing vulnerability as a person in detention. It is unclear how this amendment is necessary or reasonable.

1.184 Returning to Schedule 2 as a whole, the committee accepts that the safety of the Australian community, particularly in the current security environment, may be considered to be both a pressing and substantial concern and a legitimate objective. However, as mandatory detention applies to individuals regardless of whether they are a threat to national security, the measure does not appear to be rationally connected to this objective and may not be proportionate as it is not likely to be the least rights restrictive approach to achieve the legitimate objective.

1.185 **The committee's assessment of the proposed expansion of visa cancellation powers against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measures are justifiable under international human rights law.**

1.186 **As set out above, the expansion of visa cancellation powers limits the right to liberty. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is a rational connection between the limitation and the stated objective; and**

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27 EM, Attachment A [48].

- **whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective.**

Non-refoulement obligations and the right to an effective remedy

1.187 Australia's non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measures with Australia's non-refoulement obligations

1.188 The statement of compatibility notes that the amendments:

> may lead to an unlawful non-citizen being ineligible to make a further application for a protection visa, however, Australia's implementation of the below obligations are complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Migration Act to grant a visa.[28]

1.189 The statement of compatibility also notes that:

> My department recognises that these non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. Non-refoulement obligations are considered as part of a section 501 decision not to revoke cancellation of a visa under character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the cancellation consideration will not be removed in breach of those obligations. There are a number of personal non-compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government.[29]

1.190 As set out above in relation to Schedule 1 at paragraphs [1.157] to [1.162] the committee's view is that the minister's non-compellable powers are an insufficient protection against non-refoulement and that international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

1.191 Where the processes identified as a safeguard against refoulement involve purely administrative and discretionary mechanisms, these are insufficient, on their own, to comply with Australia's non-refoulement obligations.

1.192 **The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of**

28 EM, Attachment A [50].

29 EM, Attachment A [50].

the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.193 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Right to freedom of movement

1.194 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

1.195 The right to enter one's own country includes a right to remain in the country, return to it and enter it. There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable. Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

1.196 The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.

Compatibility of the measures with the right to freedom of movement

1.197 The committee notes that the expanded visa cancellation powers, in widening the scope of people being considered for visa cancellation, may lead to more permanent residents having their visas cancelled and potentially being deported from Australia.

1.198 The statement of compatibility states that freedom of movement is engaged by the provisions but only considers this right in relation to the right to move freely around Australia (in the context of the immigration detention). The statement of compatibility considers that the limitation is justified in these contexts.

1.199 The statement of compatibility does not address the broader issue of whether using any of the expanded visa cancellation powers to cancel the visa of a permanent resident, who has lived for many years in Australia and has strong ties with Australia, and banning them from ever returning to Australia, is consistent with the right to freedom of movement.

1.200 The UN Human Rights Committee (HRC) has interpreted the right to freedom of movement under article 12(4) of the ICCPR as applying to non-citizens where they

had sufficient ties to a country, and indeed noted that 'close and enduring connections' with a country 'may be stronger than those of nationality'.[30]

1.201 The HRC's views are not binding on Australia as a matter of international law. Nevertheless, the HRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. Moreover, these statements of the HRC in relation to article 12(4) are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[31]

1.202 In addition, the words of article 12(4) do not make any reference to a requirement of 'citizenship' or 'nationality' but instead use the phrase 'own country'. In interpreting these words according to their 'ordinary meaning' as required by the VCLT, the phrase 'own country' clearly may be read as a broader concept than the terms 'citizenship' or 'national'.

1.203 Article 32 of the VCLT provides that in the interpretation of treaties recourse may be had to supplementary means of interpretation in circumstances where the meaning is ambiguous or unreasonable. Supplementary means of interpretation include the preparatory work of a treaty, such as the negotiating record or *travaux préparatoires*. The committee notes that the *travaux préparatoires* for article 12(4) show that the terms 'national' and 'right to return to a country of which he is a national' were expressly considered and rejected by states during the negotiation of the ICCPR.

1.204 The *travaux préparatoires* for article 12(4) also show that Australia expressed concern during the negotiations about a right of return for persons who were not nationals of a country but who had established their home in that country (such as permanent residents in the Australian context). Accordingly, the phrase 'own country' was proposed by Australia as a compromise, and the right to enter one's

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30 Views: *Nystrom v. Australia* Communications No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('Nystrom'). This was subsequently affirmed by the HRC in *Warsame,* UN Doc CCPR/C/102/D/1959/2010.

31 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

'own country' rather than the right to return to a country of which one is a 'national' was agreed in the final text of the ICCPR.[32]

1.205 In this context, the right to return to one's 'own country' applies to persons who are not nationals, but have strong links with Australia. As such, the measures in the bill in expanding the visa cancellation powers and the power to ban people from returning to Australia engage and limit the right of a person to return to one's own country. This has not been justified in the statement of compatibility.

1.206 **The committee's assessment of the proposed expansion of visa cancellation powers, including barring a person from applying for other visas, against article 12(4) of the International Covenant on Civil and Political Rights (freedom of movement—right to enter one's own country) raises questions as to whether the measures are justifiable under international human rights law.**

1.207 **As set out above, the expansion of visa cancellation powers limits the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

Best interests of the child

1.208 The obligation to consider the best interests of the child is described above at paragraph [1.165] to [1.166].

Compatibility of the measure with the obligation to consider the best interests of the child

1.209 As set out above, the Character Act introduced provisions automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more. The bill makes a number of amendments to the new cancellation powers introduced by the Character Act which reduce procedural safeguards. The measures will apply to children who are convicted of an offence and imprisoned for a sentence of 12 months or more. The cancellation of a child's visa on the grounds of character raises questions as to how the obligation to consider the best interests of

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32 See Right to enter one's country, Commission on Human Rights, 5th Session (1949), Commission on Human Rights, 6th Session (1950), on Human Rights, 8th Session (1952) 261 in Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987) 261.

the child is considered as part of the visa cancellation process, when the visa being cancelled is held by a child.

1.210 This obligation to consider the best interests of the child is discussed in the statement of compatibility, however, it is unclear whether this analysis is focused on the children of adults who have their visa cancelled on character grounds or children whose visas are directly cancelled on character grounds.

1.211 The procedure for automatic loss of a visa does not appear to provide for a consideration of the best interests of the child, as the provision applies automatically to those who have been convicted of an offence and sentenced to more than 12 months imprisonment. The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the conduct in accordance with normative standards of Australian law. It does not take into account whether the loss of their visa and right to stay in Australia would be in the best interests of the child given their particular circumstances.

1.212 As set out above, the committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.213 **The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.214 **As set out above, the expansion of visa cancellation powers limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the best interests of the child 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.**

Right to equality and non-discrimination (rights of persons with disabilities)

1.215 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR.

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

1.217 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[33] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[34] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[35]

1.218 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.219 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

1.220 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Compatibility of the measure with the right to equality and non-discrimination (rights of persons with disabilities)

1.221 Individuals with mental health concerns are significantly overrepresented in Australia's prison system.[36] Accordingly, the bill, in extending the automatic visa

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

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

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

36 Australian Institute of Health and Welfare, *The mental health of prison entrants in Australia,* Bulletin 104, June 2012, available from http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198.

cancellation of individuals sentenced to 12 months or more in prison is likely to disproportionately affect individuals with mental health concerns. Mental health disorders are a disability for the purposes of the CRPD and thus a protected attribute for the purposes of the right to equality and non-discrimination.

1.222 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. However, under international human rights law such a disproportionate effect may be justifiable. More information is required to establish if the measure does impact disproportionately on persons with disabilities, and if so, if such a disproportionate effect is justifiable.

1.223 The statement of compatibility makes no reference to the rights of persons with disabilities. As stated above, the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective and is rationally connected to, and a proportionate way to achieve, its stated objective. In this regard, the committee notes that with appropriate health care and support, many individuals who commit offences while suffering mental health issues are less likely to reoffend. These individuals are therefore less likely to be a national security concern.

1.224 **The committee's assessment of the proposed expansion of visa cancellation powers against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights, and article 5 of the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.225 **As set out above, the expansion of visa cancellation powers may limit the right to equality and non-discrimination on the basis of disability. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the right to equality and non-discrimination 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.**

Bars on further applications by children and persons with a mental impairment

1.226 Section 48A of the Migration Act provides that a non-citizen who, while in the migration zone, has made an application for a protection visa that was refused, or who held a protection visa that was cancelled, may not make a further application for a protection visa. Section 48A was amended in 2014 by the *Migration Amendment Act 2014* (the MA Act) and the *Migration Legislation Amendment Act (No.1) 2014* (the MLA Act).

1.227 The MA Act prevented a further application even if the second application was based on different protection grounds. The MLA prevented a further application even if, at the time of the first application, the person was a child or unable to understand the application (for example, due to their mental health).

1.228 The effect of this bill would be to ensure that the bar on further applications applies even if the person is both a child (for example) and makes an application on different protection grounds.

1.229 The committee considered that the MLA engaged Australia's non-refoulement obligations, the obligation to consider the best interests of the child, the right of the child to be heard in judicial and administrative proceedings, the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity, and the right to equality and non-discrimination. The amendments in this bill ensure that the amendments in the MLA also apply in circumstances where the individual may wish to apply for a protection visa on a different substantive ground and, as such, the bill further restricts access to a protection visa. Accordingly, this bill also engages these rights.

1.230 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Non-refoulement obligations and the right to an effective remedy

1.231 Australia non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measures with Australia's non-refoulement obligations

1.232 The statement of compatibility notes that while the amendments:

> …engages rights under the CAT and the ICCPR, the amendment does not remove the opportunity of persons to make claims for protection as against these rights or to have those claims assessed.[37]

1.233 The statement of compatibility also notes that:

37 EM, Attachment A [55].

> …where a person who has previously had a protection visa application refused (including where the application was made by another authorised person on their behalf) now raises protection claims relying on a different ground to the one(s) on which the previous application was based, the Minister has personal power under section 48B of the Migration Act to intervene to allow a further protection visa application to be made in the public interest. For example, if a person was a minor at the time the previous protection visa application was made on their behalf (i.e. by being included in their parent's protection visa application as a member of the same family unit of the parent), and now as an adult the person has protection claims of their own, the Minister may exercise his or her personal power under section 48B to enable the person to make a new protection visa application so that their personal claims, which were not raised or assessed previously, can be assessed.[38]

1.234 As set out above at paragraphs [1.157] to [1.162] in relation to Schedule 1, the minister's personal, non-compellable powers are an insufficient protection against non-refoulement and that international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

1.235 Where the processes identified as a safeguard against refoulement involve purely administrative and discretionary mechanisms, these are insufficient, on their own, to comply with Australia's non-refoulement obligations. The committee therefore considers that the amendments could increase the risk of Australia breaching its non-refoulement obligations.

1.236 **The committee's assessment of the proposed bar on further applications by children and persons with a mental impairment against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.237 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Obligation to consider the best interests of the child

1.238 The obligation to consider the best interests of the child is described above at paragraphs [1.165] to [1.166].

38 EM, Attachment A [55].

Compatibility of the measures with the obligation to consider the best interests of the child

1.239 As noted above, the bill would prevent a child from making a further protection visa application even in circumstances where allowing the visa application would likely be in their best interests (such as where they had a valid independent protection claim).

1.240 This obligation is not addressed in the statement of compatibility. The committee notes that when the provisions were first included in the MLA the committee concluded that the measures were likely to be incompatible with the obligation to consider the best interests of the child.

1.241 As set out above, the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective and is rationally connected to, and a proportionate way to achieve, that objective.

1.242 **The committee's assessment of the proposed bar on further applications by children and persons with a disability against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.243 **As set out above, extending the bar on further applications by children limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child 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.**

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

1.244 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.245 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either

directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Compatibility of the measures with the right of the child to be heard in judicial and administrative proceedings

1.246 The amendments in Schedule 3 further limit the ability of children to make a subsequent visa application on alternative protection grounds even where they did not contribute to or consent to the first application.

1.247 When the MLA was introduced the committee noted that the effect of the proposed amendments in Schedule 1 was to create an assumption, in cases involving a subsequent visa application by a child, that the previous visa application made on behalf of the child was valid. This assumption would apply without a consideration of the age of the child, their relationship with the person who made the application on their behalf, or an individual assessment of the extent to which the application was consistent with the wishes of the child. In the committee's view, to effectively deem the previous application as valid without considering these factors represented a limitation on the right of the child to contribute to, or be heard in, judicial and administrative proceedings. The measures in this bill further limit a child's ability to make a subsequent visa application and thus further restrict the rights of the child. This right is not addressed in the statement of compatibility.

1.248 **The committee's assessment of the proposed bar on further applications by children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.249 **As set out above, extending the bar on further applications by children and persons with a disability, limits the right of the child to be heard in judicial and administrative proceedings. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of the child to be heard in judicial and administrative proceedings 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.**

Right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity

1.250 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires states to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Compatibility of the measures with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity

1.251 As set out above, the bill provides that the bar on further applications applies even if the person is both a person with a mental impairment and makes an application on different protection grounds. The right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity is not addressed in the statement of compatibility. The committee notes that it previously considered the MLA amendments which introduced these restrictions were likely to be incompatible with the rights of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

1.252 Persons with intellectual and mental impairment may be particularly at risk as asylum-seekers. Article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. The UN Committee on the Rights of Persons with Disabilities has considered the basis on which a person is often denied legal capacity, which includes where a person's decision-making skills are considered to be deficient (known as the functional approach). It has described this approach as flawed:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[39]

39 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 15.

1.253 If a person with an intellectual or mental impairment is not provided with the support required to make an informed decision about lodging a visa application and is then barred from making a subsequent visa application because an application had been lodged 'on their behalf' but without the participation of the person in that decision-making process (and on different protection grounds), this limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. This was not addressed in the statement of compatibility.

1.254 **The committee's assessment of the proposed bar on further applications by persons with a mental impairment against article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) (right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.255 **As set out above, extending the bar on further applications by persons with a mental impairment limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity 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.**

Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 21 October 2015

Purpose

1.256 The Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to:

- increase family tax benefit (FTB) Part A fortnightly rates by $10.08 for each FTB child in the family up to 19 years of age;
- restructure FTB Part B by increasing the standard rate by $1000.10 per year for families with a youngest child aged under one; introducing a reduced rate of $1000.10 per year for single parent families with a youngest child aged 13 to 16 years of age and extending the rate to couple grandparents with an FTB child in this age range; and removing the benefit for couple families (other than grandparents) with a youngest child 13 years of age or over; and
- phase out the FTB Part A and Part B supplements.

1.257 The bill also seeks to amend the *Social Security Act 1991* to increase certain youth allowance and disability support pension fortnightly rates by approximately $10.44 for recipients under 18 years of age.

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

Background

1.259 Similar amendments to the FTB Part B reforms in the bill were previously introduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014, which the committee considered in its *Ninth Report of the 44th Parliament* and *Twelfth Report of the 44th Parliament*.[1]

Reduced rate of Family Tax Benefit Part B

1.260 Schedule 2 of the bill would reduce the rate payable of FTB Part B for single parent families with a youngest child aged 13 to 16 to $1,000.10 per year (currently $2,737.50) and would remove FTB Part B for couple families (other than grandparents) with a youngest child aged 13 or over.

1.261 The committee considers that these changes to FTB Part B engages and limits the right to social security and right to an adequate standard of living.

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83-99; and Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67-83.

Right to social security

1.262 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

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

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

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

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

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

Compatibility of the measure with the right to social security

1.266 The statement of compatibility explains that the measures engage the right to social security. The statement of compatibility states that:

> The objective of the family payment reform measures is to ensure that the family payments system remains sustainable in the long term. The United Nations Committee on Economic, Cultural and Social Rights recognises that a social security scheme should be sustainable, and that the conditions for benefits must be reasonable and proportionate.[2]

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2 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 3.

1.267 While ensuring the sustainability of the social security scheme is likely to be a legitimate objective for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. This conforms with the committee's Guidance Note 1,[3] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[4] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme.

1.268 In terms of the proportionality of the measure, the statement of compatibility states that:

> For families with older children, family tax benefit Part B will be better targeted, encouraging parents to participate in the workforce when care requirements are reduced. Single parents and couple grandparents will continue to access a rate of Part B until the end of the calendar year in which their youngest child turns 16, recognising that these families may have fewer resources to meet living costs.[5]

1.269 No information is provided as to the impact of these changes on families and how those families will meet their living expenses with the reduced rates of FTB Part B or how the measures have been targeted to avoid undue economic hardship. No information is provided as to why the changes to FTB Part B are structured around the age of the child and not the income of the family. Accordingly, no information is provided as to how the measure is the least rights restrictive way of achieving a legitimate objective.

1.270 **The committee's assessment of the reduced rate of family tax benefit Part B for single income families against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the measure is a justifiable limitation on that right.**

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

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

5 EM, SoC, 4.

1.271 **As set out above, the reduced rate of family tax benefit Part B for single income families engages and limits the right to social security. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Service as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

Right to an adequate standard of living

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

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

Compatibility of the measure with the right to an adequate standard of living

1.274 For some low income families receipt of FTB Part B may be important in realising an adequate standard of living. The measure, in reducing (or removing) FTB Part B for families with the youngest child aged 13 to 16, may engage and limit the right to an adequate standard of living.

1.275 The statement of compatibility does not specifically address how the measures are compatible with the right to an adequate standard of living, though notes that:

> Families with low incomes will also continue to receive ongoing assistance through various Australian Government payments, which will assist them in maintaining an adequate standard of living.[6]

1.276 However, family tax payments are an integral part of Australia's social welfare scheme and critical for many families to provide an adequate standard of living.[7]

6 EM, SoC, 4.

7 ABS, *Household Income and Wealth, Australia, 2013-14,* 4 September 2015, available from http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6523.0Explanatory%20Notes12013-14?opendocument&tabname=Notes&prodno=6523.0&issue=2013-14&num=&view=

1.277 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[8] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[9] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.278 **The committee's assessment of the reduced rate of family tax benefit Part B for single income families against article 11(1) of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living) raises questions as to whether the measure is compatible with human rights.**

1.279 **As set out above, the reduced rate of family tax benefit Part B for single income families engages and may limit the right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Service as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

Removal of family tax benefit supplements

1.280 Schedule 3 of the bill would phase out the FTB Part A supplement by reducing it to $602.25 a year from 1 July 2016 and to $302.95 a year from 1 July

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

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

2017, before withdrawing it entirely from 1 July 2018. The FTB Part B supplement will be reduced to $302.95 a year from 1 July 2016 and to $153.30 a year from 1 July 2017, before also being withdrawn from 1 July 2018.

1.281 The FTB Part A and B supplements are components of the rate of family tax benefit, and are added into the rate after the end of the relevant income year when certain conditions are satisfied.

1.282 The committee considers that the removal of family tax benefit supplements engages and limits the right to social security and right to an adequate standard of living.

Right to social security

1.283 The right to social security is contained within article 9 of the ICESCR. More information is set out above at paragraphs [1.262] to [1.265].

Compatibility of the measure with the right to social security

1.284 The statement of compatibility notes that the measure engages the right to social security and explains that the measures are nevertheless justified.

1.285 In terms of the legitimate objective of the measures, the statement of compatibility notes that:

> The United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable and that the conditions for benefits must be reasonable, proportionate and transparent. This right is engaged by the reduction and eventual removal of the end-of-year supplements for family tax benefit Part A and family tax benefit Part B. However, this limitation is necessary and proportionate to the legitimate aim of ensuring that family tax benefit as a social security scheme continues to be sustainable.[10]

1.286 However, as noted above in relation to Schedule 2 of the bill, while ensuring the sustainability of the social security scheme is likely to be a legitimate objective for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme.

1.287 In terms of proportionality the statement of compatibility notes that:

> Families affected by this measure are still eligible to receive fortnightly payments of family tax benefit to assist with the costs of raising children.

10 EM, SoC 5.

1.288 While the continued availability of family tax benefit will be important for many families, this does not explain why removing the family tax benefit supplement for all families (regardless of income) is proportionate.

1.289 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.290 **The committee's assessment of the removal of family tax benefit supplements against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the measure is compatible with human rights.**

1.291 **As set out above, the removal of family tax benefit supplements engages and limits the right to social security. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Service as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

Right to an adequate standard of living

1.292 The right to an adequate standard of living is contained within article 11(1) of the ICESCR. More information is set out above at paragraphs [1.272] to [1.265].

Compatibility of the measure with the right to an adequate standard of living

1.293 The statement of compatibility explains that the measure engages the right to an adequate standard living. However, the statement of compatibility does not specifically address how the measure is compatible with the right to an adequate standard of living, though it notes that:

> Families affected by this measure are still eligible to receive fortnightly payments of family tax benefit to assist with the costs of raising children. The purpose of these fortnightly payments is to ensure an adequate standard of living for Australian children.[11]

11 EM, SoC 5.

1.294 As noted above in relation to the right to social security, while the continued availability of family tax benefit will be important for many families, this does not explain why removing the family tax benefit supplement for all families is proportionate.

1.295 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.296 **The committee's assessment of the removal of family tax benefit supplements against article 11(1) of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living) raises questions as to whether the measure is compatible with human rights.**

1.297 **As set out above, the removal of family tax benefit supplements engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise 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.**

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]

Portfolio: Employment
Authorising legislation: Fair Work (Building Industry) Act 2012
Last day to disallow: 3 December 2015 (Senate)

Purpose

1.298 The Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the instrument) amends the Building Code 2013 (the Code). The amendments require building contractors or building industry participants to show the ways in which they are managing drug and alcohol issues in the workplace in their work health safety and rehabilitation (WHS&R) management systems. For certain types of building work, to which the Commonwealth is making a significant contribution, building contractors and industry participants must also include a fitness for work policy to manage alcohol and other drugs in the workplace in their management plan for WHS&R.

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

Alcohol and drug testing of construction workers

1.300 Schedule 3 of the instrument sets out requirements relating to drug and alcohol testing that a fitness for work policy must address.

1.301 The committee considers that establishing a policy framework for testing workers for drugs and alcohol engages and limits the right to privacy.

1.302 The committee also considers the instrument engages the rights of persons with disabilities under the Convention on the Rights of Persons with Disabilities, as drug and alcohol dependency is a disability under international human rights law. However, the committee considers that any limitation on such rights is likely to be justifiable.

Right to privacy

1.303 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and

- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measure with the right to privacy

1.304 The statement of compatibility acknowledges that drug and alcohol testing implemented under the instrument engages the right to privacy. The statement of compatibility states that drug and alcohol testing is 'legitimate to seek to eliminate the risk that employees might come to work impaired by alcohol or drugs such that they could pose a risk to health and safety'[1] and that:

> To the extent that drug and alcohol testing implemented in accordance with the amending instrument may limit a person's right to privacy, the limitation is reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the right to safe and healthy working conditions for all workers.[2]

1.305 The committee considers that drug and alcohol-free workplaces are important in a building and construction context and the measures are likely to be considered as pursuing a legitimate objective for the purposes of international human rights law.

1.306 The committee also considers that the measures are rationally connected to that objective, in that drug and alcohol testing policies may encourage compliance with the prohibition on drugs and alcohol in the workplace.

1.307 However, it is unclear whether the policy framework for drug and alcohol policies is proportionate to achieving that objective as, under the policy, there does not appear to be any safeguards required to be put in place to protect the privacy of individuals who are subject to testing.

1.308 The fitness for work policy set out in the instrument does not include any requirements relating to how drug and alcohol tests are to be conducted, whether any blood, hair or saliva samples might be taken in order to conduct the test, the procedure for managing test results, and how long samples or records of the testing will be retained.

1.309 Additionally, the policy framework does not include requirements that the testing has to be done in the least personally intrusive manner or that the records be destroyed after a certain period of time.

1.310 The taking and retention of bodily samples for testing purposes can contain very personal information. The international jurisprudence has noted that genetic information contains 'much sensitive information about an individual' and given the nature and amount of personal information contained in cellular samples 'their

1 Explanatory Statement (ES) 3.

2 ES 3.

retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned'.[3]

1.311 The instrument is silent as to whether such samples will be retained and the committee is unaware whether there is other existing legislation that would govern the retention and destruction of samples taken in accordance with drug and alcohol policies as required by the instrument.

1.312 This issue was not addressed in the statement of compatibility. The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.313 **The committee's assessment of the policy framework for the drug and alcohol testing for construction workers against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether there are effective safeguards in place to protect the privacy of individuals who are subject to drug and alcohol testing in accordance with the policies required by the instrument.**

1.314 **As set out above, the instrument engages and limits the right to privacy. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether there are sufficient safeguards in place to protect the right to privacy.**

3 *S and Marper v UK*, ECtHR, 4 December 2008, paras 72 and 73.

Fair Work (State Declarations — employer not to be national system employer) Endorsement 2015 (No. 1) [F2015L01420]

Portfolio: Employment
Authorising legislation: Fair Work Act 2009
Last day to disallow: This instrument is exempt from disallowance (see subsection 14(5) of the Fair Work Act 2009)

Purpose

1.315 This instrument endorses a declaration by the New South Wales (NSW) government that Insurance and Care NSW is not a national system employer for the purposes of section 14(2) of the *Fair Work Act 2009* (Fair Work Act).

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

Background

1.317 Section 14(1) of the Fair Work Act provides that a national system employer means any of the following in its capacity as an employer of an individual:

- a constitutional corporation;
- the Commonwealth or a Commonwealth authority;
- a person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce;
- a body corporate incorporated in a territory; or
- a person who carries on an activity in a territory and employs a person in connection with the activity.

1.318 A national system employee is an individual employed by a national system employer (section 13 of the Fair Work Act).

1.319 The Parliaments of Victoria, South Australia, Tasmania, Queensland and New South Wales referred power to the Commonwealth Parliament to extend the Fair Work Act to employers and their employees in these states that are not already covered by sections 13 and 14. Division 2A and Division 2B of Part 1-3 of the Fair Work Act give effect to state workplace relations references by extending the meaning of national system employee and national system employer (sections 30C, 30D, 30M and 30N of the Fair Work Act).

1.320 Section 14(2) of the Fair Work Act allows states and territories to declare (subject to endorsement by the Commonwealth Minister) that certain employers over which the Commonwealth would otherwise have jurisdiction are not national system employers.

1.321 The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant state or territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave and which apply to employers and employees nationally, will continue to apply.

1.322 This instrument endorses a declaration made under the *Industrial Relations Act 1996* (NSW) that Insurance and Care NSW is not a national system employer, commencing 9 September 2015.

Alteration of persons' workplace relations arrangements

1.323 The instrument, in removing Insurance and Care NSW as a national system employer generally subject to the Fair Work Act, will instead see employees of Insurance and Care NSW subject to the workplace relations arrangements prescribed by NSW, and so engages and may limit the right to just and favourable conditions of work.

Right to just and favourable conditions of work

1.324 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1]

1.325 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;

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1 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.327 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to just and favourable conditions of work

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

1.329 The explanatory statement to the instrument states:

> The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant State or Territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave and which apply to employers and employees nationally, will continue to apply.[2]

1.330 The committee notes that to the extent that the NSW workplace relations arrangements could be less generous than the arrangements under the Fair Work Act, the measure in the instrument may be regarded as a retrogressive measure.

1.331 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to just and favourable conditions of work. A lessening in workplace relations arrangements available to an employee may therefore be a retrogressive measure for human rights purposes. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified. That is, it addresses a legitimate objective, it is rationally connected to that objective and it is a proportionate means of achieving that objective.

1.332 **The committee's assessment of the instrument against the International Covenant on Economic, Social and Cultural Rights (ICESCR) raises questions as to**

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whether the instrument promotes or limits the right to just and favourable conditions of work.

1.333 **The committee therefore seeks the advice of the Minister for Employment as to the existence of any differences between the workplace relations arrangements under the *Fair Work Act 2009* and those under NSW law and whether the instrument promotes or limits the right to just and favourable conditions of work.**

Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 3 December 2015 (Senate)

Purpose

1.334 The Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 (the regulation) amends the Migration Regulations 1994 to confirm that the effect of regulation 2.08F is to provide that any application made by certain visa applicants for a Permanent Protection Visa (PPV) will be converted into an application for a Temporary Protection Visa (TPV).

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

Background

1.336 The instrument concerns the operation of regulation 2.08F of the Migration Regulations 1994. This regulation was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act), which commenced on 16 December 2014.

1.337 The committee considered the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the 44th Parliament*.[1]

Conversion of permanent protection visa applications into temporary protection visa applications

1.338 The regulation amends regulation 2.08F of the Migration Regulations 2004, which provides that certain applications for a PPV made before 16 December 2014 are to be converted to applications for a TPV. The amendment will affect persons whose application for a PPV was made before 16 December 2014 and:

- has been the subject of a court order requiring the minister to reconsider the application;
- has been remitted to the minister for reconsideration by the Administrative Appeals Tribunal; or
- had not been decided by the minister before 16 December 2014 (due to, for example, a remittal from the Administrative Appeals Tribunal or a court).

1.339 The effect of the conversion is that people covered by the amendment who have applied for a PPV will be considered to have never applied for a PPV and will be

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 70-92.

taken to have applied for a TPV, and will only be granted temporary protection in Australia if found to engage Australia's protection obligations.

1.340 The regulation, in converting PPV applications to TPV applications, engages a number of human rights, including non-refoulement obligations; the right to health; the right to protection of the family; the obligation to consider the best interests of the child and the right to freedom of movement. These rights are considered in detail below.

Non-refoulement obligations

1.341 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[2] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

1.343 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[4]

1.344 Australia gives effect to its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa.

Compatibility of the measure with non-refoulement obligations

1.345 The changes under the regulation provide for the conversion of existing applications for PPVs into applications for TPVs.

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2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

3 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

4 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 513.

1.346 TPVs are granted for a period of up to three years at one time, rather than being permanent as is the case with PPVs.[5] The statement of compatibility acknowledges that TPVs engage Australia's non-refoulement obligations, but states that the amendments:

> … will not result in the return or removal of persons found to engage Australia's protection obligations in contravention of its non-refoulement obligations. The position of the Government has always been that grant of a protection visa is not the only way of giving protection to persons who engage Australia's protection obligations, and that grant of a temporary visa is a viable alternative.[6]

1.347 However, TPVs require refugees to prove afresh their claims for protection every three years. The international legal framework does provide for the cessation of refugee status or protection obligations where, for example, the conditions in the person's country of origin have materially altered such that the reasons for a person becoming a refugee have ceased to exist. However, as noted by the the United Nations High Commissioner for Refugees, the international protection regime 'does not envisage a potential loss of status triggered by the expiration of domestic visa arrangements,'[7] which is to say the expiry of a visa should not, of itself, affect a person's refugee status.

1.348 The statement of compatibility has not addressed whether there will be sufficient safeguards in place to ensure that any reapplication process takes account of the risk of refoulement if the person is denied continuing protection. In addition, while the statement of compatibility states that the grant of a visa is not the only way of giving protection to persons, the committee reiterates its long-standing view that administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[8]

1.349 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment**

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5 EM, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act), Attachment A 9.

6 ES 6.

7 UNHCR, 'UNHCR concerned about confirmation of TPV system by High Court' (20 November 2006) http://www.unhcr.org.au/pdfs/TPVHighCourt.pdf (accessed 14 October 2014).

8 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament* (2 February 2015) paras 1.89 to 1.99. See also *Fourth Report of the 44th Parliament*(18 March 2014) paras 3.55 to 3.66 (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.350 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how, in light of the committee's concerns raised above, the changes are compatible with Australia's absolute non-refoulement obligations.**

Right to health

1.351 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

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

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

1.353 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Compatibility of the measure with the right to health

1.354 As noted above, the changes made by the regulation confirm the conversion of existing applications for PPVs into applications for TPVs.

1.355 The right to health was not addressed in the statement of compatibility for the regulation, and instead the statement of compatibility refers to the discussion of these issues in the statement of compatibility for the RALC bill. The statement of

compatibility for the RALC bill noted that, under the new arrangements, people who were found to engage Australia's non-refoulement obligations would be granted a TPV for a period of up to three years at one time (rather than a permanent protection visa).[9] The statement of compatibility noted that the right to health was engaged by the amendments, and that TPV holders are entitled to access Medicare and the Australian public health system.[10]

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

1.357 The practical operation and consequences of TPVs may have significant adverse consequences for the health of TPV holders. TPVs require refugees to prove afresh their claims for protection every three years. Research shows that TPVs lead to insecurity and uncertainty for refugees which, in turn, may cause or exacerbate existing mental health problems, or cause anxiety and psychological suffering. Such research indicates that restrictions on family reunion places further stress on TPV holders which may lead to mental health problems.[11] This regulation expands the class of people who would become TPV holders, rather than holders of a PPV, and as such, engages and limits the right to health, which includes mental health. The committee also notes that while access to Medicare is clearly an important aspect of protecting the right to health, it does not fully mitigate against the health-related harm (particularly psychological harm) that may be caused to individuals through the issuing of TPVs rather than providing permanent protection. These issues were not addressed in the statements of compatibility for either the RALC bill or this regulation.

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9 EM RALC Act, Attachment A 9.

10 EM RALC Act, Attachment A 17.

11 See, for example, Greg Marston, *Temporary Protection Permanent Uncertainty* (RMIT University 2003) 3. http://dpl/Books/2003/RMIT_TemporaryProtection.pdf (accessed 14 October 2014); Australia Human Rights Commission, *A last resort? - Summary Guide: Temporary Protection Visas,* https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas (accessed 14 October 2014).

1.358 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12(1) of the International Covenant on Economic, Social and Cultural Rights raises questions as to whether the changes are compatible with the right to health.**

1.359 **As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to health. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

Right to protection of the family

1.360 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the ICESCR. Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

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

Obligation to consider the best interests of the child

1.362 Under the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[12]

1.363 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and

12 Article 3(1).

institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[13]

1.364 The committee notes that, while there is no universal right to family reunification, article 10 of the CRC nevertheless obliges Australia to deal with applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family, and require family unity to be protected by society and the state.

Compatibility of the measure with the right to protection of the family and the obligation to consider the best interests of the child

1.365 The statement of compatibility for the RALC bill explained that:

> The temporary protection regime provides that refugees granted temporary protection visas are not eligible to sponsor family members.[14]

1.366 This has the consequence that a person holding a TPV cannot access family reunion and, if separated from their close family members, will remain so separated while holding a TPV. Converting all PPV applications into TPV applications will mean that those grant a TPV will be unable to access family reunion, regardless of whether this would result in permanent family separation and whether this is in the best interests of the child.

1.367 The committee notes that the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration may only be limited if the measure is reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.368 The statements of compatibility for both the RALC bill and this regulation do not address these issues. As set out above, committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.369 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights (right to protection**

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13 UN Committee on the Rights of Children, General Comment 14 on the right of the child to have his or her best interest taken as primary consideration, CRC/C/GC/14 (2013).

14 EM RALC Bill, Attachment A 12.

of the family) and the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the measures are justifiable under international human rights law.

1.370 **As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to protection of the family and the obligation to consider the best interests of the child. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

Right to freedom of movement

1.371 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

1.372 The right to freedom of movement is linked to the right to liberty – a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.373 The right to freedom of movement also includes a right to leave Australia, either temporarily or permanently. This applies to both Australian citizens and non-citizens. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents without unreasonable delay or cost.

1.374 Limitations can be placed on the right as long as they are lawful and proportionate. Particular examples of the reasons for such limitations include the need to protect public order, public health, national security or the rights of others.

Compatibility of the measure with the right to freedom of movement

1.375 A TPV only allows a visa holder to travel in compassionate and compelling circumstances, as approved by the minister in writing, and to places other than the country in respect of which protection was sought.[15]

1.376 The right to leave a country is a right both to legally leave the country as well as practically leave the country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad. States are required to provide necessary travel documents to ensure this right can be realised.[16] A person who has been recognised as a refugee but does not have the necessary travel documents that would allow them to travel (and return to Australia at the conclusion of their travel) is not able to practically realise their right to leave the country. This right applies to every person lawfully within Australia, including those who have been recognised as refugees. The committee therefore considers that the right to freedom of movement is engaged and limited by the measure.

1.377 This right was not addressed in the statement of compatibility. As set out above, the committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.378 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12 of the International Covenant on Civil and Political Rights raises questions as to whether the measures are justifiable under international human rights law.**

1.379 **As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to freedom of movement. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

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15 See Subclass 785-Temporary Protection visa, which as a result of 785.611 is subject to condition 8570, see Schedules 2 and 8 to the Migration Regulations 1994.

16 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999), paras [8] to [10].

- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441]

Portfolio: Communications
Authorising legislation: Radiocommunications Act 1992
Last day to disallow: 2 December 2015 (Senate)

Purpose

1.380 The Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 (27 MHz Class Licence) revokes and replaces the Radiocommunications (27 MHz Handphone Stations) Class Licence 2002 (2002 Class Licence).

1.381 The use of handphone stations on specified carrier frequencies in the 27 MHZ band is subject to the regulatory arrangements set out in the 27 MHz Class Licence. The 27 MHz Class Licence also sets out the conditions for operating 27 MHz handphone stations. 27 MHz handphone stations are typically used by bushwalkers or in the conduct of sporting events and other group activities.

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

Conditions of 27 MHz Class Licence not to seriously alarm or affront a person

1.383 The 27 MHz Class Licence sets out the general conditions which apply to a person operating a 27 MHz headphone station, including that a person must not operate the station:

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purposes of harassing a person.

1.384 A person who operates the station in a way that causes a reasonable person to be 'seriously alarmed or seriously affronted' may be liable to imprisonment for up to two years.[1]

1.385 The committee considers that this condition limits the right to freedom of expression.

Right to freedom of expression

1.386 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

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1 See section 46 of the *Radiocommunications Act 1992* which provides that a person must not operate a radiocommunications device other than as authorised by a class licence. There are then penalties for breach of the class licence, including, if the device is a radiocommunications transmitter, imprisonment for up to two years or 1,500 penalty units, and if it is not a transmitter, 20 penalty units.

communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.387 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, 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.[2]

Compatibility of the measure with the right to freedom of expression

1.388 The statement of compatibility acknowledges that the relevant condition of the class licence engages and limits the right to freedom of expression but argues that this limitation is justifiable.[3] The statement of compatibility provides:

> The ACMA believes it is prudent to limit freedom of expression when granting the right to use a 27 MHz handphone station in order to meet the legitimate objectives of protecting public order and public morality…
>
> People using the devices may be communicating with people they know or do not know and can use the device to transmit and receive on publicly available frequencies. In this circumstance, it is possible that a person may use the device to incite crime, violence or mass panic, and thereby cause a reasonable person, justifiably in all circumstances, to be seriously alarmed or affronted. Thus, in part, the limitation on freedom of expression is necessary and appropriate to ensure public order…
>
> The protection of individuals from harassment through unsolicited communication is a legitimate objective and the ACMA considers that it is reasonable and appropriate to limit the right granted to use such devices [27 MHz handphone stations] to deter harassing speech.[4]

1.389 The committee agrees that if the objective behind the measure is to protect public order, this objective may be regarded as a legitimate objective for the purposes of international human rights law. However, protecting individuals from unsolicited communication may not necessarily meet the test for a legitimate objective as the statement of compatibility does not explain how this is a pressing and substantial concern.

1.390 The proposed conditions may be rationally connected to the stated objective as the licence condition would appear capable of discouraging individuals using a 27 MHz handphone station to harass or alarm others. However, a condition prohibiting speech that could cause a person to be seriously alarmed or affronted

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

3 Explanatory Statement (ES), Statement of Compatibility (SoC) 6-7.

4 ES, SoC 6.

goes much further than is necessary to maintain public order. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought, including whether there are less restrictive ways to achieve the same aim.

1.391 Maintaining public order is a basis on which it may be permissible to regulate speech in public places. Common 'public order' limitations include prohibiting speech which may incite crime, violence or mass panic. However, speech that merely alarms or affronts (even if it 'seriously' alarms or affronts a person) would not generally be sufficient to justify limiting freedom of expression. In this context, the committee notes the statement of compatibility provides that the instrument's limitation on freedom of expression is necessary and appropriate to ensure public order.[5] However, speech which may incite crime, violence or mass panic are already criminalised under existing law. Indeed, the statement of compatibility itself refers to the prohibition in section 474.17 of the *Criminal Code Act 1995*, stating that these conditions are consistent with this provision. That section makes it an offence for a person to use a carriage service in a way that a reasonable person would regard as being menacing, harassing or offensive. A 'carriage service' would include the operation of a 27 MHz headphone station.[6] As there is already a broad offence in the Criminal Code there appears no need to include the provision as a condition of the licence (breach of which becomes a criminal offence).

1.392 While the statement of compatibility refers only to seeking to prevent incitement of crime, violence or mass panic, the condition itself, not to seriously 'alarm or affront' a person, is much broader. It would prohibit speech that might be simply offensive to a person, such that they feel seriously affronted, but which has no link to crime, violence or the causation of mass panic. The right to freedom of expression includes a right to use expression 'that may be regarded as deeply offensive'.[7] The right to freedom of expression protects not only favourable information and ideas but also those that offend, shock or disturb because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.[8]

1.393 In order to limit the right to freedom of expression it must be demonstrated that there is a specific threat that requires action which limits freedom of speech, and it must be demonstrated that there is a direct and immediate connection

5 ES, SoC 7.

6 See definition of 'carriage service' in section 7 of the *Telecommunications Act 1997*.

7 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

8 *Handyside v United Kingdom* (1976) 1 EHRR 737.

between the expression and the threat.[9] The broad nature of the wording of the condition would not appear to meet this criteria.

1.394 The committee considers that the statement of compatibility has not demonstrated that the conditions in 27 MHz Class Licence not to seriously alarm or affront a person impose a necessary or proportionate limitation on the right to freedom of expression.

1.395 **The committee's assessment against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) of the conditions in 27 MHz Class Licences not to seriously alarm or affront a person raises questions as to whether the condition is compatible with the right to freedom of expression.**

1.396 **The committee considers that the conditions in 27 MHz Class Licences not to seriously alarm or affront a person engage and limit the right to freedom of expression. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Communications as to whether the conditions are a proportionate means to achieving the stated objective.**

9 See UN Human Rights Committee, General comment No 34 (*Article 19: Freedoms of opinion and expression*), CCPR/C/GC/34, para 35.

Further response required

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

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Portfolio: Attorney-General
Introduced: Senate, 24 September 2014

Purpose

1.398 The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) sought to make amendments to a number of Acts, primarily the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Australian Security Intelligence Organisation Act 1979*, the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979*, the *Australian Passports Act 2005*, the *Foreign Passports (Law Enforcement and Security) Act 2005*, the *Terrorism Insurance Act 2003*, the *Customs Act 1901*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Migration Act 1958*, the *Foreign Evidence Act 1994*, the *A New Tax System (Family Assistance) Act 1999*, the *Paid Parental Leave Act 2010*, the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*.

1.399 The bill also seeks to make consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977*, the *Sea Installations Act 1987*, the *National Health Security Act 2007*, the *Proceeds of Crime Act 2001* and the *AusCheck Act 2007*.

1.400 Key amendments in the bill are set out below.

1.401 Schedule 1 of the bill sought to:

- amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to expand Australian Transaction Reports and Analysis Centre's (AUSTRAC) ability to share information;
- amend the *Australian Passports Act 2005* (Passports Act) to introduce a power to suspend a person's Australian travel documents for 14 days and introduce a mechanism to provide that a person is not required to be notified of a passport refusal or cancellation decision by the Minister for Foreign Affairs;
- amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) in relation to the power to use force in the execution of a questioning warrant, and provide for the continuation of the questioning and questioning and detention warrant regime for a further 10 years;
- amend the *Crimes Act 1914* (Crimes Act) to:

  - introduce a delayed notification search warrant scheme for terrorism offences;
  - extend the operation of the powers in relation to terrorist acts and terrorism offences for a further 10 years;
  - lower the legal threshold for arrest of a person without a warrant for terrorism offences and the new advocating terrorism offence;
- amend the *Criminal Code Act 1995* (Criminal Code Act) to:
  - limit the defence of humanitarian aid for the offence of treason to instances where the person did the act for the sole purpose of providing humanitarian aid;
  - create a new offence of 'advocating terrorism';
  - make various amendments to the terrorist organisation listing provisions;
  - amend the terrorist organisation training offences;
  - extend the control order regime for a further 10 years and make additional amendments to the regime;
  - extend the preventative detention order (PDO) regime for a further 10 years and make additional amendments to the regime;
- make various amendments to the Crimes (Foreign Incursions and Recruitment) Act 1978;
- amend the Foreign Evidence Act 1994 to increase the court's authority to admit material obtained from overseas in terrorism-related proceedings; and
- amend the Foreign Passports (Law Enforcement and Security) Act 2005 to introduce a 14-day foreign travel document seizure mechanism.

1.402 Schedule 2 of the bill sought to amend the *A New Tax System (Family Assistance) Act 1999*, *Paid Parental Leave Act 2010* and the *Social Security Act 1991* to provide for the cancellation of a number of social welfare payments for individuals on security grounds.

1.403 Schedule 3 of the bill sought to amend the *Customs Act 1901* to expand the detention power of customs officials.

1.404 Schedule 4 of the bill sought to amend the *Migration Act 1958* to include an emergency visa cancellation power.

1.405 Schedule 5 sought to amend the *Migration Act 1958* to enable automated border processing control systems, such as SmartGate or eGates, to obtain personal identifiers (specifically an image of a person's face and shoulders) from all persons who use those systems.

1.406 Schedule 6 sought to amend the *Migration Act 1958* to extend the Advance Passenger Processing (APP) arrangement, which currently applies to arriving air and maritime travellers, to departing air and maritime travellers.

1.407 Schedule 7 sought to amend the *Migration Act 1958* to grant the Department of Immigration and Border Protection (DIBP) the power to retain documents presented that it suspects are bogus.

Background

1.408 The committee recognises the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of all Australians. Moreover, the committee recognises the specific importance of protecting Australians from terrorism.

1.409 The committee notes that international human rights law allows for reasonable limits to be placed on most rights and freedoms, although some absolute rights cannot be limited.[1] All other rights may be limited as long as the limitation is reasonable, necessary and proportionate to the achievement of a legitimate objective. This is the analytical framework the committee applies when exercising it statutory function of examining bills for compatibility with human rights.

1.410 The committee reported on the bill in its *Fourteenth Report of the 44th Parliament*.[2] The bill passed both Houses of Parliament and received Royal Assent on 3 November 2014.

1.411 The committee then considered the Attorney-General's response in its *Nineteenth Report of the 44th Parliament*, and concluded its examination of a number of measures in the bill.[3] The committee requested further information from the Attorney-General in relation to certain measures in Schedule 1 and Schedule 2.

National security laws and indirect discrimination

Right to equality and non-discrimination

1.412 The committee previously requested the advice of the Attorney-General as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination.

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

2 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

3 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

1.413 The committee noted that the UN Committee on the Elimination of Racial Discrimination has previously raised concerns that counter-terrorism legislation in Australia may disproportionately affect Arab and Muslim Australians.[4] In its most recent concluding observation on Australia, that committee emphasised Australia's obligation 'to ensure that measures directed at combating terrorism do not discriminate in purpose *or effect* on grounds of race, colour, descent, or national or ethnic origin'[5] (emphasis added).

1.414 The committee noted that the Attorney-General's response identified the cultural awareness training that law enforcement officers receive as supporting the non-discriminatory application of the law. However, no information was provided as to the specific nature or content of the training, or its effectiveness.

1.415 The committee considered that more information was required to explain how Australia's counter-terrorism laws are enforced in a non-discriminatory manner. Specifically, information as to how the government is addressing the UN concerns that measures directed at combating terrorism do not indirectly discriminate would assist the committee in its assessment of the bill.

1.416 The committee therefore requested the further advice of the Attorney-General as to whether the operation of the counter-terrorism laws would, in practice, be compatible with the rights to equality and non-discrimination. In particular, the committee requested information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded and amended powers.

Attorney-General's response

National security law and indirect discrimination

Right to equality and non-discrimination

The Committee has requested further advice as to whether the operation of the counterterrorism laws will, in practice, be compatible with the rights to equality and non-discrimination. In particular, the Committee has requested information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded or amended powers.

As noted in my response to the Committee of 17 February 2015, the enforcement of counter-terrorism laws is subject to the operations of a

4 UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/14 (14 April 2005); Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/15-17 (13 September 2010).

5 UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/15-17 (13 September 2010).

number of government agencies, principally the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP) and the Australian Border Force (ABF) (previously known as the Australian Customs and Border Protection Service (ACBPS)).

With regards to ASIO special powers relating to terrorism offences, section 34C(1) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) requires the Director-General to prepare a written statement of procedures to be followed in the exercise of ASIO's questioning and questioning and detention warrants under Division 3 Part III of the ASIO Act.

The current statement of procedures, which is a legislative instrument, was approved by the former Attorney-General Philip Ruddock in 2006 and is publicly available on the Federal Register of Legislative Instruments. A copy of the statement of procedures is at **Annexure A**.

In addition to the statement of procedures, ASIO has drafted and complies with extensive internal policies and procedures relating to the implementation of questioning and questioning and detention warrants. ASIO also has administrative arrangements in place with the AFP in relation to the exercise of powers conferred by ASIO's questioning and questioning and detention warrants.

ASIO are also subject to the Attorney-General's guidelines issued pursuant to section 8A of the ASIO Act, which must be observed by ASIO in the performance of its functions. A copy of the guidelines is at **Annexure B**. Paragraph 10.4 of the guidelines requires ASIO to, wherever possible, collect information using the least intrusive techniques and to undertake inquiries and investigations with due regard to cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.

ASIO staff members are required to comply with ASIO's Professional Conduct and and Behaviour Strategy which takes a multifaceted approach to addressing all forms of inappropriate behaviour including discrimination and harassment. Staff members are able to undertake a range of training courses relating to cultural awareness and understanding.

The AFP's approach to equality and non-discrimination begins with its people. A strong focus of recruitment in recent years has been attracting people from diverse cultural and linguistic backgrounds so that the AFP workforce best reflects the diverse community that it serves.

Beyond this and irrespective of background or rank, all AFP appointees are subject to the AFP Integrity Framework which encompasses four pillars: prevention, detection, investigation/response and continuous learning. Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act) sets the professional standards of the AFP and establishes procedures by which AFP conduct and practice issues may be raised and dealt with, including

holding AFP appointees to account for any action that may amount to discrimination.

The AFP's Commissioner's Order on Professional Standards (C02) sets out the standards expected of AFP appointees both in the performance of their duties and off-duty conduct. The AFP Core Values and the AFP Code of Conduct require all AFP appointees to exercise their powers and conduct themselves in accordance with legal obligations and the professional standards expected by the AFP, the Government and the broader community, including acting in a non-discriminatory manner. The AFP Code of Conduct provides that an AFP appointee must act with fairness, reasonableness, courtesy and respect, and without discrimination or harassment, in the course of AFP duties. Every member exercising police powers makes an oath of office in which the member affirms that they will faithfully and diligently exercise and perform all powers and duties as a sworn member without 'fear or favour' and 'affection or ill will.'

The AFP employment character guideline also defines the minimum AFP character standards for potential applicants across all AFP roles and responsibilities. Applicants are assessed per subsection 24(2) of the AFP Act in relation to their character and his/her ability to comply with the AFP's professional standards both in an official and private capacity.

The AFP College, via Learning & Development, develops and conducts cultural and language programs, including the Islamic Awareness Workshop. These workshops address Islamic beliefs, culture, doctrine, history and current issues as well as incorporating presentations on Muslim communities. These workshops are delivered across Australia and focus on the non-discriminatory application of the law through cultural understanding and respecting the Muslim community in order to achieve mutual goals through fairness and collaboration.

The AFP conducts training for its appointees as an ongoing priority in relation to any significant body of legislative change and this has recently included the new powers and offences as a result of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act).

There is mandatory online legislation training (regarding the above Act) for members of the Counter-Terrorism Portfolio and the new legislation and associated powers/offences have been integrated into the AFP's Counter-Terrorism Investigators Workshop (CTIW) and Advanced Counter-Terrorism Investigator Program (ACTIP). AFP Learning & Development Portfolio conducts these programs.

For example, the CTIW has been delivered once in 2015 with an additional four planned for the 2015-16 financial year. Two ACTIPs are planned to be delivered in Sydney and Melbourne in 2015 and one in Brisbane in the first half of 2016.

AFP's Counter Terrorism Portfolio in conjunction with AFP Legal have also delivered 'CT roadshows' across Australia to each Joint Counter-Terrorism Team (JCTT members include AFP, state police and intelligence partners) as well as other AFP appointees in general regarding powers and offences under the Foreign Fighters Act.

Since the enactment of the Foreign Fighters Act, the AFP has developed an extensive range of supporting governance, advisory documents and training tools to address powers afforded to the AFP under the Act, including:

- delayed notification search warrants
- new arrest thresholds and offences
- preventative detention orders
- control orders, and
- stop search and seize powers.

The AFP Investigator's Toolkit (the toolkit) is the central resource for AFP appointees to access information, templates, forms and guides relating to AFP investigations. The toolkit has a specific page dedicated to counter-terrorism investigations providing up-to-date and continuously revised information, inclusive of the provisions of the Foreign Fighters Act and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*. For example, within the toolkit the following resources can be found:

- AFP National Guideline on delayed notification search warrants
- AFP National Guideline on control orders
- AFP Commissioner delegations for the purposes of Part 1AAA *Crimes Act 1914*
- AFP Operational Summary of the Foreign Fighters Act, and
- The AFP Pocketbook Guide for Counter-Terrorism Investigations.

In April 2015 the AFP's Pocketbook Guide for Counter-Terrorism Investigations (V5) was updated to set out key Commonwealth powers available to police under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth), as well as other powers and offences that may be applicable in Australian-based counter terrorism operations. This Pocketbook Guide has been widely distributed within the AFP. The AFP also advises that AFP National Guidelines are currently in the process of being amended by AFP's Counter-Terrorism Portfolio in response to the acquisition of new legislative tools, including delayed notification search warrants and stop, search and seize powers. This includes the National Guidelines on Preventative Detention Orders and Control Orders.

On 1 July 2015 the Australian Customs and Border Protection Service (ACBPS) and the Department of Immigration and Border Protection (DIBP) was consolidated into the single Department of Immigration and Border

Protection. The Australian Border Force (ABF), a single frontline operational border agency, has been established as the new frontline agency within the Department to protect Australia's border and manage the movement of people and goods across it.

The Foreign Fighters Act amended the *Customs Act 1901* (Cth) (Customs Act) to:

- permit detention of an individual where an officer has reasonable grounds to suspect that the person has committed, is committing or intends to commit a serious Commonwealth offence (an offence punishable on conviction by imprisonment for 12 months or more)
- permit detention of a person who is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country, and
- extend the time period within which an officer is obliged to inform a detained person's family or another person has been increased from 45 minutes to two hours.

The detention powers are not new to ABF officers. The amendments made by the Foreign Fighters Act to the Customs Act expanded on existing powers to provide for detention on national security grounds. Officers exercising these powers will have undergone substantial six month entry level training consisting of both class room and on the-job instruction (National Trainee Training or NTT). That training includes a focus on statutory powers exercised by officers under the Customs Act and other legislation, and includes training in the exercise of detention powers.

The NTT course curriculum includes:

- APS Values and Code of Conduct
- cultural awareness, equity and diversity
- counter-terrorism awareness
- powers of officers
- elements of offences
- Part 1C, *Crimes Act 1914*
- general search techniques
- on the job training - consolidation and practice of legislation and powers
- questioning techniques
- travel document information and indicators, and
- detection and search.

As part of the NTT, officers are provided with detailed written materials and procedures relevant to the exercise of their statutory powers,

including their detention powers. These written materials are also available to officers at any time through the DIBP intranet.

These written materials include:

- Operational Training and Development Practice Statement
- Detention and Search of Travellers Instruction and Guideline - outlining recording requirements, detainee rights, roles of officers and registrations and powers
- Powers of Officers in the Passenger Environment Instruction and Guideline, and
- Powers of Officers in the Seaports and Maritime Environment Instruction and Guideline.

The materials reflect that officers need to be able to search travellers in a range of circumstances in order to maintain the integrity of border controls but are required to do so in a way that reflects community expectations for the preservation of civil liberties and privacy of all persons.

Additionally, divisions responsible for operational activities issue notifications to communicate policy or procedural changes and urgent operational advice to operational personnel. The Strategic Border Command (SBC), which is responsible for a large range of ABF's operational activities before, at and after the border, issues operational notifications to advise officers of changes to procedure and practice. For example, SBC issued an operational notification regarding the expanded detention powers when the legislative amendments came into effect.

Officers who are authorised to carry firearms undergo specific, additional training. Once authorised, each officer must be successfully re-certified every 12 months to continue that authorisation. Many officers working in maritime command areas, as well as the Counter Terrorism Unit (CTU) teams at the eight major international airports, are use of force trained.

The use of force curriculum includes the following elements:

- Legislation and Powers
    - Authority to carry arms and power to use force
    - Power to detain
    - Power to physically restrain
    - Power of arrest
    - Powers in the Maritime Environment
    - Use of force under various legislation
    - Power to enter and remain on coasts
    - Executing a search or seizure warrant

  - Power to remove persons from a restricted area
  - Power to remove vehicles
  - Implications of misuse of power
- Officer response, communication and de-escalation, and
- Defensive tactics and the use of personal defensive equipment.

Over the past several years the ACBPS, now the ABF, has made significant investment in reforming its workplace culture and in strengthening the integrity and professionalism of its workforce. This has included a number of both legislative and administrative measures applying specifically to ABF personnel. In addition, all ABF officers are engaged under the *Public Service Act 1999* (Cth) (Public Service Act) and, as such, are required to abide by the Australian Public Service (APS) Values and Code of Conduct.

The *Australian Border Force Act 2015* (Cth) replaced the Customs Administration Act on 1 July 2015. The new Act retains provisions that allow the Secretary and the Commissioner to make directions with respect to Immigration and Border Protection employees, including in respect of professional standards. A proven failure to comply with these directions is a breach of the Code of Conduct and may result in the imposition of a sanction under the Public Service Act.

One new feature of the ABF, provided for by the legislation, is that the ABF Commissioner is able to require officers of the ABF to take an oath or affirmation. The intention of this new power is to further support a professional and ethical culture and provide a clear up-front marker about the standards of conduct and professionalism expected. An ABF officer who has subscribed to an oath or affirmation must not engage in conduct that is inconsistent with the oath or affirmation. Proven instances of inconsistent conduct will amount to breaches of the Code of Conduct and may give rise to disciplinary action in accordance with Public Service Act.

The ABF requires its officers to undertake annual mandatory training covering officer integrity, conduct and professional standards. This includes training regarding the standards of conduct and behaviour expected of officers both as APS employees and as officers of the ABF. An officer who exercises his or her powers in a manner that is discriminatory on grounds of race, ethnicity, religion or any other unlawful ground under anti-discrimination legislation will have acted both in breach of the directions and the code of conduct and may face disciplinary action.

Given the extensive training, guidance and administrative arrangements that the relevant government agencies have in place in relation to the expanded and amended powers, I consider that operation of the counter-

terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination.[6]

Committee response

1.417 **The committee thanks the Attorney-General for his detailed response.** The committee notes the Attorney-General's advice as to the agencies involved in counter-terrorism efforts and the training and safeguards in place to prevent discriminatory conduct, including relevant awareness workshops at the Australian Federal Police (AFP) College.

1.418 However the committee notes that the Attorney-General's response does not address the specific concern raised by the committee in its initial analysis, that the UN Committee on the Elimination of Racial Discrimination has previously raised concerns that counter-terrorism legislation in Australia may disproportionately affect Arab and Muslim Australians. The committee notes that the Attorney-General's response only mentions the AFP as having specific training targeted towards countering this, and that the response contained no indication as to the effectiveness of such training.

1.419 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. While the committee is satisfied that the measure pursues a legitimate objective and is rationally connected to that objective, the Attorney-General has not explained how the measure's limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. In lieu of that explanation, the Attorney-General has offered an assurance that officers are trained to be impartial and non-discriminatory. The committee notes that the conduct of officers is also subject to the *Racial Discrimination Act 1975*.

1.420 **The committee considers that the operation of counter-terrorism laws engage and may limit the right to equality and non-discrimination, particularly in relation to profiling and targeting of individuals. However, the committee notes the Attorney-General's assurance that such powers are used by officers trained to be impartial and non-discriminatory. Accordingly, on the basis of such an assurance, the committee considers that the powers may be justified.**

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6 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 1-6.

Schedule 1 – AUSTRAC amendments

Expanding the power of AUSTRAC to disclose information

Right to privacy

1.421 The committee previously sought the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share financial information with the Attorney-General's Department (AGD) is compatible with the right to privacy, and particularly:

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

1.422 The committee noted that no response was received from the Attorney-General in relation to this particular request for further information. The committee noted that the committee's initial examination of the bill gave rise to a significant number of inquiries, and that these issues may have been overlooked in the response provided by the Attorney-General. The committee therefore reiterated its request for further information on these issues.

Attorney-General's response

> ***AUSTRAC amendments***
>
> I apologise for the oversight and not providing a response to the Committee's request for further information about the proposed AUSTRAC amendments in response to the Committee's *Fourteenth Report of the 4lh Parliament*.
>
> *Expanding the power of AUSTRAC to disclose information - right to privacy*
>
> The amendments to section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) permit AUSTRAC to share financial data with the Attorney-General's Department (AGD) as a 'designated agency' for the purposes of the Act.
>
> I consider these amendments to be aimed at achieving a legitimate objective as they recognise and support the role of AGD as Australia's lead policy agency for AML/CTF. Specifically, they will enable AGD to receive broad statistical information to support the development of a comprehensive and evidence-based AML/CTF regime.
>
> There is a rational connection between the amendments and the objective outlined above, as the amendments rectify a deficiency which inhibited AGD's ability to properly fulfil its role in administering the AML/CTF Act. Previously, as a non-designated agency under the AML/CTF Act, the Act's disclosure regime limited:

- the circumstances under which AGD could access information
- the type of information that AGD could access
- AGD's ability to forward documents containing AUSTRAC information to agencies who were otherwise entitled to access (e.g. AFP, Australian Crime Commission, the Department of Foreign Affairs and Trade), and
- the ability of partner agencies to share AUSTRAC information considered relevant to the development of policy with AGD.

This regime imposed significant constraints on the ability of AGD to efficiently and effectively develop policy in response to emerging money laundering and terrorism financing typologies. The amendments will enable AGD to develop more effective and targeted AML/CTF policy. For example:

- when developing targeted countermeasures against high risk jurisdictions, it is useful for AGD to consider statistical information on how much money is flowing to that jurisdiction, through which entities, and average amounts
- when considering AML/CTF policy responses to overseas corruption, to consider jurisdictions of interest, the quantum and method of fund flows and potentially the range of actors involved, or
- when considering terrorism financing policy responses, to consider the latest trend analysis and intelligence reports produced by AUSTRAC to assess where and how funds are moving.

AUSTRAC supported the proposal to list AGD as a designated agency, noting that providing the Department with designated agency status assisted both AUSTRAC and the AUSTRAC CEO in performing their functions under the AML/CTF Act. In its review of the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Parliamentary Joint Committee on Intelligence and Security also recognised the legitimate need for AGD to access AUSTRAC information to formulate whole-of-government policy.

I consider the amendments to be reasonable and proportionate in the achievement of their stated objective, while remaining compatible with the right to privacy. Although the amendments will result in the disclosure of AUSTRAC information to a wider class of persons, Part 11 of the AML/CTF Act will continue to provide strict limitations on the use and disclosure of AUSTRAC information. In essence, the AML/CTF Act prohibits the disclosure of AUSTRAC information, regardless of the type or format, unless a specified exception applies.

As a Commonwealth agency subject to the Australian Privacy Principles, AGD has a statutory obligation to properly protect the privacy and security of any personal information it may receive. It has extensive experience in

> dealing with sensitive information, and has appropriate controls in place to ensure that the integrity of such information is maintained.
>
> AGD has also indicated that certain additional safeguards will be implemented over and above those present in the AML/CTF Act and the *Privacy Act 1988* (Cth). For instance, AGD only intends to seek access to the minimum amount of information necessary to support its policy functions. In general terms, this will be aggregated and de-identified data which will assist in the policy-making process. AGD will also not seek direct access to the AUSTRAC database through a dedicated computer terminal, but will request relevant information through AUSTRAC.
>
> AGD is currently negotiating a formal agreement with AUSTRAC that will specify the terms of AGD's access to information held by AUSTRAC.[7]

Committee response

1.423 **The committee thanks the Attorney-General for his response.** The committee notes the Attorney-General's advice as to the objective of the measures, which is to enable AGD to support the development of a comprehensive and evidence-based anti-money laundering and counter-terrorism financing regime. This may be considered a legitimate objective for the purposes of international human rights law. The committee notes that the Attorney-General response explains that AGD 'intends to seek access to the minimum amount of information necessary to support its policy functions' and that this will generally be 'aggregated and de-identified data'.

1.424 However, regarding the proportionality of the measures, no information has been provided as to why AGD, as a policy agency and not a law enforcement agency, needs access to identifiable data nor why de-identified information is not sufficient for AGD to 'efficiently and effectively develop policy in response to emerging money laundering and terrorism financial typologies.' It would appear that more information than is strictly necessary may be shared as a result of these amendments and the amendments do not represent the least rights restrictive approach as required by international human rights law.

1.425 While the response indicates policies will be developed to guide AGD's access to AUSTRAC information, these policies are not equivalent to statutory safeguards and as such are insufficient for the purposes of international human rights law.

1.426 **The committee's assessment of the proposed expansion of AUSTRAC's power to disclose information against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether the changes are justifiable under international human rights law. As set out above, the Attorney-General's response has not demonstrated that the limitation on the right**

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7 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 7-9.

to privacy is the least rights restrictive approach (in that de-identified information could be made available instead of identifiable information) and accordingly, the committee seeks further information from the Attorney-General as to why it is necessary for AGD to receive identifiable data from AUSTRAC.

Expanding the information that AUSTRAC may disclose to partner organisations

Right to privacy

1.427 The committee sought the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share information obtained under section 49 of the AML/CTF Act with partner agencies is compatible with the right to privacy, and particularly, whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the measure and that objective; and whether the proposed amendments are reasonable and proportionate to the achievement of that objective.

1.428 The committee noted that no response was received from the Attorney-General in relation to this particular request for further information. The committee noted that the committee's initial examination of the bill gave rise to a significant number of inquiries, and that these issues may have been overlooked in the response provided by the Attorney-General. The committee therefore reiterated its request for further information on these issues.

Attorney-General's response

> *Expanding the information that AUSTRAC may disclose to partner organisations - right to privacy*
>
> The amendments to Part 11 of the AML/CTF Act remove certain restrictions on AUSTRAC's ability to share information collected under section 49 of the Act with partner agencies.
>
> I consider these changes to be aimed at achieving a legitimate objective as they provide AUSTRAC's partner agencies with greater access to AUSTRAC information – improving their ability to cross-reference it against their own intelligence holdings. This enhanced information-sharing will greatly increase the utility of information gathered by AUSTRAC under section 49, particularly where information is gathered in a systematic way to address particular threats such as foreign fighters. The amendments will also better enable AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime.
>
> There is a rational connection between the measures and the objective outlined above, as they address an identified deficiency in Part 11 of the AML/CTF Act. Section 49 of the Act allows a select group of agencies (AUSTRAC, AFP, ACC, Australian Taxation Office and DIBP) to collect additional information from reporting entities on reports provided to

AUSTRAC. Previously, however, all information collected under section 49 was subject to a restrictive access regime, which goes beyond the restrictions placed on other AUSTRAC information under Part 11 of the AML/CTF Act.

The initial rationale for the restricted access was to minimise the risk that the subject of a section 49 request became aware that they are of interest to an investigating agency, and to prevent investigations from being prejudiced by the disclosure of the fact that a section 49 information request is in existence. However, since the AML/CTF Act has been in operation, it has been found that these statutory protections have had the unintended consequence of hampering the sharing of information among AUSTRAC's partner agencies. The amendments to Part 11 will now allow AUSTRAC to share valuable information it gathers with partner agencies.

I consider the amendments to be reasonable and proportionate to the achievement of the objectives outlined above, while remaining compatible with the right to privacy – particularly given that the additional restrictions relating to the distribution of section 49 information will remain in place for all other relevant agencies, aside from AUSTRAC. As Australia's AML/CTF regulator and Financial Intelligence Unit, AUSTRAC is best placed to determine the most appropriate method for distributing section 49 information to partner agencies.

In addition, all section 49 information accessed by AUSTRAC's partner agencies will continue to be subject to the same secrecy and access regime in Part 11 of the AML/CTF Act as other AUSTRAC information. These provisions put in place significant safeguards to protect AUSTRAC information and limit its access and disclosure.

Any personal information collected under section 49 remains subject to the provisions of the *Privacy Act* and the Australian Privacy Principles. AUSTRAC continues to ensure that all employees are aware of their obligations under the *Privacy Act*.[8]

Committee response

1.429 **The committee thanks the Attorney-General for his response. The committee considers that the response demonstrates that the amendments are aimed at the legitimate objective of combating the threat of foreign fighters by improving the ability of agencies to share relevant financial intelligence and that the measures are rationally connected to that objective and proportionate. Accordingly, the committee considers that the powers are compatible with the right to privacy.**

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8 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 9-10.

Schedule 2 – Stopping welfare payments

Cancellation of welfare payments to certain individuals

Right to social security and an adequate standard of living

1.430 The committee previously sought the advice of the Attorney-General as to the compatibility of Schedule 2 with the right to social security and the right to an adequate standard of living, and particularly whether the measure may be regarded as proportionate for the purposes of international human rights law.

1.431 The committee noted that the Attorney-General's initial response did not address these concerns, and that this specific aspect of the request may have been overlooked by the Attorney-General given the significant number of inquiries raised.

Attorney-General's response

> ***Cancellation of welfare payments***
>
> I apologise for the oversight and not providing a response to part of the Committee's request for information about the cancellation of welfare amendments in response to the Committee's Fourteenth Report of the 44th Parliament.
>
> *Right to social security and the right to an adequate standard of living*
>
> Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises that the State may subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.
>
> The welfare cancellation measures may limit the rights of affected persons to social security under Article 9 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. I consider that this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments, are not able to be made available to support terrorist acts, terrorists or terrorist organisations.
>
> The powers are only available when an individual has been subject to a passport refusal or passport or visa cancellation on national security grounds. When deciding whether to issue a Security Notice to the Minister for Social Services seeking the cancellation of social security payments, the Attorney-General must have regard to whether welfare payments are being, or may be used for a purpose that might prejudice the security of Australia or a foreign country. Accordingly, there is a rational connection between the exercise of the power and the legitimate objective, being the prevention of funding of terrorism-related activities.

> Similarly, the measures may limit the rights of affected persons to an adequate standard of living under Article 11 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. Where an individual has been the subject of an adverse security assessment and security agencies have identified a link between their receipt of social security and conduct of security concern it is appropriate that access to social security is restricted. Individuals who choose to use their social security payments to support terrorist acts, terrorists or terrorist organisations should not continue to receive social security. If that funding is being used to support terrorism-related activities then it is not being used for the purposes of providing an adequate standard of living. Individuals who are the subject of a Security Notice and become ineligible for social security can still seek employment to support an adequate standard of living. I consider this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments are not able to be made available to support terrorist acts, terrorists or terrorist organisations.
>
> The power to cancel welfare is therefore compatible with the right to social security and the right to an adequate standard of living.[9]

Committee response

1.432 **The committee thanks the Attorney-General for his response.** The committee notes that the prevention of the use of social security to fund terrorism related activities is a legitimate objective for the purposes of international human rights law.

1.433 However, in terms of proportionality, the committee notes that the decision to cancel a person's social welfare payment is entirely discretionary once the threshold of passport refusal or cancelation has been reached and that there is no specific criteria used to guide ministerial decision-making. Accordingly, there is no statutory requirement that the power to cancel welfare payments is used strictly in the manner set out in the response.

1.434 Moreover, there is not a necessary link between the cancellation of a passport and the use of social security to fund terrorism. The basis on which this will be determined remains unclear in the response.

1.435 As noted in the committee's initial analysis, the availability of review of decisions to cancel welfare payments is relevant to the question of whether the measure is reasonable and proportionate. However, the ability to effectively seek review under the *Administrative Decisions Judicial Review Act 1977* (ADJR Act) is likely to be limited given there is no requirement to provide reasons for any such

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9 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 10-11.

decision (with review under the Judiciary Act also being limited in terms of the available grounds and remedies). In addition, no information is given as to how a person who has had their social security benefits cancelled is able to support themselves if they are unable to gain employment, and therefore, maintain an adequate standard of living.

1.436 **The committee's assessment of the proposed powers to cancel welfare payments against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and an adequate standard of living) raises questions as to whether the changes are justifiable under international human rights law.**

1.437 **As set out above, the committee agrees that preventing the use of social security to fund terrorism related activities is a legitimate objective for the purposes of international human rights law. The committee recommends that the Attorney-General adopt regulations and guidelines that provide objective criteria and safeguards for the cancellation of welfare payments including that there must be a link between the social security payment and the funding of terrorism.**

Right to equality and non-discrimination

1.438 The committee previously requested the advice of the Attorney-General as to whether the operation of powers to cancel welfare payments will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination.

1.439 The committee noted that the Attorney-General's initial response did not address these concerns, and that this specific aspect of the request may have been overlooked by the Attorney-General given the significant number of inquiries raised.

Attorney-General's response

> *Right to equality and non-discrimination*
>
> As noted above, the power to prevent the use of funds, including social security, to fund terrorism-related activities is a legitimate objective.
>
> While Australia has a range of obligations to ensure equality and non-discrimination, including Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of ICES CR most relevantly requires States Parties to ensure that all of the rights under that Covenant, including to social security, are provided without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, not all distinctions in treatment will constitute discrimination if the justification for the differentiation is reasonable and objective. In order for differential treatment to be permissible, the aim and effects of the measures must be legitimate, compatible with the nature of the Covenant rights, solely for the purpose of promoting the general welfare in a democratic society and

> there must be a reasonable and proportionate relationship between the aim to be realised and the measures.
>
> I consider the power to cancel social security benefits is consistent with Australia's obligations in relation to rights to equality and non-discrimination as the measures do not attach to a particular category of person. They apply equally to anyone who is refused an Australian passport or is the subject of a passport or visa cancellation on security grounds regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> The measures therefore do not discriminate and are consistent with these obligations.[10]

Committee response

1.440 **The committee thanks the Attorney-General for his response.** The response states that the measure would:

> apply equally to anyone who is refused an Australian passport or is the subject of a passport or visa cancellation on security grounds regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.441 However, the cancellation of welfare does not happen automatically as a result of those circumstances, instead welfare cancellation only happens as a result of a discretion exercised by the minister.

1.442 In its initial analysis, the committee noted that this measure does not have as its purpose discrimination against any person. However, the committee was concerned that the wide executive discretion to cancel welfare payments, in practice, could be indirectly discriminatory. The Attorney-General's response does not explain how the discretion will be appropriately circumscribed in a manner that ensures that any disproportionate impact on the grounds of race or religion is not arbitrary.

1.443 **The committee's assessment of the proposed powers to cancel welfare payments against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the changes are justifiable under international human rights law.**

1.444 **As set out above, the committee agrees that preventing the use of social security to fund terrorism related activities is a legitimate objective for the purposes of international human rights law. The committee recommends that the Attorney-General adopt regulations and guidelines that provide objective criteria and safeguards for the cancellation of welfare payments that ensure that the measure is compatible with Australia's human rights obligations.**

10 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 11.

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

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

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

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

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

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

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

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

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

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

Purpose

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

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

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

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

Background

1.449 The committee commented on the Determinations in its *Twenty-eighth Report of the 44th Parliament*, and requested further information from the Treasurer as to whether the Determinations were compatible with Australia's human rights obligations.[2]

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

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

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

1.452 Payments under the Determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the Determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of

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

2 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 10-14.

the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

1.453 The committee has previously noted, in its assessment of appropriations bills, that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

Multiple rights

1.454 The committee considered in its previous analysis that the Determinations engage and may promote or limit the following human rights:

- right to equality and non-discrimination (particularly in relation to persons with disabilities);[4]
- rights of children;[5]
- right to work;[6]
- right to social security;[7]
- right to an adequate standard of living;[8]
- right to health;[9] and
- right to education.[10]

Compatibility of the Determinations with multiple rights

1.455 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 and the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 each simply state that the instruments do not engage human rights.[11]

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

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

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

6 Articles 6, 7 and 8 of the ICESCR.

7 Article 9 of the ICESCR.

8 Article 11 of the ICESCR.

9 Article 12 of the ICESCR.

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

11 Determination 1, EM 2 and Determination 2, EM 2.

1.456 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure. The obligations under international human rights law are on Australia as a nation state - it is therefore incumbent on the Commonwealth to ensure that sufficient funding is provided to the states and territories to ensure that Australia's international human rights obligations are met.

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

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

Treasurer's response

> All of the instruments in question fall into one of two categories: annual Determinations for National Specific Purpose Payments (NSPPs) for 2013-14; and monthly Determinations for National Partnership payments (NPs) made over the period December 2014 to June 2015.
>
> **2013-14 National Specific Purpose Payments**
>
> NSPPs are payments made by the Commonwealth to the states and territories that are to be used in specifically agreed sectors, in accordance with the *Federal Financial Relations Act 2009* (the FFR Act). The FFR Act requires the Treasurer to determine the total payment amounts for each NSPP in 2013-14 by applying a relevant indexation factor to the total payment amounts from 2012-13.
>
> The determination and payment of NSPPs assist in the realisation of a number of human rights:
>
> - Both the NSPP for schools and the NSPP for skills and workforce development promote the right to education (art 13, International Covenant on Economic Social and Cultural Rights (ICESCR); art 28, Convention of the Rights of the Child (CRC) and art 24, Convention on the Rights of Persons with Disabilities (CRPD)), and the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).

- The NSPP for housing services promotes the right to an adequate standard of living (specifically in relation to housing) (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- The NSPP for disability services promotes:

  - the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);

  - rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);

  - rights concerning the personal mobility of persons with disabilities (art 20, CRPD);

  - rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and

  - the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NSPPs has a detrimental impact on any human rights.[12]

Committee response

1.459 **The committee thanks the Treasurer for his detailed response.**

1.460 The Treasurer has explained the various rights that the instruments engage and promote. However, the response does not explain whether the payments have changed over time (if there is any reduction in payments this could limit or have a retrogressive impact on human rights). As noted in the previous report, information that provides a detailed comparison for the amounts provided in the Determinations with the amounts provided in previous years would assist the committee in assessing the instruments' compatibility with human rights.

1.461 **The committee therefore requests further information from the Treasurer as to whether the Determinations are compatible with Australia's international human rights obligations, in particular whether there has been any reduction in the allocation of funding, and if so, whether this is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights.**

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

1.462 Under the the IGA, the Commonwealth provides National SPPs to the states and territories as a financial contribution to support state and territory service delivery. The *Federal Financial Relations Act 2009* provides for the minister, by

12 Appendix 1, Letter from the Hon Scott Morrison MP, Treasurer, to the Hon Philip Ruddock MP (dated 14 October 2015) 1-2.

legislative instrument, to determine the total amounts payable in respect of each National SPP.

1.463 As noted above at [1.452], the Determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

1.464 The committee has previously considered that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the ICCPR and the ICESCR.[13]

Multiple rights

1.465 The committee considered in its previous analysis that the Determinations engage and may promote or limit a number of rights as set out above at [1.454].

Compatibility of the Determinations with multiple rights

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

1.467 As noted at [1.456], Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure.

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

1.469 The committee therefore sought the advice of the Treasurer as to whether the Determinations are compatible with Australia's human rights obligations, and particularly, whether the Determinations are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; whether a failure to adopt these Determinations would have a regressive impact on other economic, social and cultural rights; whether any reduction in the allocation of funding (if applicable) is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social

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

and cultural rights; and whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

Treasurer's response

National Partnership Payments (December 2014 - June 2015)

NPs are payments made by the Commonwealth to the states and territories to support the delivery of specified outputs or projects, facilitate reforms, and to reward them for undertaking nationally significant reforms. The FFR Act requires the Treasurer to determine NP amounts to be paid to each state and territory. As these payments are generally made on the 7th day of each month, the Treasurer usually makes an NP determination at least once a month.

NP amounts are generally only determined, and then paid, once a state or territory achieves pre-determined milestones or performance benchmarks as set out in the relevant National Partnership Agreement. As shown in the table below, the Commonwealth provided NP funding to the states and territories across a variety of sectors during 2014-15. Further information on the various National Partnership Agreements that make up these totals can be found in the 2014-15 Final Budget Outcome.

Sector	Total value of NPs in 2014-15 ($m)
Health	1,338
Education	750
Skills and workforce development	395
Community services	902
Affordable housing	638
Infrastructure	4,874
Environment	531
Contingent liabilities	522
Other purposes	3,732
Total	**13,681**

It is difficult to assess the human rights compatibility of the determination and payment of NP amounts. The amounts paid to each state and territory vary each month; this reflects the fact that payments are made as individual states and territories meet varying milestones or benchmarks, as stipulated in the various National Partnership Agreements.

However, in general, the provision of NPs could be said to assist the advancement of:

- the right to education (art 13, ICESCR; art 28, CRC and art 24, CRPD),
- the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).
- the right to an adequate standard of living (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- the right to the highest attainable standard of physical and mental health (art 12(1), ICESCR; art 24, CRC and art 25, CRPD).
- the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
- rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
- rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
- rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
- the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NPs has a detrimental impact on any human rights.[14]

Committee response

1.470 **The committee thanks the Treasurer for his response. The committee notes the Treasurer's advice that determining the human rights compatibility of the National Partnership Payments instruments set out at [1.446] above is difficult due to a constant fluctuation in payment amounts from month to month. The committee therefore agrees that a human rights analysis for National Partnership Payments may not be amenable in a meaningful way, and has concluded its examination of these instruments.**

14 Appendix 1, Letter from the Hon Scott Morrison MP, Treasurer, to the Hon Philip Ruddock MP (dated 14 October 2015) 2-3.

Advice only

1.471 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015

Sponsor: Senator Wang
Introduced: Senate, 13 October 2015

Purpose

1.472 The Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015 (the bill) seeks to amend the *Commonwealth Grants Commission Act 1973* to require that the Commonwealth Grants Commission (CGC), when considering the capacity of a state or territory to raise mining revenue in preparing its annual recommendation on the distribution of goods and services tax (GST) revenue, only takes into account the most recent financial year for which mining revenue data is available.

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

Service delivery dependent on taxation revenue

1.474 The statement of compatibility states that the bill does not engage any rights or freedoms.

1.475 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on taxation revenue and the subsequent allocation of that revenue through budget expenditure. The states and territories have limited revenue capacity and rely heavily on distribution of GST revenue payments. This revenue enables the provision of a range of government services which facilitate and support the implementation of multiple human rights.

1.476 The obligations under international human rights law are on Australia as a nation state - it is therefore incumbent on the Commonwealth to ensure that there is a fair and equitable allocation of GST tax revenue between the states and territories to ensure that Australia's international human rights obligations are met.

1.477 Accordingly, the committee considers that there is a sufficiently close connection between the distribution of GST revenue and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program that may engage human rights. As a result, the statement of compatibility for this bill should provide an assessment of any limitation or promotion of human rights that may arise from that engagement. This would include information that provides a detailed comparison of how the bill

would impact on the distribution of GST revenue to states and territories and the consequential ability to provide services.[1]

1.478 The committee notes that it would be very difficult for a private senator, without the resources of the Department of Finance and Department of Treasury, to undertake such a comprehensive analysis.

1.479 **The committee considers that the bill engages multiple human rights as there is a sufficiently close connection between the distribution of goods and services tax revenue and the implementation of legislation, policy or programs that may engage human rights.**

1.480 **Accordingly, the committee encourages the legislation proponent to consult the committee's Guidance Note 1 which provides more information as to the role of the committee in scrutinising legislation for compatibility with Australia's international human rights obligations and guidance on how statements of compatibility may be prepared.**

1 See, for example, the committee's analysis of annual appropriation bills, such as in Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 5-9.

Marriage Legislation Amendment Bill 2015

Sponsors: Hon Warren Entsch MP; Hon Teresa Gambaro MP; Ms Terri Butler MP; Mr Laurie Ferguson MP; Mr Adam Bandt MP; Ms Cathy McGowan MP; Mr Andrew Wilkie MP

Introduced: House of Representatives, 17 August 2015

Purpose

1.481 The Marriage Legislation Amendment Bill 2015 (the bill) seeks to amend the *Marriage Act 1961* (the Marriage Act) to:

- define marriage as a union of two people;
- clarify that ministers of religion or chaplains are not bound to solemnise marriage by any other law; and
- remove the prohibition of the recognition of same-sex marriages solemnised in a foreign country.

1.482 The bill also seeks to amend the *Sex Discrimination Act 1984* to make consequential amendments.

1.483 Measures engaging human rights are set out below.

Changes to the Marriage Act to permit same-sex marriage

1.484 The bill seeks to make a number of changes to the Marriage Act in order to permit same-sex couples to marry.

1.485 It is important to note that the bill seeks to remove the existing domestic law prohibition on same-sex couples marrying. To date, the available international jurisprudence has focused primarily on whether a prohibition on same-sex couples marrying is compatible with human rights. The task of the committee, in examining the bill for compatibility with human rights, is not to consider whether there is a right under international human rights law to same-sex marriage, but to consider whether the removal of the prohibition on same-sex marriage is compatible with Australia's human rights obligations.

1.486 In this regard, the bill engages the right to equality and non-discrimination; the right to freedom of thought, conscience and religion or belief; the right to respect for the family; and the rights of the child.

1.487 The right of minority groups and the right to freedom of expression are not engaged by the bill.[1] This is because the bill does not prevent religious minority groups from professing and practising their own religion, or prevent any person from exercising their right to freedom of expression. The following analysis therefore does not examine these rights.

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1 See articles 27 and 19 of the ICCPR.

Right to equality and non-discrimination

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

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

1.490 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[2] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

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

1.491 The statement of compatibility acknowledges that the bill engages the right to equality and non-discrimination 'because it extends the right to marry to any two people regardless of sex, sexual orientation, gender identity or intersex status'. On this basis the statement concludes that the bill promotes those rights.

1.492 Under article 26 of the ICCPR, states are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which includes sex and 'any other status'. While sexual orientation is not specifically listed as a protected ground the treaty otherwise prohibits discrimination on 'any ground', and the UN Human Rights Committee has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[5]

1.493 On this basis, by restricting marriage to between a man and a woman the current Marriage Act appears to directly discriminate against same-sex couples on the basis of sexual orientation.

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

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

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

5 See UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992) and UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003).

1.494 In *Joslin v New Zealand* (2002) the United Nations Human Rights Committee (the UN Committee) determined that the right to marry under the ICCPR is confined to a right of opposite-sex couples to marry, and that in light of this a refusal to provide for same-sex marriage does not breach the right to equality and non-discrimination.[6] However, the UN Committee provided no reasoning as to whether the prohibition on same-sex marriage discriminated against same-sex couples. Rather, it said that in light of its findings as to the right to marry it could not find that a *mere refusal* to legislate for same-sex marriage violated the right to equality and non-discrimination. If it had examined this question, the UN Committee would have had to assess whether the differential treatment of same-sex couples is reasonably and objectively justifiable.[7] It is important to note that the committee is not required to determine this question, because the bill does not propose to treat same-sex couples differently.

1.495 While not relevant to the analysis of the bill, it should be noted that since *Joslin v New Zealand* (2002) was decided there has been a significant evolution of social attitudes towards same-sex couples. Many countries have afforded legal recognition to same-sex couples and international jurisprudence has recognised that same-sex couples are just as capable as opposite-sex couples of entering into stable, committed relationships and are in need of legal recognition and protection of their relationship, be it marriage or legally recognised civil partnerships.[8] This change in views is relevant in considering whether there is objective and reasonable justification for treating same-sex couples differently.

1.496 As noted above, the bill would remove the current prohibition on same-sex couples marrying. The committee therefore must consider whether extending the legal recognition of marriage to same-sex couples limits or promotes the right to equality and non-discrimination. Given that discrimination on the grounds of sexual orientation is recognised as a ground on which states are required to guarantee all persons equal and effective protection against, it seems clear that extending the definition of marriage to include a union between two people (rather than only for opposite-sex couples) promotes the right to equality and non-discrimination.

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6 See *Joslin v New Zealand*, UN Human Rights Committee, Communication No. 902/1999 (2002) at paragraph 8.3: 'In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant'.

7 See UN Human Rights Committee, General Comment No. 18: Non-discrimination (1989), paragraph 13.

8 See European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) paragraphs [99]; European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015), paragraph [165]; see also *Obergefell v Hodges, Director, Ohio Department of Health*, Supreme Court of the United States 576 US (2015).

1.497 It should be noted that the view that extending the legal definition of marriage promotes the right to equality and non-discrimination does not suggest that extending marriage more broadly would promote human rights. International human rights jurisprudence has established that in order for a measure to engage the rights of equality and non-discrimination there must be a difference in the treatment of persons in *relevantly similar situations*.[9] While it has been held that same-sex couples 'are just as capable as different-sex couples of entering into stable, committed relationships',[10] it has not been established that other relationships would be classified as a relevantly similar situation. For example, the case law establishes that the relationship between two cohabitating siblings is 'qualitatively of a different nature to that between married couples'.[11]

1.498 **The committee has assessed the bill against article 26 of the International Covenant on Civil and Political Rights (the right to equality and non-discrimination) and is of the view that the bill, in expanding the definition of marriage, promotes the right to equality and non-discrimination.**

Right to freedom of religion

1.499 Article 18 of the ICCPR protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching. The right includes the right to have no religion or to have non-religious beliefs protected.

1.500 The right to freedom of religion not only requires that the state should not, through legislative or other measures, impair a person's freedom of religion, but that the state should also take steps to prevent others from coercing persons into having, or changing, religion.

1.501 The right to hold a religious or other belief or opinion is an absolute right. However, the right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is necessary to protect public safety, order, health or morals or the rights of others. The right to non-discrimination often intersects with the right to freedom of religion and each right must be balanced against one another.

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9 See European Court of Human Rights, *D.H. and Others v the Czech Republic*, Application No. 57325/00, paragraph [175] (emphasis added).

10 See European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015), paragraph [165].

11 European Court of Human Rights, *Burden v the United Kingdom*, Application No. 13378/05 (2008), paragraph [62].

Compatibility of the measure with the right to freedom of religion

1.502 The Marriage Act currently grants a minister of religion of a recognised denomination the discretion whether to solemnise a marriage.[12]

1.503 The bill would amend the Marriage Act to extend this discretion to ensure that nothing in the Marriage Act 'or in any other law' imposes an obligation on a minister of religion to solemnise any marriage. Accordingly, ministers of religion would be free not to solemnise a same-sex marriage for any reason, including if this was contrary to their religious beliefs.

1.504 Importantly, provided that a minister of religion is authorised by their religion to solemnise marriages, they retain absolute discretion under the law as to whether or not they wish to solemnise a particular marriage. This discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.

1.505 In contrast, under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws. The amendments in the bill would mean that civil celebrants (who are not ministers of religion) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. This would apply even if the civil celebrant had a religious objection to the marriage of same-sex couples. This engages and limits the right to freedom of religion under article 18 of the ICCPR.

1.506 To the extent that this limits a civil celebrant's right to freedom of religion, it is necessary to consider whether this limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.507 The statement of compatibility states that the objective of the bill is to allow any two people to marry and thereby recognise the right of all people to equality before the law. Ensuring that persons are not discriminated against on the basis of a prohibited ground is a legitimate objective for the purposes of human rights law; and the measure is clearly rationally connected to this objective (that is, would be effective to achieve that objective).The central question is whether, by not providing

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12 *Marriage Act 1961*, section 47(b). The Marriage Act defines a 'minister of religion' as 'a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation'. Once a religious body recognises a person as having authority to solemnise marriages in accordance with their rights and customs, section 47 of that Act gives the minister of religion a right not to solemnise any marriage, on any basis, without the need to give reasons. As a matter of statutory interpretation it is not relevant whether the religious body or organisation to which the minister of religion is attached allows for same-sex marriage, because the exception in the Marriage Act applies to the minister of religion personally. Of course, if the religious body or organisation does not recognise that person to have authority to solemnise marriages they would not be considered to be a minister of religion – in which case they would need to be registered as a civil celebrant in order to legally solemnise a marriage.

an exemption for civil celebrants to solemnise marriage where to do so may be contrary to their religious beliefs, the bill is proportionate to the objective of promoting equality and non-discrimination. On the scope of the exemption the statement of compatibility states:

> It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow discrimination on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with characteristics that are protected under discrimination legislation differently from other groups of people with characteristics that are also protected.[13]

1.508 Article 18(3) of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The UN Committee has explained:

> In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26 [equality and non-discrimination]. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18…Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[14]

1.509 The UN Committee has thus concluded that the right to exercise one's freedom of religion may be limited to protect equality and non-discrimination. As set out above, the right to equality and non-discrimination has been extended to sexual orientation. It is therefore permissible to limit the right to exercise one's freedom of religion in order to protect the equal and non-discriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.

1.510 This point has been addressed by the South African Constitutional Court in *Fourie*;[15] and by the British Columbia Court of Appeal (Canada) in *Halpern*,[16] in which

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13 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 2.

14 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, (1993) paragraph [8].

15 *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19 [97].

the court concluded that marriage as a legal institution, does not interfere with each religion determining what marriage is for the purposes of that religious institution.[17]

1.511 In *Eweida and Ors v United Kingdom*,[18] the European Court of Human Rights dismissed Ms Ladele's complaint that she was dismissed by a UK local authority (the Islington Council) from her job as a register of births, death and marriages, because she refused on religious grounds to have civil partnership duties of same-sex couples assigned to her. The court upheld the finding of the UK courts that the right to freedom of religion (under article 9 of the European Human Rights Convention) did not require that Ms Ladele's desire to have her religious views respected should 'override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community.'[19]

1.512 On the question of proportionality, the bill appears to take the least rights restrictive approach to the limit placed on the right to freedom of religion, because it maintains the exception for ministers of religion to refuse to solemnise a marriage on any basis. While it does not provide an exception for civil celebrants this is in line with existing laws and, as explained above, seeks to balance the competing rights of same-sex couples to be treated equally by civil celebrants once the law is in force. Accordingly, the fact that civil celebrants may be required to officiate at same-sex weddings, regardless of their religious views, is not a disproportionate limit on the right to freedom of religion.

1.513 It should be noted in the Australian context that civil celebrants, acting under the Marriage Act, are performing the role of the state in solemnising marriages. It is irrelevant to this analysis that civil celebrants are not directly employed by the state. Further, nothing in the bill affects the body of existing anti-discrimination law provisions which prohibit persons who provide goods or services to the public from discriminating against persons on the basis of their sexual orientation.

1.514 **The committee has assessed the bill against article 18, read in conjunction with articles 2 and 26 of the International Covenant on Civil and Political Rights (the right to freedom of religion and the right to equality and non-discrimination) and a number of committee members are of the view that the bill is compatible with the right to freedom of religion, as any limitation on the right to freedom of religion is proportionate to the objective of promoting equality and non-discrimination.**

1.515 **However, the committee was divided on the issue of the limitation which the bill places on the right to freedom of religion. A number of committee members considered that this limitation is not justified as the bill does not provide**

16 *Barbeau v British Columbia (A-G*) 2003 BCCA 251.

17 *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA) [53].

18 *Eweida & Ors v United Kingdom* [2013] ECHR 37.

19 *London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] ICR 532.

civil celebrants with the option to refuse to solemnise marriages that are contrary to their religious beliefs.

Right to respect for the family

1.516 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection. Article 23 of the ICCPR recognises the right of men and women of marriageable age to marry and found a family.

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

Compatibility of the measure with the right to respect for the family

1.518 By allowing same-sex couples to marry the bill would not impose any limitation on the right to respect for the family. This is because it would not reduce in any way the existing protections afforded to married couples and their families.

1.519 To the extent that the bill would expand the protections afforded to married couples under Australian domestic law to same-sex couples, it may engage the right to respect for the family. The statement of compatibility states that it supports families 'by extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents'.[20]

1.520 The right to respect for the family under international human rights law applies to all families, including same-sex couples, and the bill is consistent with this expanded view of the family under international human rights law.

1.521 For example, recognising the diversity of family structures worldwide, the UN Committee has adopted a broad conception of what constitutes a family, noting that families 'may differ in some respects from State to State…and it is therefore not possible to give the concept a standard definition'.[21] Consistent with this approach, the European Court of Human Rights noted in 2010 that same-sex couples without

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20 EM, SoC 2.

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

children fall within the notion of family, 'just as the relationship of a different-sex couple in the same situation would'.[22]

1.522 Similarly, the UN Committee on the Rights of the Child noted in 1994 that the concept of family includes diverse family structures 'arising from various cultural patterns and emerging familial relationships', and stated:

> …[the Convention on the Rights of the Child (CRC)] is relevant to 'the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family'.[23]

1.523 This statement on family diversity, along with the UN Committee's more recent inclusion of sexual orientation as a prohibited ground of discrimination against a child and a child's parents, is consistent with the view that the Convention on the Rights of the Child (CRC) extends protection of the family to same-sex families.[24] Further, the UN Committee has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.[25]

1.524 It is relevant to note that views on what constitutes marriage under international human rights law are changing, and have changed since the time when the ICCPR was drafted. The ICCPR is a living document and is to be interpreted in accordance with contemporary understanding. The UN Committee has emphasised that the ICCPR should be 'applied in context and in the light of present-day conditions'.[26]

1.525 In addition, state practice is an important element of international law, both as a key component of customary international law and as a crucial tool for

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22 European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) paragraphs [93]–[94].

23 UN Committee on the Rights of the Child, *Report on the Fifth Session*, 5th sess, UN Doc CRC/C/24 (8 March 1994) Annex 5 ('Role of the Family in the Promotion of the Rights of the Child'). See also UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003).

24 UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003). Privacy, family life and home life are protected by art 16 of the CRC, as well as by art 17(1) of the ICCPR, which states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

25 UN Committee on the Rights of the Child, *Report on the Twenty-eighth Session*, 28th sess, UN Doc CRC/C/111 (28 November 2001) [558].

26 UN Human Rights Committee, *Roger Judge v Canada*, Communication No 829/1998 (5 August 2002) paragraph [10.3]. See also European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015).

interpreting treaties. The definitions of marriage and family in the ICCPR should therefore be interpreted in accordance with current state practice.

1.526 Currently, a large number of countries recognise same-sex partnerships to some degree (through civil unions, registries and same-sex marriage), and there is a clear trend towards further recognition. Interpreting the ICCPR consistent with emerging state practice thus requires an expansive view of marriage and family.[27]

1.527 **The committee has assessed the bill against articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights (right to respect for the family) and is of the view that the bill promotes the right to respect for the family by extending the availability of marriage to same-sex couples.**

Rights of the child

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

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

1.529 Under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[28]

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

Compatibility of the measure with the rights of the child

1.531 The statement of compatibility states that the bill promotes the best interests of children by:

> …extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents.[29]

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27 Jens M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' *The Equal Rights Review,* 10 (2013), 83.

28 Article 3(1) of the Convention on the Rights of the Child (CRC).

1.532 It also states that the bill does not affect the status quo regarding the parentage of children and therefore does not 'adversely affect the rights of children'.[30]

1.533 It is noted that the bill proposes to make one amendment which would engage the rights of the child, namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child.

1.534 However, as the bill relates strictly to marriage it does not directly engage the rights of the child. The regulation of marriage provides legal recognition for a relationship between two people, which in and of itself has no impact on whether the persons in that relationship have children—there are many married couples who do not have children and many unmarried couples that do have children.

1.535 Further, the bill would not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children. Such laws therefore fall outside the scope of the committee's examination of the bill for compatibility with human rights.

1.536 In addition, whether or not a child's parents or guardians are married has no legal effect on the child. In compliance with the requirements of international human rights law, there are no laws in Australia that discriminate against someone on the basis of their parents' marital status.[31] Therefore, amending the definition of marriage in the Marriage Act will not affect the legal status of the children of married or unmarried couples.

1.537 It is noted that the CRC refers to 'parents' and 'legal guardians' interchangeably and refers to 'family' without referencing mothers or fathers.[32] The preamble notes that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[33] There is no reference to marriage in the Convention. Provisions in the CRC relating to a child's right to know

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29 EM, SoC 3.

30 EM, SoC 3.

31 See article 2 of the CRC which states that all rights should be ensured to children without discrimination of any kind, irrespective of the child's or parent's social origin or birth. See also article 26 of the International Covenant on Civil and Political Rights which requires state parties to guarantee equal protection against discrimination on any ground, including social origin, birth or other status.

32 Fathers are not mentioned in the Convention and mothers are only referred to in the context of pre and postnatal care.

33 See the Preamble to the CRC.

its parents and a right to remain with its parents,[34] are not engaged by the bill, which is limited to the legal recognition of relationships.

1.538 There is an obligation in the CRC to take into account the best interests of the child 'in all actions concerning children', and this legal duty applies to all decisions and actions that directly or indirectly affect children. The UN Committee on the Rights of the Child has said that this obligation applies to 'measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure'.[35] This applies to the legislature in enacting or maintaining existing laws, and the UN Committee has given the following guidance as to when a child's interests may be affected:

> Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.[36]

1.539 In this regard, it is questionable whether the legal recognition of a parent's relationship would have a major impact on a child.

1.540 However, assuming it would, it is necessary to assess whether legislating to allow same-sex marriage would promote or limit the rights of the child to have his or her best interests assessed and taken into account as a primary consideration. There is no evidence to demonstrate that legal recognition of same-sex parents' relationships would be contrary to the best interests of the children of those couples.

1.541 In contrast, there is some evidence suggesting that children living with cohabiting, but unmarried, parents may do less well than those with married parents.[37] There is also some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married.[38]

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34 See articles 7 and 9 of the CRC.

35 UN Committee on the Rights of the Child*, General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* (2013) paragraph [19].

36 UN Committee on the Rights of the Child, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, (2013) paragraph [20].

37 See Lixia Qu and Ruth Weston, Australian Institute of Family Studies, *Occasional Paper No. 46: Parental marital status and children's wellbeing*, 2012.

38 Christopher Ramos, Naomi G Goldberg and M V Lee Badgett, The Effects of Marriage Equality in Massachusetts: A Survey of the Experience and Impact of Marriage on Same-sex Couples (Williams Institute) 10.

1.542 Further, to the extent that any existing laws provide greater protection for married couples compared to non-married couples, extending the protection of marriage to same-sex couples may indirectly promote the best interests of the child.

1.543 Therefore, there is nothing to demonstrate that extending the legal recognition of marriage to same-sex couples would constitute a limitation on the best interests of the child; rather, it may promote the best interests of the child.[39]

1.544 **The committee has assessed the bill against the rights in the Convention on the Rights of the Child. As the bill is limited to the legal recognition of a relationship between two people, and does not regulate procreation or adoption, the committee is of the view that the rights of the child are not engaged by the bill. In relation to the obligation to consider the best interests of the child, to the extent that the bill engages this right, the committee is of the view that the bill does not limit, and may promote, the obligation to consider the best interests of the child.**

39 Note that studies or evidence relating to children's wellbeing in same-sex parented families are not relevant in this instance as the bill relates to the legal recognition of marriage, and not to the ability of same-sex couples to be parents.

Chapter 2

Concluded matters

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

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

Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015

Sponsors: Senators Leyonhjelm and Day
Introduced: Senate, 13 August 2015

Purpose

2.3 The Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015 (the bill) seeks to amend the *Fair Work Act 2009* to exclude employers in the restaurant and catering, hotel, and retail industries which employ fewer than 20 employees from being required to pay penalty rates under an existing or future modern award unless:

- the work is in addition to ten hours of work in a 24 hour period; or
- the work is on a public holiday; or
- the work is on a weekend and in addition to 38 hours of work over the relevant week.

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

Background

2.5 The committee previously considered the bill in its *Twenty-seventh Report of the 44th Parliament* (previous report) and requested further information from the legislation proponent as to the compatibility of the bill with the right to just and favourable conditions of work, right to an adequate standard of living and right to equality and non-discrimination.[1]

Removal of penalty rates in certain circumstances

2.6 Most employees in Australia have their minimum wages and conditions set by awards, though other instruments such as individual contracts or enterprise agreements often provide additional wages and conditions above the minimum conditions established in awards. Penalty rates generally apply to non-standard

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1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (17 September 2015) 8-15.

hours of work (such as weekend and night work), overtime and work on public holidays.

2.7 As set out above, this bill would exempt small business employers (with fewer than 20 employees) in the restaurant and catering, hotel, and retail industries from being required to pay penalty rates under an existing or future modern award unless certain conditions are met. Awards will be allowed to include penalty rates provisions for work: in addition to ten hours of work (in a 24 hour period); on a weekend but only if the work is in addition to 38 hours in the week; and on a public holiday.

2.8 The bill engages and may limit the right to just and favourable conditions of work, as the changes to penalty rates for non-standard work hours (such as weekend and night work) may reduce the take home pay of individuals in those industries.

2.9 In reducing the income of some of the lowest paid employees in Australia, the measure also engages and may limit the right to an adequate standard of living.

2.10 In addition, the measure engages and may limit the right to equality and non-discrimination. In particular, the measure may constitute indirect discrimination on the basis of gender and age, as women and young people are disproportionately represented in the affected industries.

Right to just and favourable conditions of work

2.11 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

2.12 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;

2 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

2.14 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to just and favourable conditions of work

2.15 The statement of compatibility for the bill acknowledges that the measure engages the right to work and rights in work but states that the bill does not limit the right of employees to earn either fair wages or equal remuneration.[3] However, the statement of compatibility does not directly address the limitation on the right to just and favourable conditions of work.

2.16 The statement of compatibility states that the bill is 'intended to support and encourage greater employment within small businesses'. The statement of compatibility does not outline how this measure pursues a legitimate objective for the purposes of international human rights law; nor has it demonstrated that the measure is rationally connected to that objective.

2.17 The statement of compatibility has also not demonstrated that the measure is proportionate to its stated objective (that is, that it is the least rights restrictive means of achieving that objective). The committee considered in its previous analysis that there is likely to be a less rights restrictive alternative to achieving the stated objective of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers.

2.18 The committee therefore sought the advice of the legislation proponents as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; there is a rational connection between the limitation and that objective; and the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to an adequate standard of living

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

2.20 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to

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3 Explanatory Memorandum (EM), Statement of Compatibility (SOC) 5.

ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

2.21 The committee previously noted that employees in the restaurant and catering, hotel and retail industries have the lowest average full time weekly earnings in Australia, and employees in these industries are likely to be reliant on the conditions in awards.[4]

2.22 The changes in the payment of penalty rates proposed by the bill has the potential to have a sizeable impact on the wages earnt by the affected low paid employees, particularly existing employees who may have structured their work patterns according to the available wages and penalty rates. It is also possible that penalty rates have been part of the overall wage packages in such industries, and average wage rates would have been higher if penalty rates were lower (or zero).

2.23 As the statement of compatibility does not identify the measure as limiting the right to an adequate standard of living in this way, no justification for the limitation is provided.

2.24 The committee therefore sought the advice of the legislation proponent as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; there is a rational connection between the limitation and that objective; and the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to equality and non-discrimination

2.25 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

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

2.27 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[5] which has either the purpose (called

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4 Australian Bureau of Statistics 2015, *Average Weekly Earnings, Australia, May 2015*, Cat. No. 6302.0, released 13 August 2015.

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

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[6] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[7]

2.28 In addition to the articles on non-discrimination in the ICCPR and CEDAW, article 2(2) of the ICESCR guarantees the right to equality and non-discrimination in the exercise of economic, social and cultural rights, including the right to earn fair wages or equal remuneration sufficient to earn a decent living in article 7 of the ICESCR.

2.29 Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

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

2.30 The measure engages and may limit the right to equality and non-discrimination because of the possibility of indirect discrimination on the basis of gender or age.

2.31 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

2.32 The committee previously noted that the majority of employees in the restaurant and catering, hotel and retail industries are female, and more women in these industries work part-time than full-time.[8] Given the low base wage for these industries, women who work part-time are possibly more reliant on penalty rates to supplement their base wage. The changes to penalty rates may possibly have a disproportionate impact on women.

2.33 Employees in the restaurant and catering, hotel and retail industries are also likely to be younger on average and award reliant.[9] Minimum wage jobs are often entry level, with a much higher reliance on minimum wage jobs observed among employees aged less than 20 years (25 per cent of employees) and between 21 to 24 years (14 per cent of employees) compared with those aged 25 to 54 (roughly 5 per

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

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

8 Australian Bureau of Statistics 2015, *Labour Force, Australia, Detailed, Quarterly, May 2015*, Cat. No. 6291.0.55.003, released 18 June 2015.

9 Australian Bureau of Statistics 2014, *Employee Earnings and Hours, Australia, May 2014*, Cat. No. 6306.0, released 22 January 2015.

cent).[10] Therefore the changes to penalty rates may possibly have a disproportionate impact on young people.

2.34 As the statement of compatibility does not identify the measure as limiting the right to equality and non-discrimination in this way, no justification for the limitation is provided.

2.35 The committee therefore sought the advice of the legislation proponent as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; there is a rational connection between the limitation and that objective; and the limitation is a reasonable and proportionate measure for the achievement of that objective.

Legislation proponent's response

> Thank you for your letter of 8 September regarding your committee's report on the *Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015*, which I introduced with Senator Day.
>
> In your report you state that my Bill 'limits the right to just and favourable conditions of work', 'limits the right to an adequate standard of living', and represents 'indirect discrimination against women and young people'.
>
> As outlined in my explanatory memorandum, my bill 'only affects the circumstances in which certain employers will be required to pay penalties above the base wage'. This means you are effectively arguing that the base wages in the affected industries do not constitute just and favourable conditions of work, do not provide an adequate standard of living, and represent discrimination against women and young people.
>
> For you to make this extraordinary argument, you presumably have a view as to the minimum base rate in the affected industries that constitutes just and favourable conditions of work, provides an adequate standard of living, and avoids discrimination against women and young people. Please advise what this wage rate is.
>
> Given the negative relationship between regulated wages and employment, as outlined by the Shadow Assistant Treasurer in the *Australian Economic Review* in March and June 2004, I also invite you to indicate how much unemployment would be created by a requirement to pay this wage rate. Further, please advise whether the unemployment created would include women and young people.
>
> I note that governments in many developed countries do not impose base rates of pay, below which it is illegal to employ people. Governments that do impose such base rates generally set them at levels well below those in

10 Productivity Commission, *Workplace Relations Framework*, Draft Report, August 2015, p. 315 based on Australian Bureau of Statistics 2014, *Microdata: Employee Earnings and Hours, Australia, May 2014*, Cat. No. 6306/0/55/001, released 11 June 2015.

> Australia. Base rates of pay in Australia are many multiples above the level of NewStart. Moreover, there is no bar on negotiating higher wages through enterprise bargaining.
>
> Your report goes on to state 'the committee considers that there is likely to be a less rights restrictive alternative to achieving the stated objectives of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers'.
>
> This appears to reflect a desire by the committee to impose costs on the taxpayer, and to define human rights as an entitlement to other people's money (such as a right to social security) rather than the right of an individual taxpayer to retain his or her property. It would be helpful if you could confirm whether this understanding is accurate and to comment on its general applicability.
>
> I have copied this letter to Peter Harris AO, the Chairman of the Productivity Commission, as I anticipate he may be interested in hearing your view that a proposal to reduce penalty rate requirements in certain industries - a proposal very similar to a recommendation in the Commission's draft report on the workplace relations framework - represents a violation of human rights.
>
> He may also be interested in your committee's statement that 'employees in these industries often have little bargaining power over the conditions of their employment' - a statement apparently in conflict with the aforementioned draft report. I encourage you to outline to Mr Harris any concerns you have with the Commission's draft report.
>
> Finally, I have copied this letter to Coalition Senators on the committee, Senators Canavan and Smith, to draw attention to the statements published in their name. I have also copied this letter to the Minister for Employment, Senator the Hon Michaelia Cash, and to the Bill's cosponsor, Senator Bob Day.[11]

Committee response

2.36 **The committee thanks Senator Leyonhjelm for his response**.

2.37 The committee notes that Australia has voluntarily accepted obligations under the seven core UN human rights treaties and that the committee's role is to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations. These obligations include the right to just and favourable conditions of work and the right to an adequate standard of living under articles 6(1), 7 and 8(1)(a) and 11(1) of the ICESCR.

2.38 As set out in the committee's initial analysis, the bill engages the right to just and favourable conditions of work as the changes to penalty rates for non-standard

11 See Appendix 1, Letter from Senator David Leyonhjelm, to the Hon Philip Ruddock MP (dated 19 October 2015) 1-2.

work hours may reduce the take home pay of individuals in those industries. In reducing the income of some of the lowest paid employees in Australia, the measure also engages the right to an adequate standard of living. Further, the measure engages the right to equality and non-discrimination (indirect discrimination) on the basis of gender and age, as women and young people are disproportionately represented in the affected industries.

2.39 The legislation proponent's response does not provide advice on the compatibility of the bill with the right to just and favourable conditions of work, right to an adequate standard of living and right to equality and non-discrimination.

2.40 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights**.**

2.41 Accordingly, the committee encourages the legislation proponents to consult the committee's Guidance Note 1 which provides more information as to the role of the committee in scrutinising legislation for compatibility with Australia's international human rights obligations and guidance on how statements of compatibility may be prepared.

2.42 On the information provided, the committee considers that the bill is likely to be incompatible with the right to just and favourable conditions of work, the right to an adequate standard of living and the right to equality and non-discrimination.

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

Portfolio: Attorney-General
Introduced: House of Representatives, 30 October 2014

Purpose

2.43 The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the bill) amended the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to introduce a mandatory data retention scheme. This scheme requires service providers to retain types of telecommunications data under the TIA Act for two years. The bill also provided 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.

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

Background

2.45 The committee first commented on the bill in its *Fifteenth Report of the 44th Parliament*, and requested further information from the Attorney-General as to whether the bill was compatible with the right to privacy, the right to freedom of opinion and expression and the right to an effective remedy.[1]

2.46 The committee considered the Attorney-General's response in its *Twentieth Report of the 44th Parliament*, and concluded its consideration of most of the measures contained within the bill.[2] As the Attorney-General in his response did not address the committee's concerns in regard to the right to an effective remedy, the committee sought further advice from the Attorney-General in order to complete its consideration of this matter.

1 Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 10-22.

2 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74.

2.47 The bill passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015.

Mandatory data retention scheme—right to an effective remedy

2.48 Under the scheme, data is retained and can subsequently be accessed without the user or individual ever being informed. The committee considered in its previous analysis that the measure engages and may limit the right to an effective remedy.

Right to an effective remedy

2.49 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires state parties to ensure access to an effective remedy for violations of human rights. State parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

2.50 State parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

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

Compatibility of the measure with the right to an effective remedy

2.52 The committee's initial analysis noted that 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.

2.53 The committee noted that the Attorney-General's response provided a range of information regarding remedies that may be available in relation to misuse of telecommunications data. However, the response did not directly address how and whether there are sufficient mechanisms to seek redress for a violation of the right to privacy or the right to freedom of opinion and expression in circumstances where a person is not aware that their telecommunications data has been accessed.

2.54 The committee therefore reiterated its request for the advice of the Attorney-General as to what measures there are to ensure that there are effective remedies available to individuals for any breaches that may occur of the right to

privacy or the right to freedom of association (which should have read freedom of expression) as a result of the mandatory data retention regime.

Attorney-General's response

The Data Retention Bill passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015. The Act now incorporates a number of features which respond to concerns raised by the Committee which I have highlighted below. In a number of respects, the views of the Government continue to depart from those of the Committee or its members. I have sought to explain the Government's reasoning in relation to those matters.

I would like to thank the Committee for its constructive contribution to the robust public debate on the data retention legislation. I am confident that the Act properly balances the need to retain data to underpin the efforts of agencies to protect the community with appropriate privacy protections and strong oversight arrangements.

Data set to be retained

Consistent with the Committee's view that the data set to be retained should be detailed in primary rather than delegated legislation, section 187 AA of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (the Data Retention Act) now specifies the information or documents that service providers must retain. Any amendments to the data set must be referred to the Parliamentary Joint Committee on Intelligence and Security for review.

Definition of content

The Data Retention Act does not define content. I acknowledge the Committee's view that an exclusive definition of the term 'content' may not be required where the data set is set out in the primary legislation, as is now the case. As detailed in my earlier submission to the Committee, defining the types of data to be retained under the data retention scheme is more privacy protective than defining 'content'. The risk in defining 'content' is that any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content and the protections that apply to it.

The data set included in the Data Retention Act specifically excludes information that is the content or substance of a communication. In particular, paragraph 187 A(4)(b) provides that service providers are not required to retain information that details an address to which a communication was sent that was obtained by the carrier only as a result of providing a service for internet access. This provision ensures that service providers are not required to keep records of the uniform resource locators (URLs), internet protocol (IP) addresses and other internet

identifiers with which a person has communicated via an internet access service provided by the service provider.

Privacy protections

The Government maintains the view that access to telecommunications data should not be limited to investigations of complex or serious crimes, specific serious threats or the investigation of serious matters. Applying different timeframes to data access based on offence types would introduce a layer of complexity and inconsistency of application that would affect the efficacy of the data retention regime as a whole.

The various elements of the data set are relevant to all investigations; not just investigations of the most serious offences. Subscriber information, such as name and address information, is often the first source of lead information for further investigations, helping to identify potential suspects and to indicate whether an offence has been committed and the nature of that offence. Historical data also provides critical evidence needed to demonstrate to a court that the elements of a particular offence have been met, including whether a person communicated with a particular individual or organisation.

Rather than limit the range offences for which data can be accessed, the Act includes a range of additional privacy protections. Section 180F of the *Telecommunications (Interception and Access) Act 1979* has been amended to include a more stringent requirement that authorising officers be satisfied on reasonable grounds that the particular disclosure or use of telecommunications data being proposed is proportionate to the intrusion into privacy. In making a decision, authorised officers are required to consider the gravity of the conduct being investigated, including whether the investigation relates to a serious criminal offence.

The Data Retention Act will also restrict access to data to specified criminal law-enforcement agencies and to authorities or bodies declared to be an enforcement agency. The changes to the definition of 'enforcement agency' mean that access to retained data is limited to interception agencies, the Department of Immigration and Border Protection, the Australian Securities and Investments Commission, and the Australian Competition and Consumer Commission. Any permanent addition to the list of criminal law-enforcement agencies or enforcement agencies must be effected by legislative amendments and referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry. Any Ministerial declaration to temporarily declare an additional enforcement agency will cease to have effect 40 sitting days after the declaration comes into force.

The Data Retention Act also includes significant new oversight requirements by the Commonwealth Ombudsman, accompanied by extensive additional record-keeping and annual reporting.

Section 182 of the *Telecommunications (Interception and Access) Act 197*9 also makes it an offence for a person to use or to disclose

telecommunications data where the use or disclosure is not 'reasonably necessary' for the enforcement of the criminal law, a law imposing a pecuniary penalty or the protection of the public revenue. The improper use or disclosure of telecommunications data is a criminal offence punishable by up to two years imprisonment.

Destruction requirements

The Committee also expressed concern about the lack of specific destruction requirements in relation to data accessed under the *Telecommunications (Interception and Access) Act 1979*. The Parliamentary Joint Committee on Intelligence and Security also considered this issue and recommended that my Department review the adequacy of the existing destruction requirements that apply to information and documents accessed under Chapter 4 of the Act and report back by 1 July 2017. The Government has agreed that the Department will conduct this review.

Legal professional privilege

I acknowledge the Committee's response that the proposed data retention scheme will protect legal professional privilege. I note that some Committee members consider that legal professional privilege would be assured only if the legislation includes a non-exclusive definition of the type of data that constitutes 'content' for the purposes of the scheme. As discussed above, the Data Retention Act does not define the term 'content'. However, the data set clearly excludes information that is the content or substance of a communication. As legal professional privilege attaches to the content of communications, rather than to the fact or existence of those communications, the Data Retention Act in no way undermines legal professional privilege.

Independent authorisations or warrants to access to data

I note that while the majority of the Committee considers that the existing authorisation requirements provide sufficient safeguards to address privacy concerns, some Committee members recommend that access to retained data be granted only on the basis of prior independent authorisation.

The introduction of a warrant process (Judicial or ministerial) for access to telecommunications data would significantly impede the operational effectiveness of agencies. However, the Government has acknowledged that specific public interest issues associated with the identification of confidential journalists' sources and amended the Data Retention Bill to introduce a journalist information warrant regime. The Act prohibits agencies that do not have a warrant from authorising the disclosure of a journalist's or their employer's telecommunications data for the purposes of identifying a journalist's confidential source.

Notification

The Data Retention Act does not include a requirement for agencies to notify individuals about access to or proposed access to their telecommunications data. The covert investigative powers contained in the *Telecommunications (Interception and Access) Act 1979* are generally used where the integrity of an investigation would be compromised by revealing its existence.

Remedies

The Data Retention Act provides that the *Privacy Act 1988* applies in relation to service providers to the extent that the activities of the service provider relate to retained data. The effect of this requirement is that the Privacy Act and the Australian Privacy Principles (APPs) will apply to all service providers as though they were 'organisations', including service providers that would otherwise be exempt from the Privacy Act under the 'small business operator' exemptions in the Privacy Act.

In particular, service providers will be required to comply with the information security obligations contained in APP 11.1 in relation to all retained data, and will be required to de-identify or destroy retained data at the end of the retention period (except as allowed by APP 11.2). Individuals will also be able to request access to their personal retained data in accordance with APP 12, removing any uncertainty about whether particular types of retained data are personal information.

Privacy protection will be further enhanced by the Data Retention Act through requirements that service providers protect and encrypt telecommunications data that has been retained for the purposes of the mandatory data retention scheme. Encryption will supplement the existing information security obligations under the Privacy Act and the Telecommunications Consumer Protection Code. The Government has also agreed to introduce legislation to enact a mandatory data breach notification scheme.

Conclusion

The Data Retention Act contains a number of additional safeguards that engage and promote privacy rights and the right to freedom of expression while ensuring that the Government meets its obligations under Articles 6 and 9 of the *International Covenant on Civil and Political Rights* to protect the life and physical security of individual Australians.[3]

Committee response

2.55 **The committee thanks the Attorney-General for his response, and for providing additional information regarding amendments that were made to the bill before it passed both Houses of Parliament**. The committee notes that its remaining

3 Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 1-4.

question for the Attorney-General related solely to whether the legislation was compatible with the right to an effective remedy. As such, though it appreciates this additional information it makes no further comment on it.

2.56 The committee notes the Attorney-General's advice that the government has agreed to introduce legislation to enact a mandatory data breach notification scheme, and notes that the Attorney-General has stated elsewhere the government intends to introduce such a scheme by the end of 2015 in response to the recommendations of the PJCIS.[4]

2.57 The committee also notes the Attorney-General's advice that the privacy principles will apply to all service providers, requiring them to comply with the *Privacy Act 1988* (the Privacy Act). The committee notes that there are a range of enforcement mechanisms available under the Privacy Act.

2.58 The committee considers that a mechanism that ensures that individuals are notified when their telecommunications data has been accessed (noting that there may be circumstances where such notification would need to be delayed to avoid jeopardising any ongoing investigation) is essential to ensuring persons are able to exercise their right to effective review.

2.59 The committee welcomes the Attorney-General's advice that legislation regarding a mandatory data breach notification scheme will be introduced. Depending on the extent of such a notification scheme, this may address many of the committee's concerns as to whether a person would be able to seek redress for any breach of their right to privacy and right to freedom of expression. The committee notes that as the bill has now been enacted and is in force this commitment should be implemented expeditiously. The committee will assess any such legislation to determine whether the forthcoming legislation will address the committee's concerns.

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4 See also the Attorney-General's response to Recommendation 38 of the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015) at: http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/Government-Response-To-Committee-Report-On-The-Telecommunications-Interception-And-Access-Amendment-Data-Retention-Bill.aspx.

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

Paid Parental Leave Amendment Rules 2015 [F2015L01266]

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

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

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

Purpose

2.60 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015; the Paid Parental Leave Amendment Rules 2015; the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015 (the determinations) either amend or remake existing instruments relating to the issuing of public interest certificates.

2.61 Under legislation relating to payments for family assistance, social security, student assistance and paid parental leave it is an offence to make an unauthorised use of personal information obtained under the legislation; and officers are not required to disclose information or documents to any person, except for the purposes of the relevant law they are administering.[1]

2.62 However, the Secretary (or delegate) of the Department of Social Services or the Department of Human Services may certify that it is necessary in the public interest to disclose such information in a particular case or class of case. In doing so, the secretary must act in accordance with guidelines made under the relevant Act.[2] These determinations set out the guidelines for the exercise of this power.

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

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

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

Background

2.64 The committee previously considered the 2015 Guidelines in its *Twenty-eighth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Social Services as to the compatibility of the determinations with the right to privacy and the rights of the child.[3]

Disclosure of personal information

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

- the information cannot reasonably be obtained from a source other than a department;
- the person to whom the information will be disclosed has a sufficient interest in the information (being a genuine and legitimate interest); and
- the secretary is satisfied that the disclosure is for at least one of a number of specified purposes.[4]

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

- for the enforcement of laws;
- if necessary for the making of (or supporting or enforcing) a proceeds of crime order;
- to brief a minister;
- to assist with locating a missing person or in relation to a deceased person;
- for research, statistical analysis and policy development;
- to facilitate the progress or resolution of matters of relevance within departmental portfolio responsibilities;
- to a department or other authority of a state or territory, or an agent or contracted service provider of a department or authority, if the information is about a public housing tenant (or applicant), or is necessary to facilitate income management measures; and
- to ensure a child is enrolled in or attending school, or to meet or monitor infrastructures and resource needs in a school.[5]

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3 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 3-9.

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

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

Right to privacy

2.68 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information;
- the right to control the dissemination of information about one's private life.

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

Compatibility of the measure with the right to privacy

2.70 The statements of compatibility for the determinations acknowledge that the instruments engage and limit the right to privacy. However, they provide assessments of only three of the numerous purposes for which personal protected information can be disclosed.

2.71 This is despite the fact that three of the four Determinations[6] are remaking the guidelines, including all the specified purposes for which a public interest certificate can be made.

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

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

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

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

2.74 First, while the statements of compatibility state that the *Privacy Act 1988* (the Privacy Act) will continue to apply to the management of disclosed information, it is not clear that all recipients of the information would be subject to the provisions of that Act.

2.75 Second, the manner in which the information can be disclosed may not, in all instances, be the least rights restrictive approach.

2.76 Third, the determinations provide that in appropriate circumstances the disclosure of information may be accompanied by additional measures to protect the information. It is not clear why the requirement to further protect the information in such cases is not set out in the determinations themselves.

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

Minister's response

> With respect to the approach taken to the statement of human rights compatibility, normally the Statement of Compatibility with Human Rights would consider everything that is presented in the instruments. On this occasion it was thought appropriate to remake three of the four instruments to assist users. Since there were relatively few changes to the previous versions of the instruments, the Statements of Compatibility focussed only on the substantive changes. Only the *Paid Parental Leave Rules 2010* were not remade in full due to their length.
>
> I understand that the Committee's key concerns are: whether the limitations on the right to privacy are reasonable and proportionate to the objectives; whether the limitations are rationally connected to legitimate objectives; whether the safeguards protecting information are adequate; and if the least rights restrictive approach is used when sharing personal information.
>
> Issues that the Parliamentary Joint Committee on Human Rights raised about the instruments are considered below.
>
> <u>Legitimate objectives and rational connection with limitations</u>
>
> The purposes set out in the Public Interest Certificate Guidelines achieve various legitimate objectives. The grounds for disclosure are precisely-

defined, and are all subject to the condition that information can only be disclosed if:

- it cannot reasonably be obtained from a source other than a Department; and
- the person to whom the information relates has "sufficient interest" in the information.

The term "sufficient interest" is met if the Secretary is satisfied that the person has a genuine and legitimate interest in the information, or the person is a Minister.

It is also important to note that the misuse or unauthorised disclosure of protected information is a criminal offence and can result in a recipient of the information being subject to a maximum penalty of two years imprisonment in the event that they misuse or improperly disclose the information.

Before disclosing information, a delegate needs to consider whether the disclosure is 'necessary' in the public interest and that the disclosure is for one or more of the purposes set out in the Public Interest Certificate Guidelines. This requirement of necessity also limits the kinds of information disclosed.

Each of the grounds for disclosure in the Guidelines is reasonable and proportionate. The measures are precisely defined and contain suitable qualifications that ensure they only target the issues they are addressing. This means that any officer making a Public Interest Certificate on the basis of the Guidelines has a tightly-controlled discretion, which is appropriate and proportionate in the circumstances.

In the Department of Social Services, the power to issue public interest certificates is only delegated to senior officers in the Department.

The objectives of the Public Interest Certificate Guidelines broadly fall under the categories of law enforcement (including criminal law, proceeds of crime and threats to Commonwealth staff and property), safety (such as stopping abuse or violence to a homeless young person, and preventing a threat to the life, health or welfare of a person or locating a missing person), welfare (by assisting with income management, ensuring that correct public housing support is received, and assisting with the administration of a deceased estate) and supporting children's education (by ensuring that a child is attending school and that schools have adequate resources).

All of these objectives require that some limitations are placed on the right to privacy in order to address these substantial and often pressing issues.

Another broad objective of the Public Interest Certificate Guidelines is to assist with accountability to Parliament. Policies and programmes are examined to ensure that they are achieving their intended outcomes and are being used appropriately, efficiently and effectively. Accountability to

Parliament requires that Ministers have access to sound and comprehensive evidence on which policies and programmes can be developed, implemented and amended over time. In order to achieve this objective, it is necessary to conduct research, statistical analysis and policy development, and progress matters of relevance within portfolio responsibilities.

Ministers require briefing to be accountable to Parliament, to consider complaints or issues raised by a person and to address a mistake of fact. On some occasions, these briefings require protected personal information to be disclosed in order to address the matter being resolved.

Although these requirements mean that some privacy limitations are introduced, they each have a demonstrated and rational connection to the objective of achieving accountability to Parliament.

The attachment to this letter contains more details about the legitimacy of the objectives and the rational connection with the limitations.

Reasonable and proportionate measure for achieving objectives

The limitations on the right to privacy introduced by the Public Interest Certificate Guidelines are minimal when considered in the context of the private and public benefits achieved by each of the objectives.

For example, the provisions in the Guidelines applicable to research and statistical analysis, policy development and briefings to Ministers enable more effectively targeted services to Australians.

Benefits to people whose information is accessed using Public Interest Certificate Guidelines far outweigh the limits to privacy. Examples include resolving cases of missing persons, improving child education, child protection, stopping abuse or violence to a homeless young person, obtaining entitlement to compensation and ensuring that correct benefits are provided by public housing.

When the benefits of these limitations are considered together with safeguards taken to protect personal information, I consider these limitations to be both reasonable and proportionate to achieve the objectives. The attachment to this letter contains further information attesting to the measures being reasonable and proportionate for the achievement of the objectives.

Safeguards to protect personal information

I note the Committee's concerns about the application of the *Privacy Act 1988* (the Privacy Act) to certain recipients of protected information.

Whilst not every recipient of information under a Public Interest Certificate will be subject to the Privacy Act, State and Territory privacy legislation will apply to many recipients of protected information.

While there will be individuals and organisations not subject to any privacy legislation, again I draw the Committee's attention to the criminal

sanctions under the *Social Security (Administration) Act 1999* (for example, section 204) and similar provisions in the other three legislative regimes.

Least restrictive rights approach

The least restrictive rights approach is used when providing access to personal information under Public Interest Certificate Guidelines.

Information is only disclosed where necessary and is limited where possible to de-identified information. However, it is not always practicable to disclose de-identifying information for research purposes where, for example, there is a need to follow up with participants for studies that are conducted over a number of years or when linking data between databases.

Determinations

The Committee has queried why methods for further protecting information are not set out in the Guidelines themselves. The purpose of the Guidelines is to list the grounds on which information can be disclosed by the Secretary (or delegate). The administrative processes pursuant to which information should be disclosed are addressed on a case-by-case basis. In relation to disclosures for research purposes, it is standard practice to require undertakings of confidentiality to be provided by the recipients and members of research teams.[7]

Committee response

2.78 **The committee thanks the Minister for Social Services for his detailed response.** In particular, the committee notes the minister's advice as to the objective behind each of the numerous purposes for which a public interest certificate can be issued, and considers that these are likely to be considered legitimate objectives for the purposes of international human rights law. The committee also notes the minister's advice as to the proportionality of the determinations and considers the measure are likely to be proportionate to achieving those objectives, in particular taking into account the minister's advice;

- that there are existing statutory provisions that the misuse or unauthorised disclosure of protected information is a criminal offence, which apply even where a recipient of the information may not be subject to the *Privacy Act 1988*;
- that it is standard practice to require undertakings of confidentiality by the recipients and members of research teams when disclosures are made for research purposes; and
- that de-identified information is provided where possible and that it is not always practicable to disclose de-identifying information.

7 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 19 October 2015) 1-3.

2.79 Accordingly, the committee considers that the minister's advice has demonstrated that the determinations are likely to be compatible with the right to privacy.

Disclosure of personal information relating to homeless children

2.80 Three of the determinations provide for the disclosure of information relating to a child who is homeless.[8] These provide that a public interest certificate can be provided in a number of circumstances if the information cannot reasonably be obtained otherwise, the secretary is satisfied that the disclosure will not result in harm to the young person and the disclosure is for purposes set out in the guidelines, or will be made to a welfare authority where the child is in their care and is under 15 years old.

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

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

2.82 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include the right to privacy, which includes the same contents as the general right to privacy set out above at paragraphs [2.68] to [2.69].[9]

2.83 In addition, under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[10]

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

Compatibility of the measure with the rights of the child

2.85 The statements of compatibility for each of the three relevant determinations do not consider whether the measures engage and limit the rights of the child.[11]

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

9 Article 16 of the CRC.

10 Article 3(1) of the CRC.

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

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

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

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

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

Minister's response

> Disclosure of personal information relating to homeless children
>
> I note that Convention on the Rights of the Child refers to the need for the disclosure to be in the best interests of the child, rather than that disclosure will not result in harm to the child.
>
> As you have stated, the circumstances when the information can be disclosed include:
>
> 1. if the information is about the child's family member and the Secretary is satisfied that the child, or the child's family member, has been subjected to abuse or violence;
> 2. if the disclosure is necessary to verify qualifications for payments;

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

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

3. if the disclosure will facilitate reconciliation between the child and his or her parents; and

4. if necessary to inform the parents of the child as to whether the child has been in contact with the respective department.

Under point 1, I consider that it is in the best interest of the child to not be subject to abuse or violence. It is also not in the best interests of the child to witness abuse or violence being inflicted on another person.

Regarding point 2, I again consider that it is in the child's best interest to receive their correct entitlements to help them to support themselves. It is not in children's interests to allow for overpayments to occur as this may reduce their income later, if repayments are required to be made to the government.

Regarding point 3, I consider that it is in the best interests of the child to facilitate reconciliation in circumstances where harm would not result to the child.

In relation to point 4, I anticipate that a child's parents would only be contacted where this is legally necessary and subject to consideration of the risk of harm to the child.

As outlined above, each of the objectives are aimed at achieving a legitimate objective and there are rational connections between the limitation and objectives. The limitations are relatively minor compared with the benefits resulting from promoting the best interests of the child. Consequently the limitations are both proportionate and reasonable.[13]

Committee response

2.91 **The committee thanks the Minister for Social Services for his response.** In particular, the committee notes the minister's advice as to the legitimate objectives behind disclosing information relating to children and considers that these are likely to be considered legitimate objectives for the purposes of international human rights law. However, the committee reiterates its advice that while considerations of harm to the child are relevant to the question of what is in the best interests of the child, the obligation to consider the best interests of the child is broader than simply considering whether a child would be harmed by the disclosure.

2.92 The committee recommends that to ensure that the rights of the child are protected, the determinations be amended to require the secretary to be satisfied that the disclosure would be in the best interests of the child.

13 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 19 October 2015) 4.

Dissenting report by Coalition Senators on the Marriage Legislation Amendment Bill 2015

3.1 The Committee report makes a number of unsupported findings in regard to the *Marriage Legislation Amendment Bill 2015* (the Bill). In particular it finds that the Bill is compatible with, and in some cases promotes, the rights engaged by the relevant human rights treaties. Such conclusions are not merely unsupported by a thorough understanding of the content of the international instruments and the judicial decisions made concerning them; they betray such a degree of ignorance of those instruments and decisions as to render the conclusions unreliable.

3.2 The Bill engages multiple human rights conventions and covenants, and raises serious concerns around breaches of fundamental human rights under applicable instruments. These include: the right to freedom of thought, conscience and religion or belief; the right to freedom of expression; the right to respect for the family; and the rights of the child. The discussion in the report is based on a seriously deficient understanding of the concepts of equality and non-discrimination under the relevant instruments. While the report highlights that the Committee was divided on some of the issues above, the analysis presented does not provide a balanced assessment of all sides of the debate.

Summary

Non-Discrimination and Equality before the Law

3.3 The Committee makes the erroneous claim that the *Marriage Act 1961* (Cth) (the Marriage Act) is directly discriminatory on the basis that it defines marriage as between a man and a woman. It further claims that this direct discrimination will be removed by redefining marriage as a union between '2 people' (1.491-1495). This view is not supported in relevant international human rights law.

3.4 Article 23 of the ICCPR contains the right to traditional (man-woman) marriage, although the Covenant also contains Articles 2 and 26 which confer the right to non-discrimination and equality before the law. The Covenant cannot be internally contradictory; traditional marriage and non-discrimination are compatible.[1]

3.5 The claim that redefining marriage removes direct discrimination conflates identical treatment with non-discrimination and equality before the law. This is beyond the scope of Article 26 according to the Covenant's travaux préparatoires[2] and the UN Human Rights Committee's own General Comment 18 on Article 26.[3] Differentiation of treatment does not necessarily amount to discrimination.

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1 *Human Rights Committee, Decision Communication No. 902.1999, 75th sess, (Joselin et. al v New Zealand), 8.2-9*.

2 Fifth session (1949), sixth session (1950), eighth session (1952), tenth session A/2929, Chap. VI, 179.

3 At paragraph 13.

3.6 The Committee states that interpreting the ICCPR consistent with emerging state practice requires an expansive view of marriage and family (1.524), due to the recognition of same-sex unions by a 'large' number of countries. But there is nothing in this observation that would require the redefinition of marriage. The principle that the ICCPR be interpreted in accordance with emerging state practice is enlivened only insofar as there is consensus amongst the States Parties. There is clearly no consensus around the redefinition of marriage, as only about 19 of 175 States Parties – barely one in ten – have changed the law in this regard.

3.7 This is true even in Europe, which has a relatively high concentration of states with same-sex marriage laws. The European Court of Human Rights (ECHR) this year ruled that there is no consensus amongst European states that would enable a right to same-sex marriage under the European Convention on Human Rights.[4]

3.8 The Committee's reliance on ECHR cases is fundamentally unsound. It hardly needs saying, but Australia is not (and cannot be) signatory to any European conventions to which those cases relate. The rights expressed under those conventions are often differently worded or contextualised, and even a seemingly slight difference in this regard can have very wide impacts on their interpretation and implementation. The Committee's own guide to human rights (current as at June 2015) states that such cases may assist but are not binding. They cannot be validly imported into Australian law; nor can Australian law be validly subjected to them. By contrast, the seven UN treaties have been ratified by the Commonwealth of Australia under the Constitution's external affairs power (section 51(xxix)).

3.9 Nonetheless, the Committee has chosen to refer substantively to ECHR cases on the European Conventions, including *Schalk and Kopf v Austria*, *Hämäläinen v Finland* and *Oliari and Others v Italy*. Far from supporting the Committee's views, those cases actually demonstrate quite the opposite, that the Committee's interpretation of European rights is deeply deficient (further analysis below at 1.37 – 1.39).

3.10 Of particular note in the European cases is the Court's application of the margin of appreciation doctrine, permitting states a certain latitude in the way that they ensure that the rights of same-sex couples are achieved (1.37). It was therefore not contrary to human rights for Austria to maintain traditionalmarriage.[5] The cases also note that same-sex couples are not in "relevantly similar situations" as opposite-sex couples such as to require the right to marry[6] (1.38 – 1.39) – a point overlooked by the Committee's analysis of the "relevantly similar situations" principle.

4 *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015).

5 *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 105.

6 Above n 4, 165; Ibid, 99.

3.11 Finally, by requiring all civil celebrants to perform same-sex marriages, the Bill places an unjustified and intolerable burden on the consciences of celebrants who adhere to a traditional understanding of the nature of marriage. This amounts to indirect discrimination on religious grounds under Article 26, given that it is a burden on the celebrant's Article 18 right to freedom of religion, by way of a law that is not required under the Covenant but disproportionately affects people with a specific attribute.

Freedom of thought, conscience and religion or belief

3.12 There is no right to same-sex marriage under the relevant covenants, but there is a right to hold and express one's thought, conscience and religion or belief in public and in private.[7]

3.13 The UN Human Rights Committee has described freedom of religion as a "fundamental" right in its General Comment 22. It is also one of a limited number that are non-derogable, meaning it cannot be infringed even in a time of public emergency.[8]

3.14 Article 18(3) provides permissible grounds for limiting this right, including protection of the fundamental rights and freedoms of others, but as same-sex marriage is not a right it cannot therefore be used to limit Article 18, even on the invocation of Article 26.

3.15 The Bill will infringe the Article 18 rights of the following classes of people:

a. Ministers of religion within bodies that have altered their rites or customs in a manner that does not reflect the beliefs of the individual minister (see below 1.52 – 1.57);

b. Civil celebrants and marriage registrars whose beliefs do not reflect those promoted by the Bill (see below 1.58 – 1.69);

c. Indirectly, wedding service providers whose beliefs do not reflect those in the Bill (primarily through enforcement of the Bill through anti-discrimination laws) (see below 1.71 – 1.73);

d. Ethnic and religious minorities (also Article 27) (see below 1.74).

3.16 The Bill's violation of protections for religious freedoms of religious bodies and their members breaches religious freedom as understood in international law. Religious freedom is a right enjoyed by all persons in conjunction with their right to thought, conscience and belief, irrespective of their occupation or memberships.

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7 *International Covenant on Civil and Political Rights* Article 18.

8 ICCPR Article 4(2).

Family and the Rights of the Child

3.17 General Comment 19 on the ICCPR provides that, "The right to found a family implies, in principle, the possibility to procreate and live together." Article 23(2) provides that this right to 'found' a family follows from "the right of men and women of marriageable age to marry." Article 23(1) describes the family as "the natural and fundamental group unit of society" implying its role in producing children. The government's interest in legislating marriage is inextricably linked to the function of marriage as a foundation for children and family. The recognition of same-sex marriages therefore clearly entails the affirmation of the right of same-sex couples to parent children.

3.18 Whilst the Committee states that the Bill does not engage the rights of the child in amending laws relating to such matters as adoption, surrogacy and assisted reproductive technology the remarks above show that it nonetheless qualifies as an action that concerns children. Such actions must be done with the best interest of the child as the primary consideration.[9]

3.19 In view of the above, the Convention on the Rights of the Child (CRC) is critical to the present assessment. The CRC promotes the right of every child to know his or her parents and protects the integrity of the natural family from state interference.[10] By permitting same-sex couples to marry and found a family, the state is sanctioning a family structure that will, by definition, undermine children's rights to know and be raised by their parents. By definition, at least one parent in a family headed by a same-sex couple cannot a biological parent.

3.20 Whilst it cannot be said that there is any requirement not to legislate same-sex marriage on these grounds in paragraphs 1.17-1.19, the language of the CRC and the ICCPR is clear. Those rights may therefore be best promoted according to the highest ideals by preserving the traditional nuclear family and the biological relationships therein as far as possible.

Conclusion

3.21 The discussion in the report fails utterly in its examination of the serious human rights breaches contemplated by the Bill. It does not provide a robust supporting basis for the conclusions that the legislation is compatible with, and in some cases further promotes, the rights engaged by the relevant human rights treaties discussed above.

3.22 The Bill engages multiple human rights conventions and covenants and is demonstrably incompatible with a number of these including the right to freedom of thought, conscience and religion or belief; the right to respect for the family; and the rights of the child.

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9 *Convention on the Rights of the Child* Article 3(1)

10 See generally, Articles 7 and 9; also Article 17 ICCPR.

Background

3.23 Marriage in Australia is regulated by the *Marriage Act 1961 (Cth)* (Marriage Act) and the *Marriage Regulations 1963* (Cth). All marriages in Australia must be conducted in accordance with this legislation. The Marriage Act defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.[11]

3.24 The Bill seeks to make a number of changes to the Marriage Act to permit same-sex couples to marry. The Bill would replace the current definition of marriage with:

> ***marriage*** means the union of 2 people to the exclusion of all others, voluntarily entered into for life.

Compatibility of the Bill with human rights

3.25 The statement of compatibility claims that the Bill engages a number of rights:

- right to equality and non-discrimination;
- right to freedom of thought, conscience and religion or belief;
- right to respect for the family; and
- rights of the child.

In addition, the Bill engages the right to freedom of expression.

Assessment of human rights concerns

The right to equality and non-discrimination

3.26 The statement of compatibility accompanying the Bill claims that the 'Bill engages rights of equality and non-discrimination because it extends the right to marry to any two people regardless of sex, sexual orientation, gender identity or intersex status. In doing so it promotes those rights.'

3.27 The Committee's Report makes the claim that "the current Marriage Act, in restricting marriage to between a man and a woman, directly discriminates against same-sex couples on the basis of sexual orientation … The Bill, in seeking to extend the legal recognition of marriage to same-sex couples, promotes the right to equality and non-discrimination by removing the existing direct discrimination in the Marriage Act.' (at 1.491-1.495). This claim is not supported by the international human rights instruments listed at section 3 of the Act, to which the Committee is to have regard.

3.28 In *Joslin et al. v. New Zealand*[12] the United Nations Human Rights Committee, noting that Article 23(2) of the International Covenant on Civil and

11 *Marriage Act 1961* (Cth) s 5(1).

12 Human Rights Committee, Decision Communication No. 902.1999, 75th sess, (*Joselin et. al v New Zealand*).

Political Rights (ICCPR) states that '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized', held that 'a mere refusal to provide for marriage between homosexual couples' does not violate the State Party's obligations under the ICCPR. The Committee expressed its View as follows:

> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
>
> 8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.
>
> 9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.[13]

3.29 The reasoning of the UN Committee is consistent with the maxim of interpretation *generalia specialibus non derogant*, provisions of a general statute must yield to those of a specific one, which would exclude a definition of marriage contrary to that in Article 23(2) being adopted. Thus the Bill proposes redefinition of a legal institution protected and defined by the Covenant itself.

3.30 The UN Human Rights Committee's View is that whether discrimination exists over marriage is a matter of the meaning that is ascribed to marriage. If it is accepted that the concept of marriage includes a union between two persons who are of the same sex, then discrimination will arise where those persons are precluded from marrying. However if by definition marriage includes only a union between persons of the opposite sex, then by classification, discrimination cannot exist. The UN Committee interpreted the specific language of Article 23(2) to require that the ICCPR's definition of marriage falls within the latter category. The inability of same sex couples to marry does not follow from a differential treatment of same sex couples, or an exclusion or restriction, but from the inherent nature of the institution

13 Ibid, 8.2-9.

of marriage recognized by article 23, paragraph 2, itself. Given the scope of marriage under the ICCPR cannot contain same sex marriage by definition, the UN Human Rights Committee held in *Joslin et al. v. New Zealand* that no discrimination can arise under Articles 2 or 26 of the ICCPR.

3.31 That construction is supported by reputed academic comment. As noted by Harris and Joseph "It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2)."[14] Nowak also notes that "The prohibition of 'marriages' between partners of the same sex is easily upheld by the term 'to marry' ('se marrier') which traditionally refers only to persons of different gender. Moreover, article 23(2) places particular emphasis, as in comparable provisions in regional conventions, on the right of 'men and women' to marry".[15]

3.32 The Bill's proposal to interpret the principle of non-discrimination so as to redefine the institution of marriage seeks not non-discrimination but identical treatment, which is beyond the scope of article 26. The Covenant's *travaux préparatoires* recognize that the right to non-discrimination does not require identical treatment.[16]

3.33 That ICCPR definition is also consistent with Article 16 of the Universal Declaration of Human Rights which provides, in the only gender-specific reference in the Declaration, the right of "[m]en and women … to marry". Such is also consistent with the ordinary meaning of marriage. It is also consistent with Article 16 of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), which provides:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;

3.34 The Committee's Report claims that 'Currently, a very large number of countries recognise same-sex partnerships to some degree (through civil unions, registries and same-sex marriage), and there is a clear trend towards further recognition. Interpreting the ICCPR consistent with emerging state practice requires an expansive view of marriage and family' (at 1.523-1.524). All Australian States have given legal recognition to same sex partnerships through civil unions or partnerships or have amended their laws to recognise same sex partnerships as de facto

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14 Harris, D., Joseph, S, *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Oxford University Press, 1995, 507.

15 *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl, 1993) 407.

16 Fifth session (1949), sixth session (1950), eighth session (1952), tenth session A/2929, Chap. VI, 179.

relationships and have enacted legislation to remove discrimination against same sex couples. The Bill however proposes to alter the definition of *marriage.*

3.35 It cannot be said that a very large number of countries have recognised *marriage*. Of the 175 State Parties to the ICCPR, in total 19 have redefined marriage to include persons of the same sex. There is no emerging ICCPR State Party consensus redefining marriage to include persons of the same sex. Rather, the overwhelming consensus amongst State Parties to the ICCPR remains the definition of marriage as being between persons of the opposing sex. The State Parties that have legislated for same sex marriage are in the vast minority.

3.36 Even in the European context where a higher proportion of states have introduced same-sex marriage laws, those that have done so remain in the vast minority, and there is no consensus. At July 2015 twenty-four of the forty-seven states had given legal recognition in the form of marriage or as a civil union or registered partnership, with those redefining marriage comprising only eleven of those twenty-four.[17] A more marked lack of consensus is evident globally, and in the Asia-Pacific region which Australia occupies. States that have legislated for same-sex marriage remain in the vast minority. The Covenant, including in its Article 26 right to equality before the law and non-discrimination, confers no obligation on those that have not enacted such laws to do so.

3.37 The Committee's responsibility under section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is to 'examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights' as defined under the seven international instruments referenced therein. Those instruments do not include the rights contained within the *European Convention for the Protection of Human Rights and Fundamental Freedoms* or the *European Charter on Human Rights*, to which Australia is not a signatory. The rights contained in (and the surrounding jurisprudence accompanying) those European instruments differ in content and limitation from those the Committee is required to review for compatibility. That this is the approach to be adopted is clarified by the Explanatory Memorandum accompanying the *Human Rights (Parliamentary Scrutiny) Bill 2010*, which provides that the human rights to which the Committee is to have regard are those 'rights and freedoms recognised or declared by the seven core United Nations human rights treaties as that treaty applies to Australia [sic].' The rights are those specifically 'recognised or declared' by the seven treaties, and which specific treaties apply to Australia. Such a reading is also to be preferred as the only possible construction in light of the varying nature of human rights under differing international systems (a matter to which we return). For this reason we consider that the actual human rights to which the Committee is to have regard are those rights (with their specific limitations and extensions) contained in the seven listed instruments, and not the similarly titled rights contained in other international

17 *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015), 55.

instruments. Without detracting from this, it may be helpful for the current analysis, particularly as the Committee has cited that context as authority for various of its propositions, to give some consideration to the European context. As acknowledged within the Committee's June 2015 Guide to Human Rights:

> 3.38 case law from other domestic systems, including cases brought under the European Convention on Human Rights (which is very similar to the ICCPR), can be a valuable resource in understanding how human rights are to be applied in practice. While none of this is binding on how the committee carries out its scrutiny function, it can assist the committee in gaining a broader understanding of the content and application of human rights.

3.39 The European Court of Human Rights (ECHR) has found that there is no right of same-sex couples to be included in the definition of marriage. In *Schalk and Kopf v Austria* [2010] the ECHR upheld the application of the doctrine of the "margin of appreciation" to Austria's refusal to marry a same sex couple, finding that there was no right to same sex marriage under the European human rights charters. In so doing, the Court held that in the European context, 'The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.'[18] The Court affirmed its prior judgements to the effect that although 'the Convention was a living instrument which had to be interpreted in the light of present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States.'[19] In 2014 in *Hämäläinen v. Finland*[20] the ECHR 'held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same sex couples.'[21]

3.40 As noted in the Committee's Report (at 1.495), the ECHR has held that in order for a measure to engage the rights of equality and non-discrimination there must be a difference in the treatment of persons in relevantly similar situations.[22] In *Schalk and Kopf v Austria* the Court held that 'same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' However, as noted in the preceding paragraph, in *Schalk and Kopf v Austria* that 'relevantly similar

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18 *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 105.

19 Ibid, 46.

20 Hämäläinen v. Finland [GC], no. 37359/09, § 62, ECHR 2014.

21 *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015), 191.

22 *D.H. and Others v. the Czech Republic ([GC], no. 57325/00, ECHR 2007-IV);* See also *Burden v. the United Kingdom ([GC], no. 13378/05, ECHR 2008).*

situation' did not extend from the need for legal protection to then encompass a right to marriage. The Court did not hold however that States Parties are required to afford same-sex couples access to marriage. Instead, in an acknowledgement of the differing views concerning the definition of marriage, in light of the 'deep rooted social and cultural connections which may differ largely from one society to another' it instead recognised the rights of States Parties to define marriage autonomously. Having found that the Convention does not impose an obligation to grant same-sex couples access to marriage, the Court found that the prohibition on discrimination under Article 14 was not breached.[23] The existence of legal protections afforded by registered partnerships and equality in access to benefits were relevant to this determination. The majority of Australian States offer registered partnerships and in 2008 the Commonwealth enacted a range of laws to remove vestiges of discrimination in respect of Commonwealth government conferred rights and entitlements.

3.41 In *Oliari v Italy* [2015] the Court held that same-sex couples are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' Again, the Court's ruling pertains only to 'the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection'. The Court held that the extent to which same sex couples are in a relevantly similar situation to different-sex couples did not extend to their inclusion in the definition of marriage. The Court reaffirmed its decisions in *Schalk and Kopf v Austria* and *Hämäläinen v Finland* referred to above.

3.42 In relation to the need for equality in legal protection in Australia, as noted above, all Australian States have undertaken projects to remove discrimination in relation to same-sex partnerships. Furthermore, the Australian Human Rights Commission 'has welcomed the removal of discrimination against same-sex couples and their children from most Commonwealth legislation [which] reforms followed the release of Same-Sex: Same Entitlements, the Commission's 2007 report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits'.[24]

3.43 Although reference to Australian law is not necessitated by section 7(a) of the Act, given the application of the margin of appreciation doctrine by the ECHR to marriage, some comment may also be made on the definition of marriage in the Australian context. In 2013 the High Court held that there was no constitutional prohibition on Parliament legislating to permit same-sex marriage. The Court held

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23 *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 101.

24 Inquiry into the Marriage Equality Amendment Bill 2009 - Australian Human Rights Commission Submission to the Senate Standing Committee on Legal and Constitutional Affairs 2009.

that in order to determine whether the ACT law legislating same sex marriage was inconsistent with the Commonwealth Constitution and the Marriage Act it was necessary to decide whether section 51(xxi) of the Constitution permits the Commonwealth Parliament to enact "a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the Marriage Act if the federal Parliament had no power to make a national law providing for same sex marriage". Neither the Commonwealth, the ACT nor Australian Marriage Equality (as *amicus curiae*), argued that such a determination was necessary. Indeed, as Professor Anne Twomey has noted:

> It is hard to see how this could be the case, given that the court had earlier stated that the object of the ACT Act was to "provide for marriage equality for same sex couples, not for some form of legally recognised relationship which is relevantly different from the relationship of marriage which the federal laws provide for and recognise" (at [3]). If this is so, then how could an ACT law establishing the status of "marriage" for same sex couples, operate concurrently with the Marriage Act 1961 (Cth), if both the Constitution and the Marriage Act defined marriage exclusively as unions of people of the opposite sex and the Commonwealth law covered the field of "marriage"? [25]

3.44 If such be so, then the High Court's determination on the Constitutional sanction of same sex-marriage is *obiter dictum*: influential but not binding. This means that the issue as to whether discrimination occurs remains a definitional one – does marriage by definition include only persons of the opposite sex or does marriage include persons of the same sex? Other respected academic commenters have postulated the opposing views that may have been considered, but were not in the Court's reasoning in the absence of a contradictor.[26]

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25 Anne Twomey, 'Same-Sex Marriage and Constitutional Interpretation' (2014) 88(9) *Australian Law Journal* 613, 613-4.

26 Professors Patrick Parkinson and Nicholas Aroney in 'The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case' (2014) 28(2) *Australian Journal of Family Law* 160, have argued that the Constitutional law principles of 'connotation' and 'denotation' might be applied to shed light on the question. A connotation is the essence of a concept, whereas a denotation is the class of objects which at any time are designated by a word, and which may vary over time. In that article, they advance alternative arguments based on existing judicial authority in support of the proposition that the connotation of the definition of marriage includes persons of the opposite sex. They argue:

3.45 Finally, returning to the ICCPR, whilst under international human rights law the definition of marriage does not include couples of the same sex, and thus the question of discrimination cannot arise, in its General Comment 18, the United Nations Human Rights Committee has explained that conduct is not discriminatory if it is for a purpose that is legitimate under the ICCPR:

> 'the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'

3.46 This statement is not qualified by necessity, nor does it require that the purported differentiation is the most appropriate means of achieving the purpose; rather, the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria. The definition of marriage adopted under the ICCPR is objectively and reasonably justified, for a purpose legitimate under the Covenant. In differentiating between same-sex couples and heterosexual couples, the existing provisions of the Marriage Act rely on clear and historically objective criteria that have shaped the definition of marriage, and which reflect the social and cultural values that that institution represents. As noted above, this purpose is explicitly recognised as legitimate by article 23, paragraph 2, of the Covenant.

3.47 For the foregoing reasons the Committee's conclusion that it 'assessed the bill against article 26 of the *International Covenant on Civil and Political Rights* (the right to equality and non-discrimination) and is of the view that the bill, in expanding the definition of marriage, promotes the right to equality and non-discrimination' is entirely unsupported by human rights law.

> 'If a committed contradictor had been available to scrutinise these propositions, these inconsistencies in reasoning might have been avoided. None of the States chose to intervene in the case, even though, as it transpired, the Court made a very significant determination about the scope of the Commonwealth's power to legislate with respect to marriage. If a State Solicitor-General had the opportunity to question the wide view of Commonwealth power that was in issue, the reasoning of the Court, if not the result, might have been very different. Thus, for example, much reliance was placed on the observation of Higgins J in the Union Label Case, that the constitutional conception of marriage cannot be tied to the state of the law at any particular time, for otherwise the power to make law will become illusory. Reasoning in this way draws attention to only one side of the argument, however, the side that pushes in the direction of expanded Commonwealth legislative power. But Higgins J in that case also drew attention to the other side of the argument: the Commonwealth cannot be allowed to proclaim simply anything to be a marriage, for that would render the specificity of the Commonwealth's enumerated legislative powers similarly illusory. The Commonwealth, he pointed out, cannot be allowed to have power under the Constitution to enact what he called a "sham" law which deems some other entirely different subject matter to be a "trade mark" as a pretext to regulating it.'

3.48 Furthermore, the Bill is not compatible with the rights to freedom from discrimination on religious grounds enshrined in Articles 2(1) and 26 of the ICCPR. For the reasons elaborated below, in its refusal to provide an exemption for religiously conscientious objectors, the Bill discriminates against celebrants, dissenting religious ministers and service providers on the basis of their religious convictions. As noted by the Committee (at 1.488) the ICCPR defines 'discrimination' as a distinction based on a personal attribute (which attributes include religion) which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute. For the reasons now put the Bill disproportionately affects people with a religious conviction.

The right to freedom of thought, conscience and religion or belief

3.49 The Bill is not compatible with the right to freedom of religion for several categories of persons, including dissenting ministers of religion, celebrants and persons supplying services.

3.50 Article 18(1) of the ICCPR provides ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’ Article 18(3) provides that the ‘Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’

3.51 Article 4(2) of the ICCPR reflects the fundamental aspect of the right to religious freedom, listing it amongst a limited suite of the freedoms that may not be infringed upon, even in a time of ‘public emergency which threatens the life of the nation’. This has led the Human Rights Committee in General Comment 22 to describe the right to religious freedom as a ‘fundamental’ right, ‘which is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.’

3.52 The Statement of Compatibility with Human Rights that accompanies the bill provides:

> It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow discrimination on the grounds of a person’s sex,

sexual orientation, gender identity or intersex status would treat one group of people with characteristics that are protected under discrimination legislation differently from other groups of people with characteristics that are also protected. Not providing an exemption for other authorised celebrants is not considered to be an unreasonable limitation on the right to freedom of thought, conscience and religion or belief. For the same reasons, it is not considered appropriate to provide an exemption from discrimination legislation for those who provide goods or services, or who make facilities available, in connection with a marriage.

3.53 However, such is not compatible with the law promulgated by the human rights instruments to which the Committee is to have regard. In the foregoing section it was noted that under the ICCPR the UN Human Rights Committee has held that that no discrimination can arise under Articles 2 or 26 of the ICCPR in relation to same-sex marriage, on the basis that the ICCPR defines marriage to include persons of the opposite sex. (Furthermore, having found that there is no right of same-sex couples to be included in the definition of marriage the European Court of Human Rights has found that the prohibition on discrimination under Article 14 was not breached.)

3.54 As there is no right to same-sex marriage, such cannot be said to be a fundamental right or freedom, and Article 18(3) cannot be enlivened to curtail the right to manifest freedom of religion or beliefs (whether of ministers of religion, celebrants or service suppliers). Accordingly, as is set out below, the Bill proposes limitations that are not compatible with the right to religious freedom; indeed, the Bill if enacted would implement severe breaches of that right.

Ministers of Religion

3.55 In proposing to alter the definition of marriage at section 5 of the *Marriage Act 1961* (Cth) to be “the union of 2 people to the exclusion of all others, voluntarily entered into for life”, the Bill leaves unaffected the existing exemption granted to “a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation”.[27]

3.56 At paragraphs 1.501-1.502 the Committee makes the claim that the Bill provides that ‘ministers of religion would be free not to solemnise a same-sex marriage for any reason, including if this was contrary to their religious beliefs. Importantly, provided that a minister of religion is authorised by their religion to solemnise marriages, that individual minister of religion retains absolute discretion under the law as to whether or not they wish to solemnise a particular marriage. This discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.' That assertion does not withstand scrutiny.

27 *Marriage Act 1961* (Cth) s 5.

3.57 In order to rely on the exemption proposed by the Bill, a minister must be able to claim that he or she has authority to solemnise weddings in accordance with the "rites or customs of the body or organisation". Arguably the tying of the exemption to those rites or customs limits the religious freedom rights of two categories of minister:

(a) ministers with a traditional view of marriage within bodies or organisations that have altered their rites or customs to permit solemnisation of same-sex marriages; and

(b) ministers with a traditional view of marriage within bodies or organisations that have no definitive statement in the application rites or customs that marriage is between persons of the opposite sex.

3.58 On the first of these categories, ministers who wished to decline the solemnisation of same- sex weddings would need to argue the absurd proposition that they hold "authority to solemnise marriages in accordance with the rites or customs of the body or organisation", which rites or customs permit such a ceremony, but that they themselves are under no obligation to perform a same-sex wedding ceremony. How could such persons claim to be authorised to perform marriages in 'accordance with the rites and customs' and yet have authority to object to a sub-category of those marriages?

3.59 Furthermore, to rely on the exemption, a minister must accept the rites and customs of the organisation concerning the solemnisation of same-sex marriage. For many dissenting ministers within a religious body that permits same-sex marriage, this may amount to an acceptance contrary to conscience. This would be the case regardless of whether the religious body's precepts require the altered doctrine to be accepted by the minister. The tying of the exemption to the associated denominational position on marriage has the real prospect that any conservative minister serving within a religious institution that has permitted same-sex marriages to be performed by clergy would not be protected by the exemption, or would not be willing to accept the benefit of the exemption without conflicted conscience. Such an eventuality would likely lead to exodus of such ministers from existing institutions and the associated social disruption to religious communities.

3.60 This same eventuality would apply to the second of the categories identified at paragraph 1.54 where the rules of interpretation of the rites or customs provide that they are to be determined with reference to general principles of law within the wider context of the legal system of the State in which they are located. Where that is the case, references to "marriage" within those canons could be read, in the absence of any official resolution to the contrary, to include same-sex marriage on a change in the definition. Again, this would give rise to the prospect listed at paragraphs 1.55 to 1.56, that ministers who hold a traditional view of marriage could not rely upon the exemption. This would amount to an unnecessary limitation on the religious freedom rights of those individuals.

Celebrants and Registrars

3.61 The amendments in the Bill mean that civil celebrants would be prohibited from refusing to solemnise same-sex marriages. The right to religious freedom under Article 18 of the ICCPR is not limited to religious ministers, but applies to all. The United Nations Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[28] provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue'. The Principles provide that 'Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

> (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
>
> (b) responds to a pressing public or social need,
>
> (c) pursues a legitimate aim, and
>
> (d) is proportionate to that aim.'

3.62 In light of the intended (but as noted above, ultimately unsuccessful) exemptions to be granted to religious ministers, the Bill's requirement that all celebrants solemnise same-sex marriages regardless of religious conviction entails a limitation on the right to religious freedom of those who hold an objection that is not necessary. To the extent that the exemption for individuals who are religious ministers is proposed in recognition of the right to religious freedom, there is no legitimate rationale for limiting the religious freedom of individuals who are marriage celebrants, as both are equally capable of autonomous agency.

3.63 As noted above, it is not acknowledged that the Bill concerns the right to equality as the definition of marriage under the ICCPR has been held not to encompass persons of the same sex. However, even if marriage were to so encompass persons of the same sex, there are less restrictive ways of recognising competing rights. The Bill's proposal is to exhaust a celebrant's religious freedom in favour of the right to freedom from discrimination. A proportionate approach to the balancing of rights would require investigation of means to accommodate competing rights without unduly burdening the right to religious freedom. The proposed Bill has not undertaken to do so in respect of celebrants. The limitation is not proportionate.

3.64 The Committee's Report provides at paragraph 1.507 that 'the UN Human Rights Committee has concluded that the right to exercise one's freedom of religion may be limited to protect equality and nondiscrimination. As set out above, the right to equality and non-discrimination has been extended to sexual orientation. Therefore, it is permissible to limit the right to exercise one's freedom of religion in order to protect the equal and nondiscriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.'

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28 U.N. Doc. E/CN.4/1985/4, Annex (1985).

3.65 In addition to the authority cited by the Committee, to support this position the Committee also refers to two decisions of domestic courts (of South Africa and Canada) recognising same-sex marriage. These decisions reflect the unique positions of individual States Parties, and are not references to the matters to which the Committee is to have regard in assessing the compatibility of Bills with human rights.

3.66 The authorities cited by the Committee, however, do not establish that the right to equality in respect of sexual orientation necessitates equality in respect of the concept of marriage. As noted above, the UN Human Rights Committee has held that the ICCPR defines marriage as between a man and a woman, and that therefore discrimination cannot arise under Article 26, as persons of the same sex are not eligible for admission to the concept of marriage. Similarly, the ECHR has not compulsorily required States to extend the recognition of same-sex partnerships to *marriage*, and such a requirement cannot be then relevant to the pursuit of the right to freedom from discrimination. On that analysis there are no contravening rights which would serve to limit the religious freedom rights of celebrants under Article 18(3). They therefore cannot be burdened in the manner the Bill proposes. To do so is inconsistent with the human rights law the Committee is required to have regard to under the Act.

3.67 The same conclusion would also extend to registrars under the Marriage Act and registrars under the respective State and Territory jurisdictions who would be required to enter same-sex marriages on the applicable register. That such persons may seek to express their right to religious freedom has been controversially demonstrated in the recent incarceration of Kim Davis, a county clerk in the Commonwealth of Kentucky who had a conscientious objecttion, founded in her religious beliefs, to a requirement to register same-sex marriages.

3.68 The Committee's Report refers to the ECHR decision in *Eweida and Ors v United Kingdom* as authority for its proposition that 'to the extent that the Bill would result in a requirement that all civil celebrants officiate at same-sex weddings, regardless of their religious views, this is not a disproportionate limit on the right to freedom of religion'. However, the Committee has overlooked two important distinctions between the facts of the Eweida case and the provisions of the Bill.

3.69 First, the case applied to the registration of civil partnerships, not marriage. We have argued above that a definition of marriage that restricts it to a union between a man and woman is not inconsistent with human rights law. Indeed, we argue that marriage is actively defined under Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR) as '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized'. Therefore, a law which imposes an obligation on individuals to recognise marriages defined in a different way is a disproportionate limitation of their freedom of religion or belief.

3.70 The question of whether a law that imposes an obligation on individuals to recognise civil partnerships is completely separate, as civil partnerships are not mentioned in human rights law. Indeed, to the extent that civil partnerships are used

as a means to remove discrimination from same-sex couples there could be an argument that limiting someone's freedom of religion or belief to require him or her to recognise such unions is justified to ensure the right to non-discrimination is not breached. Yet even in that case requiring any particular individual to register a civil partnership could be a breach of human rights given that there could be a less restrictive way of satisfying any concerns about discrimination.

3.71 Second, Ms Ladele was an employee of a UK local authority, not a civil celebrant engaged in private practice. Employees of one organisation do not necessarily have a right to impose their religious or conscientious objections to restrict the practices of an organisation. The particular UK local authority in this case had a policy of duly registering civil partnerships under the law. This is very different from the situation facing civil celebrants who often operate as sole traders and would not be restricting others' freedom by refusing to solemnise same-sex marriages. Nevertheless, even in these cases an employer should give a reasonable accommodation to employees' religious beliefs. Whether the UK Council Authority gave such a reasonable accommodation is not relevant to the interpretation of this decision, however, which deals with the obligations placed on celebrants, not registrars.

3.72 In addition, in the context of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, in the case of Lillian Ladele, a registrar in the United Kingdom who objected to a policy requirement that she officiate at same-sex civil partnership ceremonies, the European Court of Human Rights applied the 'margin of appreciation' doctrine in determining whether the policy was proportionate. The ECHR held that under European law the matter to be determined was "whether the policy pursued a legitimate aim and was proportionate." The ECHR held that the Convention allows States Parties a "wide margin of appreciation" permitting States to reach their own determination as to what comprises a legitimate aim and what comprises the appropriate balance between competing rights, and in this case the determination by first the local authority, the UK Employment Appeal Tribunal, and then the UK Court of Appeal did not exceed that permissible margin. The 'margin of appreciation' doctrine provides that 'According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference [with the right to religious freedom] is necessary'.[29] The Court held:

> In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.

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29 *Ladele v the London Borough of Islington* [2009] EWCA Civ 1357, 84.

3.73 Therefore the ECHR ruling that the restrictions placed upon Ms Ladele's religious freedom were proportionate were based upon the ECHR's margin of appreciation doctrine. That doctrine provides that, subject to consideration of the nature of the right, the aims pursued, as well as the presence or absence of a European consensus, the Court will leave to the domestic authorities the determination as to the appropriate balance to be struck between competing rights. The ECHR applies the doctrine as it considers that these local authorities are often best placed to weight the local democratic, cultural, political and other factors. Accordingly, the ECHR ruling is not a statement that the outcome in Ms Ladele's case is required to be applied to all domestic jurisdictions. By that same doctrine, it might be reasonable to conclude that there would be nothing precluding a European State Party from balancing the competing rights by providing that Ms Ladele could object, including where other registrars were made available.

Service Suppliers

3.74 Furthermore, the Bill is not compatible with the right to religious freedom of persons supplying services associated with marriages or persons who are married in their capacity as married persons. Such persons include, but are not limited to caterers, photographers, musicians, florists, operators or hirers of reception halls, wedding planners or advisory services and operators of bridal or honeymoon suites. Also relevant are other service providers engaged in areas not directly related to a wedding ceremony, such as fertility treatment, student accommodation and marriage or relationship counselling, programs, courses and retreats.

3.75 All Australian jurisdictions that prevent discrimination, including the Commonwealth, have enacted provisions that endeavour to "balance" religious freedom with the right to freedom from discrimination. However, Professor Foster concludes that, "the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or 'professionals') is contained in the law of Victoria".[30] Even this provision has been construed very narrowly. In 2014 the Victorian Court of Appeal ruled that a Christian youth camp had breached Victorian law by refusing to take a booking from a homosexual group.[31] Central to that decision was Maxwell P's determination that, due to the commercial nature of the operations undertaken by Christian Youth Camps, it could not rely upon the exemption:

> The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation

30 Neil Foster, Freedom of Religion and Balancing Clauses in Discrimination Legislation (June 2015) http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil_foster, cited 18 September 2015. He notes that a more limited exception exists in Tasmania: *Anti-Discrimination Act 1998* (Tas) s 52(d).

31 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

> services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC's activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.[32]

3.76 The decision is to be contrasted with the 2014 decision of the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al*, where the Court held that closely-held corporations can assert religious freedom rights, proclaiming "[f]urthering their religious freedom also 'furthers individual religious freedom'".[33]

3.77 Article 18 is not limited in its application, it applies to 'everyone', not just religious ministers. The Victorian Court of Appeal decision highlights the concern that discrimination law within Australia fails to ensure that sufficient recognition of religious freedom rights are provided not only to religious institutions but also to businesses and individuals. The expansion of the definition of marriage proposed by the Bill will expand the incidents in which suppliers will be required to supply services against their religiously informed conscience. For these, the Bill is therefore incompatible with the right to religious freedom of those persons.

Ethnic and religious minorities

3.78 We also note that Article 27 of the ICCPR provides that 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' As there is no limitation or restriction placed upon this right to religious freedom for minorities, the Bill will harm the religious freedom rights of those minorities.

The right to freedom of expression

3.79 Article 19 of the ICCPR provides a protection to freedom of expression. It is as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

32 Ibid 269.

33 *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014).

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

3.80 The right to freedom of expression includes religious discourse.[34] The relevance of freedom of religious expression to human rights principles is demonstrated by the Supreme Court of Canada's decision in *Trinity Western University v British Columbia College of Teachers*[35] wherein the Supreme Court of Canada upheld a lower court's ruling prohibiting the TWU's refusal to register teachers who had signed a contract declaring their conservative stance on homosexuality. In Canada, concerns over the right to freedom of religious expression were seen to be sufficiently legitimate to require the inclusion of an acknowledgement in the Preamble to the Canadian *Civil Marriage Act 2005* of 'the freedom of members of religious groups to hold and declare their religious beliefs'. The Bill offers no similar protection.

3.81 In respect of the limitations to freedom of expression contained at Article 19(3), UN Human Rights Committee General Comment 34 provides that 'Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights'.[36] As we have noted, 'human rights' under the ICCPR are inclusive of the right to religious freedom.

3.82 Furthermore, Article 18(4) provides that States Parties must ensure 'the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.' Articles 13(3)-(4) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reinforce that right.

3.83 Parents in Canada and several European countries have been required to leave their children in sex-education classes that teach the virtues of same-sex activity and its equality with heterosexual marital activity. As an example, David and Tanya Parker objected to their kindergarten son being taught about same-sex marriage after it was legalised by the Massachusetts Supreme Judicial Court, leading

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34 Human Rights Committee, General Comment 34 Article 19 Freedoms of opinion and expression, 102nd sess, (12 September 2011). See also communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006

35 *Trinity Western University v British Columbia College of Teachers* (2001) 39 CHRR D/357, 2001 SCC 31.

36 See communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

to David being handcuffed and arrested for trying to remove his son from the class for that lesson.

3.84 An alteration in the law of the Commonwealth resulting in a change to a fundamental social institution, as is proposed by the Bill, would require that change to be reflected in public education. Any such requirement in public education, which would logically flow from State endorsement of same-sex marriage, would amount to a limitation on the Article 18(3) rights of the parents to 'ensure the religious and moral education of their children in conformity with their own convictions'. Importantly, it would also amount to a limitation on the right of educators to express their religious beliefs.

The right to respect for the family

3.85 The human rights instruments contained at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* do not support the redefinition of marriage to include couples comprising of persons of the same sex on the grounds of the right to respect for the family. The right to respect for the family is contained at Articles 17 and 23 of the ICCPR and Article 10 of the ICESCR. Article 23 provides :

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.

3.86 As noted by the Committee at paragraph 1.519, the UN Committee on Economic, Social and Cultural Rights General Comment 19 recognises 'that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.' The Committee's report offers this statement along with the inclusion of same-sex orientation as a protected attribute for discrimination law as authority in support of its proposition that 'the CRC [*Convention on the Rights of the Child*] extents [sic] protection of the family to same-sex couples.' However, General Comment 19 reflects the UN's recognition of the ability of States to determine their definition of the family in accordance with local factors and reflects the diversity amongst States Parties at the time of its promulgation. The Report of the Fifth Session of the Committee on the Rights of the Child recognised this diversity and the central importance of the family in the following statement:

> 2.1. The basic institution in society for the survival, protection and development of the child is the family. When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging familial relationships. In this regard, the Convention refers to the extended family and the community and applies

> in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family. Such situations deserve to be studied in the framework of the rights of the child within the family. Relevant measures and remedies have to be identified to protect the integrity of the family (see, in particular, arts. 5, 18 and 19), and to ensure appropriate assistance in the upbringing and development of children.

3.87 The foregoing demonstrates that certain attributes are to be ascribed to the core concept of family under the ICCPR. Article 23(1), describes the family as the 'natural and fundamental group unit of society.' General Comment 19 provides that 'The right to found a family implies, in principle, the possibility to procreate and live together.' Article 23(2) provides that this right to 'found' a family follows from 'the right of men and women of marriageable age to marry' and, as noted above, that Article has been held to determine that the Convention intends that the distinct concept of 'marriage' includes men and women. This contextual reading is strengthened by the use of the word "spouse" in Articles 23(3) and (4). The Convention thus links the family to marriage. It is also consistent with existing views of the Human Rights Committee, where it has considered matters concerning marriage.[37]

3.88 In support of its contention at paragraph 1.518 that the 'right to respect for the 'family' under international human rights law applies to all families, including same-sex couples' the Committee states that the 'ICCPR is a living document and is to be interpreted in accordance with contemporary understanding' (at paragraph 1.522). The Committee's analysis cites the approach adopted by the UN Committee on Human Rights in *Roger Judge v Canada*, a matter concerning the death penalty, but in so doing the Committee omits an important qualification from the UN Human Rights Committee's approach to alterations in human rights law according to 'contemporary understanding'. In *Roger Judge v Canada* the UN Human Rights Committee held (at paragraph 10.3):

> While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of the application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of the abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out …

37 See for example, Human Rights Committee, Decision Communication No. 549.1993, 60th sess, (*Hopu v France*) and Human Rights Committee, Decision Communication No. 35.1978 ,12th sess, (*Amuereddy v Mauritius*).

> The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

3.89 This is similar to the approach adopted by the ECHR, which also requires a consensus amongst States Parties, and which has found that no such shift has occurred in Europe in respect of same-sex marriage. This finding was in the European context, where a greater (but minority) proportion of States have legislated for same-sex marriage.[38] Instead the Committee claims 'Currently, a very large number of countries recognise same-sex partnerships to some degree (through civil unions, registries and same-sex marriage), and there is a clear trend towards further recognition.' As evidenced in paragraphs 1.34 to 1.35, this is an exaggeration bordering on a falsehood.

3.90 The ECHR has held that same-sex couples without children fall within the notion of family, wherein it said 'a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would'.[39] In its decision, however, the Court had regard to the introduction of Article 9 of the *Charter of Fundamental Rights of the European Union*, which was signed on 7 December 2000 and came into force on 1 December 2009, which reads as follows: "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." The Court noted that the grant of the right to marry to "men and women" in Article 12 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, must now be read against the omission of that distinction in the Charter. However, in respect of the interpretation of Article 12 of the Convention, the Court held that absent consideration of Article 9 of the Charter, the following would flow:

> The applicants argued that the wording did not necessarily imply that man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.[40]

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38 See the ECHR's decision applying the same standard in *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010) 46.

39 Ibid.

40 European *Convention for the Protection of Human Rights and Fundamental Freedoms* Rome, 4.XI. 1950.

3.91 In that regard, the European Convention reflects the ICCPR's treatment of the right to marriage (as articulated in respect of Article 23(2) above), which unlike the position for European Union States, has not been altered by subsequent instrument. As noted above, the Joint Parliamentary Committee is required to report specifically with regard to the rights contained in the ICCPR, and Australia is not a State Party to either the ECHR Convention or the Charter. However, the absence of such a change in the applicable instruments to which Australia is a party and to which the Committee is required to report against is illustrative of the absence of an alteration in the applicable international human rights on the right of the family as pertains to Australia.

The rights of the child

3.92 The Bill limits the rights of the child. As noted by the Committee, Article 3(1) of the CRC requires that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The redefinition of the family structure in law that requires a child to miss out on his or her mother or father is incompatible with Article 7, which confers on a child, "as far as possible, the right to know and be cared for by his or her parents."

3.93 The Committee notes that there is some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married [1.539]. However, the Committee's report does not engage with the wide body of scholarship that shows the importance of biological parents to child development. Multiple studies show that child development is best on average when the child lives with the biological mother and father who remain married. As Murray notes:

> Trends in marriage are important not just with regard to the organisation of communities, but because they are associated with large effects on the socialisation of the next generation. No matter what the outcome being examined- the quality of the mother-infant relationship[41], externalising behaviour in childhood (aggression, delinquency, and hyperactivity)[42], delinquency in adolescence[43], criminality as adults[44], illness and injury in

41 Aronson, Stacey R., and Aletha C. Hutson. 2004. The mother-infant relationship in single, cohabitating, and married families: a case for marriage? *Journal of Family Psychology* 18 (1): 5-18

42 Fomby, Paula, and Andrew J. Cherlin. 2007. Family instability and child well-being. *American Sociological Review* 72 (April): 181-204.; Cavenagh, Shannon E., and Aletha C. Hutson. 2006. Family instability and children's early problem behaviour *Social Forces* 85:551-80.

43 Bronte-Tinkew, Jacinta, Kristin A. Moore, and Jennifer Carrano. 2006. The influence of father involvement on youth risk behaviours among adolescents: A comparison of native-born and immigrant families. *Social Science Research* 35:181-209.; Harper, Cynthia C., and Sara S. McLanahan. 1998. Father absence and youth incarceration. Presented at the American Sociological Association, 1998.

childhood[45], early mortality[46], sexual decision making in adolescence[47], school problems and dropping out[48], emotional health[49], or any other measures of how well or poorly children do in life-the family structure that produces the best outcomes for children, on average, are two biological parents who remain married. … All of these statements apply after controlling for the family's socioeconomic status.[50] I know of no other set of important findings that are as broadly accepted by social scientists that follow the technical literature, liberal as well as conservative, and yet are so resolutely ignored by network news programs, editorial writers for the major newspapers, and politicians of both major political parties.

3.94 At paragraphs 1.531 and 1.532, the Committee asserts that the Bill only proposes:

> 'one amendment which would engage the rights of the child, namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child.
>
> 1.532 However, as the bill relates strictly to marriage it does not directly engage the rights of the child.'

3.95 The human rights law to which the Committee is to have regard does not support this proposition. The recognition of same-sex marriage proposed by the Bill

44 Sourander et al., 2006. Childhood predictors of male criminality: A prospective population-based follow-up study from age 8 to late adolescence. *Journal of the American Academy of Child and Adolescent Psychiatry* 45:578-86.

45 Bauman, Laurie J., Ellen J. Silver, and Ruth E. K. Stein. 2006. Cumulative social disadvantage and child health. *Paediatrics* 117: 1321-27.

46 Warner, David F., and Mark D. Hayward. 2006. Early-life origins of the race in men's mortality. *Journal of Health and Social Behaviour* 47:209-26.

47 Pearson, Jennifer, Chandra Muller, and Michelle L. Frisco. 2006. Parental involvement, family structure, and adolescent sexual decision making. *Sociological Perspectives* 49:67-90.

48 Carlson, Marcia J. 2006. Family structure, father involvement, and adolescent outcomes. *Journal of Marriage and the Family* 68:137-54

49 Brown, Susan L. 2006. Family structure transitions and adolescent well-being. *Demography* 43: 447-61.

50 The citations of specific journal articles are only illustrative of a large literature. Some major review sources are McLanahan, Sara, and Gary Sandefur. 1994. *Growing Up with a Single Parent* Cambridge, MA: Harvard University Press.; Mayer, Susan E. 1997 *What Money Can't Buy: Family Income and Children's Life Chances. Cambridge, MA: Harvard University Press.*; McLanahan, Sara S. 2001. Life without father: What happens to the children? Princeton, NJ: Center for Research on Child Wellbeing.; Aronson and Hutson, 2004; and Hymowitz, Kay S. 2006. *Marriage and Caste in America: Separate and Unequal Families in a Post-Marital Age.* Chicago: Ivan R. Dee.

entails the affirmation of the ability of same-sex couples to parent children, which through their natural inability to procreate independently necessitates the removal of a child from at least one of his or her biological parents. It is therefore concluded that the Bill does impact on the rights of the child under the applicable human rights instruments.

3.96 At paragraph 1.532 the Committee notes that 'The amendments proposed by the Bill do not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children.' Whether existing laws permit same-sex couples to have children is irrelevant to the determination to be made by the Committee under section 7(a) of the Act, which is 'to examine Bills … for compatibility with human rights,' including the rights of the child.

3.97 Article 7 of the CRC provides that each child 'shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.' Article 8(1) of the Convention provides 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.'

3.98 Similarly, Article 9(1) of the *United Nations Convention on the Rights of the Child* (CRC) provides that 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when … such separation is necessary for the best interests of the child.' In addition Article 9(3) provides that 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

3.99 As noted by the Committee, the Convention does not define parents. The provisions of the CRC were struck in 1989 prior to the advent of any legislation regulating assisted reproductive technology. Article 8 in particular was included as a response to the abduction of new-borns within Argentina, giving weight to the conclusion that the rights were intended to apply from the moment of birth, and therefore in relation to the biological parents.

3.100 Article 9(4) obliges States Parties to provide 'the essential information concerning the whereabouts of the absent member(s) of the family' where the separation results from 'any action initiated by the State Party.' The Committee on the Rights of the Child has clarified in its General Comment 14 that this right particularly pertains to circumstances where a child has been separated from his or her 'biological family':

> Regarding religious and cultural identity, for example, when considering a foster home or placement for a child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20, para. 3), and the decision-

> maker must take into consideration this specific context when assessing and determining the child's best interests. The same applies in cases of adoption, separation from or divorce of parents. Due consideration of the child's best interests implies that children have access to the culture (and language, if possible) of their country and family of origin, and the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country (see art. 9, para. 4).

3.101 Article 17 of the ICCPR similarly provides that 'no one shall be subjected to arbitrary or unlawful interference with his … family.' As noted above, in the context of the ICCPR, the term 'family' is to be associated with marriage between a man and a woman. Accordingly, the rights of the child cannot be distinguished from the question of marriage. The UN Human Rights Committee's General Comment 19 acknowledges this link wherein it provides:

> Thus, any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection.

3.102 Article 16 of the CEDAW also associates the rights of parents vis-à-vis their children with male and female parentage and reiterates the recognition of the paramountcy of the interests of the children found in the CRC as follows:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;
>
> …
>
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

3.103 In the European context, the ECHR has held that there is a positive obligation on member States to develop the 'family life' from birth, and that this includes the right of the child to develop a relationship with his or her genetic father.[51]

3.104 We consider that the rights of children to know and to be raised by their parents and to know their identity are engaged by the Bill and that the Bill limits those rights.

51 See for example *Johnson v Ireland* (1986) 9 EHRR 203 and *Keegan v Ireland* (1994) 18 EHRR 342.

Conclusion

3.105 Accordingly, we do not agree with the Committee's finding that the Bill be included in the committee's report as a 'Bill not raising human rights concerns'.

Dr David Gillespie MP	**Senator Matthew Canavan**	**Mr Michael Sukkar MP**
Committee Member	**Committee Member**	**Committee Member**

Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC15/03490

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
PO Box 6100, Parliament House
CANBERRA ACT 2600

17 SEP 2015

Dear ~~Chair~~ Philip

Thank you for the letter of 3 March 2015 from the then Chair of the Parliamentary Joint Committee on Human Rights (the Committee), Senator Dean Smith, providing the *Nineteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill).

I would like to take this opportunity to again thank the Committee for its robust consideration of the compatibility of the Bill with Australia's human rights obligations and provide the enclosed additional information in response to the Committee's requests for further information.

Once again, I thank the Committee for its consideration of the Bill and trust this additional information is of assistance.

Yours faithfully

(George Brandis)

Encl. Response to the Parliamentary Joint Committee on Human Rights' *Nineteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Response to the Parliamentary Joint Committee on Human Rights' *Nineteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

National security law and indirect discrimination

Right to equality and non-discrimination

The Committee has requested further advice as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination. In particular, the Committee has requested information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded or amended powers.

As noted in my response to the Committee of 17 February 2015, the enforcement of counter-terrorism laws is subject to the operations of a number of government agencies, principally the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP) and the Australian Border Force (ABF) (previously known as the Australian Customs and Border Protection Service (ACBPS)).

With regards to ASIO special powers relating to terrorism offences, section 34C(1) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) requires the Director-General to prepare a written statement of procedures to be followed in the exercise of ASIO's questioning and questioning and detention warrants under Division 3 Part III of the ASIO Act.

The current statement of procedures, which is a legislative instrument, was approved by the former Attorney-General Philip Ruddock in 2006 and is publicly available on the Federal Register of Legislative Instruments. A copy of the statement of procedures is at **Annexure A**.

In addition to the statement of procedures, ASIO has drafted and complies with extensive internal policies and procedures relating to the implementation of questioning and questioning and detention warrants. ASIO also has administrative arrangements in place with the AFP in relation to the exercise of powers conferred by ASIO's questioning and questioning and detention warrants.

ASIO are also subject to the Attorney-General's guidelines issued pursuant to section 8A of the ASIO Act, which must be observed by ASIO in the performance of its functions. A copy of the guidelines is at **Annexure B**. Paragraph 10.4 of the guidelines requires ASIO to, wherever possible, collect information using the least intrusive techniques and to undertake inquiries and investigations with due regard to cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.

ASIO staff members are required to comply with ASIO's Professional Conduct and Behaviour Strategy which takes a multifaceted approach to addressing all forms of

inappropriate behaviour including discrimination and harassment. Staff members are able to undertake a range of training courses relating to cultural awareness and understanding.

The AFP's approach to equality and non-discrimination begins with its people. A strong focus of recruitment in recent years has been attracting people from diverse cultural and linguistic backgrounds so that the AFP workforce best reflects the diverse community that it serves.

Beyond this and irrespective of background or rank, all AFP appointees are subject to the AFP Integrity Framework which encompasses four pillars: prevention, detection, investigation/response and continuous learning. Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act) sets the professional standards of the AFP and establishes procedures by which AFP conduct and practice issues may be raised and dealt with, including holding AFP appointees to account for any action that may amount to discrimination.

The AFP's Commissioner's Order on Professional Standards (CO2) sets out the standards expected of AFP appointees both in the performance of their duties and off-duty conduct. The AFP Core Values and the AFP Code of Conduct require all AFP appointees to exercise their powers and conduct themselves in accordance with legal obligations and the professional standards expected by the AFP, the Government and the broader community, including acting in a non-discriminatory manner. The AFP Code of Conduct provides that an AFP appointee must act with fairness, reasonableness, courtesy and respect, and without discrimination or harassment, in the course of AFP duties. Every member exercising police powers makes an oath of office in which the member affirms that they will faithfully and diligently exercise and perform all powers and duties as a sworn member without 'fear or favour' and 'affection or ill will.'

The AFP employment character guideline also defines the minimum AFP character standards for potential applicants across all AFP roles and responsibilities. Applicants are assessed per subsection 24(2) of the AFP Act in relation to their character and his/her ability to comply with the AFP's professional standards both in an official and private capacity.

The AFP College, via Learning & Development, develops and conducts cultural and language programs, including the Islamic Awareness Workshop. These workshops address Islamic beliefs, culture, doctrine, history and current issues as well as incorporating presentations on Muslim communities. These workshops are delivered across Australia and focus on the non-discriminatory application of the law through cultural understanding and respecting the Muslim community in order to achieve mutual goals through fairness and collaboration.

The AFP conducts training for its appointees as an ongoing priority in relation to any significant body of legislative change and this has recently included the new powers and offences as a result of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act).

There is mandatory online legislation training (regarding the above Act) for members of the Counter-Terrorism Portfolio and the new legislation and associated powers/offences have been integrated into the AFP's Counter-Terrorism Investigators Workshop (CTIW) and Advanced Counter-Terrorism Investigator Program (ACTIP). AFP Learning & Development Portfolio conducts these programs.

For example, the CTIW has been delivered once in 2015 with an additional four planned for the 2015-16 financial year. Two ACTIPs are planned to be delivered in Sydney and Melbourne in 2015 and one in Brisbane in the first half of 2016.

AFP's Counter Terrorism Portfolio in conjunction with AFP Legal have also delivered 'CT roadshows' across Australia to each Joint Counter-Terrorism Team (JCTT members include AFP, state police and intelligence partners) as well as other AFP appointees in general regarding powers and offences under the Foreign Fighters Act.

Since the enactment of the Foreign Fighters Act, the AFP has developed an extensive range of supporting governance, advisory documents and training tools to address powers afforded to the AFP under the Act, including:

- delayed notification search warrants
- new arrest thresholds and offences
- preventative detention orders
- control orders, and
- stop search and seize powers.

The AFP Investigator's Toolkit (the toolkit) is the central resource for AFP appointees to access information, templates, forms and guides relating to AFP investigations. The toolkit has a specific page dedicated to counter-terrorism investigations providing up-to-date and continuously revised information, inclusive of the provisions of the Foreign Fighters Act and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*. For example, within the toolkit the following resources can be found:

- AFP National Guideline on delayed notification search warrants
- AFP National Guideline on control orders
- AFP Commissioner delegations for the purposes of Part 1AAA *Crimes Act 1914*
- AFP Operational Summary of the Foreign Fighters Act, and
- The AFP Pocketbook Guide for Counter-Terrorism Investigations.

In April 2015 the AFP's Pocketbook Guide for Counter-Terrorism Investigations (V5) was updated to set out key Commonwealth powers available to police under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth), as well as other powers and offences that may be applicable in Australian-based counter terrorism operations. This Pocketbook Guide has been widely distributed within the AFP. The AFP also advises that AFP National Guidelines are currently in the process of being amended by AFP's Counter-Terrorism Portfolio in response to the acquisition of new legislative tools, including delayed notification search warrants and stop, search and seize powers. This includes the National Guidelines on Preventative Detention Orders and Control Orders.

On 1 July 2015 the Australian Customs and Border Protection Service (ACBPS) and the Department of Immigration and Border Protection (DIBP) was consolidated into the single Department of Immigration and Border Protection. The Australian Border Force (ABF), a single frontline operational border agency, has been established as the new frontline agency within the Department to protect Australia's border and manage the movement of people and goods across it.

The Foreign Fighters Act amended the *Customs Act 1901* (Cth) (Customs Act) to:

- permit detention of an individual where an officer has reasonable grounds to suspect that the person has committed, is committing or intends to commit a serious Commonwealth offence (an offence punishable on conviction by imprisonment for 12 months or more)
- permit detention of a person who is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country, and
- extend the time period within which an officer is obliged to inform a detained person's family or another person has been increased from 45 minutes to two hours.

The detention powers are not new to ABF officers. The amendments made by the Foreign Fighters Act to the Customs Act expanded on existing powers to provide for detention on national security grounds. Officers exercising these powers will have undergone substantial six month entry level training consisting of both class room and on the-job instruction (National Trainee Training or NTT). That training includes a focus on statutory powers exercised by officers under the Customs Act and other legislation, and includes training in the exercise of detention powers.

The NTT course curriculum includes:

- APS Values and Code of Conduct
- cultural awareness, equity and diversity
- counter-terrorism awareness
- powers of officers
- elements of offences
- Part 1C, *Crimes Act 1914*
- general search techniques
- on the job training — consolidation and practice of legislation and powers
- questioning techniques
- travel document information and indicators, and
- detection and search.

As part of the NTT, officers are provided with detailed written materials and procedures relevant to the exercise of their statutory powers, including their detention powers. These written materials are also available to officers at any time through the DIBP intranet.

These written materials include:

- Operational Training and Development Practice Statement
- Detention and Search of Travellers Instruction and Guideline — outlining recording requirements, detainee rights, roles of officers and registrations and powers
- Powers of Officers in the Passenger Environment Instruction and Guideline, and
- Powers of Officers in the Seaports and Maritime Environment Instruction and Guideline.

The materials reflect that officers need to be able to search travellers in a range of circumstances in order to maintain the integrity of border controls but are required to do so in a way that reflects community expectations for the preservation of civil liberties and privacy of all persons.

Additionally, divisions responsible for operational activities issue notifications to communicate policy or procedural changes and urgent operational advice to operational personnel. The Strategic Border Command (SBC), which is responsible for a large range of ABF's operational activities before, at and after the border, issues operational notifications to advise officers of changes to procedure and practice. For example, SBC issued an operational notification regarding the expanded detention powers when the legislative amendments came into effect.

Officers who are authorised to carry firearms undergo specific, additional training. Once authorised, each officer must be successfully re-certified every 12 months to continue that authorisation. Many officers working in maritime command areas, as well as the Counter Terrorism Unit (CTU) teams at the eight major international airports, are use of force trained.

The use of force curriculum includes the following elements:

- Legislation and Powers
    - Authority to carry arms and power to use force
    - Power to detain
    - Power to physically restrain
    - Power of arrest
    - Powers in the Maritime Environment
    - Use of force under various legislation
    - Power to enter and remain on coasts
    - Executing a search or seizure warrant
    - Power to remove persons from a restricted area
    - Power to remove vehicles
    - Implications of misuse of power
- Officer response, communication and de-escalation, and
- Defensive tactics and the use of personal defensive equipment.

Over the past several years the ACBPS, now the ABF, has made significant investment in reforming its workplace culture and in strengthening the integrity and professionalism of its workforce. This has included a number of both legislative and administrative measures

applying specifically to ABF personnel. In addition, all ABF officers are engaged under the *Public Service Act 1999* (Cth) (Public Service Act) and, as such, are required to abide by the Australian Public Service (APS) Values and Code of Conduct.

The *Australian Border Force Act 2015* (Cth) replaced the Customs Administration Act on 1 July 2015. The new Act retains provisions that allow the Secretary and the Commissioner to make directions with respect to Immigration and Border Protection employees, including in respect of professional standards. A proven failure to comply with these directions is a breach of the Code of Conduct and may result in the imposition of a sanction under the Public Service Act.

One new feature of the ABF, provided for by the legislation, is that the ABF Commissioner is able to require officers of the ABF to take an oath or affirmation. The intention of this new power is to further support a professional and ethical culture and provide a clear up-front marker about the standards of conduct and professionalism expected. An ABF officer who has subscribed to an oath or affirmation must not engage in conduct that is inconsistent with the oath or affirmation. Proven instances of inconsistent conduct will amount to breaches of the Code of Conduct and may give rise to disciplinary action in accordance with Public Service Act.

The ABF requires its officers to undertake annual mandatory training covering officer integrity, conduct and professional standards. This includes training regarding the standards of conduct and behaviour expected of officers both as APS employees and as officers of the ABF. An officer who exercises his or her powers in a manner that is discriminatory on grounds of race, ethnicity, religion or any other unlawful ground under anti-discrimination legislation will have acted both in breach of the directions and the code of conduct and may face disciplinary action.

Given the extensive training, guidance and administrative arrangements that the relevant government agencies have in place in relation to the expanded and amended powers, I consider that operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination.

Schedule 1

Extension of powers subject to sunset provision — ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers

I note that the Committee reiterated its recommendation that the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers be reviewed by the Independent National Security Legislation Monitor (INSLM) and Parliamentary Joint Committee on Intelligence and Security (PJCIS) to establish that they are necessary and proportionate to achieving the legitimate objective of national security. I also note that the Committee separately recommends that a statement of compatibility be prepared for the ASIO special powers regime, control order regime,

preventative detention order regime, and police stop, search and seizure powers noting that they have not previously been subject to a human rights compatibility assessment.

As I noted in my earlier response to the Committee's *Fourteenth Report of the 44th Parliament*, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 made amendments to require the INSLM to review these powers by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018.

The Committee may wish to note that paragraph 8(1)(a) of the *Independent National Security Legislation Monitor Act 2010* (Cth) states that the INSLM, when performing their functions, must have regard to Australia's obligations under international agreements including human rights obligations.

I consider that the reviews to be undertaken will provide the Prime Minister and the Parliament with a robust examination of the powers including consideration of their compatibility with Australia's human rights obligations. Further, any amendments to the powers made subsequent to these reviews, including any proposal to further extend the powers beyond 2018, will require the preparation of a statement of compatibility for consideration by the Committee.

AUSTRAC amendments

I apologise for the oversight and not providing a response to the Committee's request for further information about the proposed AUSTRAC amendments in response to the Committee's *Fourteenth Report of the 44th Parliament.*

Expanding the power of AUSTRAC to disclose information – right to privacy

The amendments to section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) permit AUSTRAC to share financial data with the Attorney-General's Department (AGD) as a 'designated agency' for the purposes of the Act.

I consider these amendments to be aimed at achieving a legitimate objective as they recognise and support the role of AGD as Australia's lead policy agency for AML/CTF. Specifically, they will enable AGD to receive broad statistical information to support the development of a comprehensive and evidence-based AML/CTF regime.

There is a rational connection between the amendments and the objective outlined above, as the amendments rectify a deficiency which inhibited AGD's ability to properly fulfil its role in administering the AML/CTF Act. Previously, as a non-designated agency under the AML/CTF Act, the Act's disclosure regime limited:

- the circumstances under which AGD could access information
- the type of information that AGD could access
- AGD's ability to forward documents containing AUSTRAC information to agencies who were otherwise entitled to access (e.g. AFP, Australian Crime Commission, the Department of Foreign Affairs and Trade), and

- the ability of partner agencies to share AUSTRAC information considered relevant to the development of policy with AGD.

This regime imposed significant constraints on the ability of AGD to efficiently and effectively develop policy in response to emerging money laundering and terrorism financing typologies. The amendments will enable AGD to develop more effective and targeted AML/CTF policy. For example:

- when developing targeted countermeasures against high risk jurisdictions, it is useful for AGD to consider statistical information on how much money is flowing to that jurisdiction, through which entities, and average amounts
- when considering AML/CTF policy responses to overseas corruption, to consider jurisdictions of interest, the quantum and method of fund flows and potentially the range of actors involved, or
- when considering terrorism financing policy responses, to consider the latest trend analysis and intelligence reports produced by AUSTRAC to assess where and how funds are moving.

AUSTRAC supported the proposal to list AGD as a designated agency, noting that providing the Department with designated agency status assisted both AUSTRAC and the AUSTRAC CEO in performing their functions under the AML/CTF Act. In its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Parliamentary Joint Committee on Intelligence and Security also recognised the legitimate need for AGD to access AUSTRAC information to formulate whole-of-government policy.

I consider the amendments to be reasonable and proportionate in the achievement of their stated objective, while remaining compatible with the right to privacy. Although the amendments will result in the disclosure of AUSTRAC information to a wider class of persons, Part 11 of the AML/CTF Act will continue to provide strict limitations on the use and disclosure of AUSTRAC information. In essence, the AML/CTF Act prohibits the disclosure of AUSTRAC information, regardless of the type or format, unless a specified exception applies.

As a Commonwealth agency subject to the Australian Privacy Principles, AGD has a statutory obligation to properly protect the privacy and security of any personal information it may receive. It has extensive experience in dealing with sensitive information, and has appropriate controls in place to ensure that the integrity of such information is maintained.

AGD has also indicated that certain additional safeguards will be implemented over and above those present in the AML/CTF Act and the *Privacy Act 1988* (Cth). For instance, AGD only intends to seek access to the minimum amount of information necessary to support its policy functions. In general terms, this will be aggregated and de-identified data which will assist in the policy-making process. AGD will also not seek direct access to the AUSTRAC database through a dedicated computer terminal, but will request relevant information through AUSTRAC.

AGD is currently negotiating a formal agreement with AUSTRAC that will specify the terms of AGD's access to information held by AUSTRAC.

Expanding the information that AUSTRAC may disclose to partner organisations – right to privacy

The amendments to Part 11 of the AML/CTF Act remove certain restrictions on AUSTRAC's ability to share information collected under section 49 of the Act with partner agencies.

I consider these changes to be aimed at achieving a legitimate objective as they provide AUSTRAC's partner agencies with greater access to AUSTRAC information – improving their ability to cross-reference it against their own intelligence holdings. This enhanced information-sharing will greatly increase the utility of information gathered by AUSTRAC under section 49, particularly where information is gathered in a systematic way to address particular threats such as foreign fighters. The amendments will also better enable AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime.

There is a rational connection between the measures and the objective outlined above, as they address an identified deficiency in Part 11 of the AML/CTF Act. Section 49 of the Act allows a select group of agencies (AUSTRAC, AFP, ACC, Australian Taxation Office and DIBP) to collect additional information from reporting entities on reports provided to AUSTRAC. Previously, however, all information collected under section 49 was subject to a restrictive access regime, which goes beyond the restrictions placed on other AUSTRAC information under Part 11 of the AML/CTF Act.

The initial rationale for the restricted access was to minimise the risk that the subject of a section 49 request became aware that they are of interest to an investigating agency, and to prevent investigations from being prejudiced by the disclosure of the fact that a section 49 information request is in existence. However, since the AML/CTF Act has been in operation, it has been found that these statutory protections have had the unintended consequence of hampering the sharing of information among AUSTRAC's partner agencies. The amendments to Part 11 will now allow AUSTRAC to share valuable information it gathers with partner agencies.

I consider the amendments to be reasonable and proportionate to the achievement of the objectives outlined above, while remaining compatible with the right to privacy – particularly given that the additional restrictions relating to the distribution of section 49 information will remain in place for all other relevant agencies, aside from AUSTRAC. As Australia's AML/CTF regulator and Financial Intelligence Unit, AUSTRAC is best placed to determine the most appropriate method for distributing section 49 information to partner agencies.

In addition, all section 49 information accessed by AUSTRAC's partner agencies will continue to be subject to the same secrecy and access regime in Part 11 of the AML/CTF Act as other AUSTRAC information. These provisions put in place significant safeguards to protect AUSTRAC information and limit its access and disclosure.

Any personal information collected under section 49 remains subject to the provisions of the *Privacy Act* and the Australian Privacy Principles. AUSTRAC continues to ensure that all employees are aware of their obligations under the *Privacy Act*.

Schedule 2

Cancellation of welfare payments

I apologise for the oversight and not providing a response to part of the Committee's request for information about the cancellation of welfare amendments in response to the Committee's *Fourteenth Report of the 44th Parliament.*

Right to social security and the right to an adequate standard of living

Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises that the State may subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

The welfare cancellation measures may limit the rights of affected persons to social security under Article 9 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. I consider that this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments, are not able to be made available to support terrorist acts, terrorists or terrorist organisations.

The powers are only available when an individual has been subject to a passport refusal or passport or visa cancellation on national security grounds. When deciding whether to issue a Security Notice to the Minister for Social Services seeking the cancellation of social security payments, the Attorney-General must have regard to whether welfare payments are being, or may be used for a purpose that might prejudice the security of Australia or a foreign country. Accordingly, there is a rational connection between the exercise of the power and the legitimate objective, being the prevention of funding of terrorism-related activities.

Similarly, the measures may limit the rights of affected persons to an adequate standard of living under Article 11 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. Where an individual has been the subject of an adverse security assessment and security agencies have identified a link between their receipt of social security and conduct of security concern it is appropriate that access to social security is restricted. Individuals who choose to use their social security payments to support terrorist acts, terrorists or terrorist organisations should not continue to receive social security. If that funding is being used to support terrorism-related activities then it is not being used for the purposes of providing an adequate standard of living. Individuals who are the subject of a Security Notice and become ineligible for social security

can still seek employment to support an adequate standard of living. I consider this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments are not able to be made available to support terrorist acts, terrorists or terrorist organisations.

The power to cancel welfare is therefore compatible with the right to social security and the right to an adequate standard of living.

Right to equality and non-discrimination

As noted above, the power to prevent the use of funds, including social security, to fund terrorism-related activities is a legitimate objective.

While Australia has a range of obligations to ensure equality and non-discrimination, including Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of ICESCR most relevantly requires States Parties to ensure that all of the rights under that Covenant, including to social security, are provided without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, not all distinctions in treatment will constitute discrimination if the justification for the differentiation is reasonable and objective. In order for differential treatment to be permissible, the aim and effects of the measures must be legitimate, compatible with the nature of the Covenant rights, solely for the purpose of promoting the general welfare in a democratic society and there must be a reasonable and proportionate relationship between the aim to be realised and the measures.

I consider the power to cancel social security benefits is consistent with Australia's obligations in relation to rights to equality and non-discrimination as the measures do not attach to a particular category of person. They apply equally to anyone who is refused an Australian passport or is the subject of a passport or visa cancellation on security grounds regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The measures therefore do not discriminate and are consistent with these obligations.

TREASURER

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

Dear Mr Ruddock

On 17 September 2015, you wrote to my predecessor seeking advice as to the human rights compatibility of a number of instruments made by him.

All of the instruments in question fall into one of two categories: annual Determinations for National Specific Purpose Payments (NSPPs) for 2013-14; and monthly Determinations for National Partnership payments (NPs) made over the period December 2014 to June 2015.

2013-14 National Specific Purpose Payments

NSPPs are payments made by the Commonwealth to the states and territories that are to be used in specifically agreed sectors, in accordance with the *Federal Financial Relations Act 2009* (the FFR Act). The FFR Act requires the Treasurer to determine the total payment amounts for each NSPP in 2013-14 by applying a relevant indexation factor to the total payment amounts from 2012-13.

The determination and payment of NSPPs assist in the realisation of a number of human rights:

• Both the NSPP for schools and the NSPP for skills and workforce development promote the right to education (art 13, International Covenant on Economic Social and Cultural Rights (ICESCR); art 28, Convention of the Rights of the Child (CRC) and art 24, Convention on the Rights of Persons with Disabilities (CRPD)), and the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).

• The NSPP for housing services promotes the right to an adequate standard of living (specifically in relation to housing) (art 11, ICESCR; art 27, CRC and art 28, CRPD).

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 Facsimile: 61 2 6277 3420

•The NSPP for disability services promotes:

- the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
- rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
- rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
- rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
- the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NSPPs has a detrimental impact on any human rights.

National Partnership Payments (December 2014 – June 2015)

NPs are payments made by the Commonwealth to the states and territories to support the delivery of specified outputs or projects, facilitate reforms, and to reward them for undertaking nationally significant reforms. The FFR Act requires the Treasurer to determine NP amounts to be paid to each state and territory. As these payments are generally made on the 7th day of each month, the Treasurer usually makes an NP determination at least once a month.

NP amounts are generally only determined, and then paid, once a state or territory achieves pre-determined milestones or performance benchmarks as set out in the relevant National Partnership Agreement. As shown in the table below, the Commonwealth provided NP funding to the states and territories across a variety of sectors during 2014-15. Further information on the various National Partnership Agreements that make up these totals can be found in the 2014-15 Final Budget Outcome.

Sector	Total value of NPs in 2014-15 ($m)
Health	1,338
Education	750
Skills and workforce development	395
Community services	902
Affordable housing	638
Infrastructure	4,874
Environment	531
Contingent liabilities	522
Other purposes	3,732
Total	**13,681**

It is difficult to assess the human rights compatibility of the determination and payment of NP amounts. The amounts paid to each state and territory vary each month; this reflects the fact that payments are made as individual states and territories meet varying milestones or benchmarks, as stipulated in the various National Partnership Agreements.

However, in general, the provision of NPs could be said to assist the advancement of:

- the right to education (art 13, ICESCR; art 28, CRC and art 24, CRPD),
- the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).
- the right to an adequate standard of living (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- the right to the highest attainable standard of physical and mental health (art 12(1), ICESCR; art 24, CRC and art 25, CRPD).
- the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
- rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
- rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
- rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
- the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NPs has a detrimental impact on any human rights.

The Hon Scott Morrison MP

19/10/2015

AUSTRALIAN SENATE

David Leyonhjelm
BVSc LLB MBA
Liberal Democrats Senator for NSW

19 October 2015

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

Dear Mr Ruddock,

Thank you for your letter of 8 September regarding your committee's report on the *Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015*, which I introduced with Senator Day.

In your report you state that my Bill 'limits the right to just and favourable conditions of work', 'limits the right to an adequate standard of living', and represents 'indirect discrimination against women and young people'.

As outlined in my explanatory memorandum, my bill 'only affects the circumstances in which certain employers will be required to pay penalties above the base wage'. This means you are effectively arguing that the base wages in the affected industries do not constitute just and favourable conditions of work, do not provide an adequate standard of living, and represent discrimination against women and young people.

For you to make this extraordinary argument, you presumably have a view as to the minimum base rate in the affected industries that constitutes just and favourable conditions of work, provides an adequate standard of living, and avoids discrimination against women and young people. Please advise what this wage rate is.

Given the negative relationship between regulated wages and employment, as outlined by the Shadow Assistant Treasurer in the *Australian Economic Review* in March and June 2004, I also invite you to indicate how much unemployment would be created by a requirement to pay this wage rate. Further, please advise whether the unemployment created would include women and young people.

Parliament House
CANBERRA ACT 2600
Tel: (02) 6277 3054
Fax: (02) 6277 5945
Email: senator.leyonhjelm@aph.gov.au

PO Box 636
DRUMMOYNE NSW 1470
Tel: (02) 9719 1078
Fax: (02) 8289 9829
Toll Free: 1300 884 092

I note that governments in many developed countries do not impose base rates of pay, below which it is illegal to employ people. Governments that do impose such base rates generally set them at levels well below those in Australia. Base rates of pay in Australia are many multiples above the level of NewStart. Moreover, there is no bar on negotiating higher wages through enterprise bargaining.

Your report goes on to state 'the committee considers that there is likely to be a less rights restrictive alternative to achieving the stated objectives of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers'.

This appears to reflect a desire by the committee to impose costs on the taxpayer, and to define human rights as an entitlement to other people's money (such as a right to social security) rather than the right of an individual taxpayer to retain his or her property. It would be helpful if you could confirm whether this understanding is accurate and to comment on its general applicability.

I have copied this letter to Peter Harris AO, the Chairman of the Productivity Commission, as I anticipate he may be interested in hearing your view that a proposal to reduce penalty rate requirements in certain industries — a proposal very similar to a recommendation in the Commission's draft report on the workplace relations framework — represents a violation of human rights.

He may also be interested in your committee's statement that 'employees in these industries often have little bargaining power over the conditions of their employment' — a statement apparently in conflict with the aforementioned draft report. I encourage you to outline to Mr Harris any concerns you have with the Commission's draft report.

Finally, I have copied this letter to Coalition Senators on the committee, Senators Canavan and Smith, to draw attention to the statements published in their name. I have also copied this letter to the Minister for Employment, Senator the Hon Michaelia Cash, and to the Bill's co-sponsor, Senator Bob Day.

Yours sincerely,

David Leyonhjelm

ATTORNEY-GENERAL

CANBERRA

MC15-003652

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

17 SEP 2015

Dear Chair Philip,

Thank you for your letter of 18 March 2015 regarding further review by the Parliamentary Joint Committee on Human Rights of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. I apologise for the delay in responding.

The Data Retention Bill passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015. The Act now incorporates a number of features which respond to concerns raised by the Committee which I have highlighted below. In a number of respects, the views of the Government continue to depart from those of the Committee or its members. I have sought to explain the Government's reasoning in relation to those matters.

I would like to thank the Committee for its constructive contribution to the robust public debate on the data retention legislation. I am confident that the Act properly balances the need to retain data to underpin the efforts of agencies to protect the community with appropriate privacy protections and strong oversight arrangements.

Data set to be retained
Consistent with the Committee's view that the data set to be retained should be detailed in primary rather than delegated legislation, section 187AA of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (the Data Retention Act) now specifies the information or documents that service providers must retain. Any amendments to the data set must be referred to the Parliamentary Joint Committee on Intelligence and Security for review.

Definition of content
The Data Retention Act does not define content. I acknowledge the Committee's view that an exclusive definition of the term 'content' may not be required where the data set is set out in the primary legislation, as is now the case. As detailed in my earlier submission to the Committee, defining the types of data to be retained under the data retention scheme is more privacy protective than defining 'content'. The risk in defining 'content' is that any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content and the protections that apply to it.

The data set included in the Data Retention Act specifically excludes information that is the content or substance of a communication. In particular, paragraph 187A(4)(b) provides that service providers are not required to retain information that details an address to which a communication was sent that was obtained by the carrier only as a result of providing a service for internet access. This provision ensures that service providers are not required to keep records of the uniform resource locators (URLs), internet protocol (IP) addresses and other internet identifiers with which a person has communicated via an internet access service provided by the service provider.

Privacy protections

The Government maintains the view that access to telecommunications data should not be limited to investigations of complex or serious crimes, specific serious threats or the investigation of serious matters. Applying different timeframes to data access based on offence types would introduce a layer of complexity and inconsistency of application that would affect the efficacy of the data retention regime as a whole.

The various elements of the data set are relevant to all investigations; not just investigations of the most serious offences. Subscriber information, such as name and address information, is often the first source of lead information for further investigations, helping to identify potential suspects and to indicate whether an offence has been committed and the nature of that offence. Historical data also provides critical evidence needed to demonstrate to a court that the elements of a particular offence have been met, including whether a person communicated with a particular individual or organisation.

Rather than limit the range offences for which data can be accessed, the Act includes a range of additional privacy protections. Section 180F of the *Telecommunications (Interception and Access) Act 1979* has been amended to include a more stringent requirement that authorising officers be satisfied on reasonable grounds that the particular disclosure or use of telecommunications data being proposed is proportionate to the intrusion into privacy. In making a decision, authorised officers are required to consider the gravity of the conduct being investigated, including whether the investigation relates to a serious criminal offence.

The Data Retention Act will also restrict access to data to specified criminal law-enforcement agencies and to authorities or bodies declared to be an enforcement agency. The changes to the definition of 'enforcement agency' mean that access to retained data is limited to interception agencies, the Department of Immigration and Border Protection, the Australian Securities and Investments Commission, and the Australian Competition and Consumer Commission. Any permanent addition to the list of criminal law-enforcement agencies or enforcement agencies must be effected by legislative amendments and referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry. Any Ministerial declaration to temporarily declare an additional enforcement agency will cease to have effect 40 sitting days after the declaration comes into force.

The Data Retention Act also includes significant new oversight requirements by the Commonwealth Ombudsman, accompanied by extensive additional record-keeping and annual reporting.

Section 182 of the *Telecommunications (Interception and Access) Act 1979* also makes it an offence for a person to use or to disclose telecommunications data where the use or disclosure is not 'reasonably necessary' for the enforcement of the criminal law, a law imposing a pecuniary penalty or the protection of the public revenue. The improper use or disclosure of telecommunications data is a criminal offence punishable by up to two years imprisonment.

Destruction requirements
The Committee also expressed concern about the lack of specific destruction requirements in relation to data accessed under the *Telecommunications (Interception and Access) Act 1979*. The Parliamentary Joint Committee on Intelligence and Security also considered this issue and recommended that my Department review the adequacy of the existing destruction requirements that apply to information and documents accessed under Chapter 4 of the Act and report back by 1 July 2017. The Government has agreed that the Department will conduct this review.

Legal professional privilege
I acknowledge the Committee's response that the proposed data retention scheme will protect legal professional privilege. I note that some Committee members consider that legal professional privilege would be assured only if the legislation includes a non-exclusive definition of the type of data that constitutes 'content' for the purposes of the scheme. As discussed above, the Data Retention Act does not define the term 'content'. However, the data set clearly excludes information that is the content or substance of a communication. As legal professional privilege attaches to the content of communications, rather than to the fact or existence of those communications, the Data Retention Act in no way undermines legal professional privilege.

Independent authorisations or warrants to access to data
I note that while the majority of the Committee considers that the existing authorisation requirements provide sufficient safeguards to address privacy concerns, some Committee members recommend that access to retained data be granted only on the basis of prior independent authorisation.

The introduction of a warrant process (judicial or ministerial) for access to telecommunications data would significantly impede the operational effectiveness of agencies. However, the Government has acknowledged that specific public interest issues associated with the identification of confidential journalists' sources and amended the Data Retention Bill to introduce a journalist information warrant regime. The Act prohibits agencies that do not have a warrant from authorising the disclosure of a journalist's or their employer's telecommunications data for the purposes of identifying a journalist's confidential source.

Notification
The Data Retention Act does not include a requirement for agencies to notify individuals about access to or proposed access to their telecommunications data. The covert investigative powers contained in the *Telecommunications (Interception and Access) Act 1979* are generally used where the integrity of an investigation would be compromised by revealing its existence.

Remedies
The Data Retention Act provides that the *Privacy Act 1988* applies in relation to service providers to the extent that the activities of the service provider relate to retained data. The effect of this requirement is that the Privacy Act and the Australian Privacy Principles (APPs) will apply to all service providers as though they were 'organisations', including service providers that would otherwise be exempt from the Privacy Act under the 'small business operator' exemptions in the Privacy Act.

In particular, service providers will be required to comply with the information security obligations contained in APP 11.1 in relation to all retained data, and will be required to de-identify or destroy retained data at the end of the retention period (except as allowed by APP 11.2). Individuals will also be able to request access to their personal retained data in accordance with APP 12, removing any uncertainty about whether particular types of retained data are personal information.

Privacy protection will be further enhanced by the Data Retention Act through requirements that service providers protect and encrypt telecommunications data that has been retained for the purposes of the mandatory data retention scheme. Encryption will supplement the existing information security obligations under the Privacy Act and the Telecommunications Consumer Protection Code. The Government has also agreed to introduce legislation to enact a mandatory data breach notification scheme.

Conclusion

The Data Retention Act contains a number of additional safeguards that engage and promote privacy rights and the right to freedom of expression while ensuring that the Government meets its obligations under Articles 6 and 9 of the *International Covenant on Civil and Political Rights* to protect the life and physical security of individual Australians.

I would once again like to thank the Committee for its contribution. Should you have any questions please do not hesitate to contact my National Security Adviser, Mr David Mason, on (02) 6277 7300.

Yours faithfully

(George Brandis)

The Hon Christian Porter MP
Minister for Social Services

MS15-001947

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

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter of 17 September 2015 about the human rights compatibility of the following instruments:

- Family Assistance (Public Interest Certificate Guidelines) Determination [F2015L01269]
- Paid Parental Leave Amendment Rules 2015 [F2015L01266]
- Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 [F2015L01267]
- Student Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01268].

With respect to the approach taken to the statement of human rights compatibility, normally the Statement of Compatibility with Human Rights would consider everything that is presented in the instruments. On this occasion it was thought appropriate to remake three of the four instruments to assist users. Since there were relatively few changes to the previous versions of the instruments, the Statements of Compatibility focussed only on the substantive changes. Only the *Paid Parental Leave Rules 2010* were not remade in full due to their length.

I understand that the Committee's key concerns are: whether the limitations on the right to privacy are reasonable and proportionate to the objectives; whether the limitations are rationally connected to legitimate objectives; whether the safeguards protecting information are adequate; and if the least rights restrictive approach is used when sharing personal information.

Issues that the Parliamentary Joint Committee on Human Rights raised about the instruments are considered below.

<u>Legitimate objectives and rational connection with limitations</u>

The purposes set out in the Public Interest Certificate Guidelines achieve various legitimate objectives. The grounds for disclosure are precisely-defined, and are all subject to the condition that information can only be disclosed if:

- it cannot reasonably be obtained from a source other than a Department; and
- the person to whom the information relates has "sufficient interest" in the information.

The term "sufficient interest" is met if the Secretary is satisfied that the person has a genuine and legitimate interest in the information, or the person is a Minister.

It is also important to note that the misuse or unauthorised disclosure of protected information is a criminal offence and can result in a recipient of the information being subject to a maximum penalty of two years imprisonment in the event that they misuse or improperly disclose the information.

Before disclosing information, a delegate needs to consider whether the disclosure is 'necessary' in the public interest and that the disclosure is for one or more of the purposes set out in the Public Interest Certificate Guidelines. This requirement of necessity also limits the kinds of information disclosed.

Each of the grounds for disclosure in the Guidelines is reasonable and proportionate. The measures are precisely defined and contain suitable qualifications that ensure they only target the issues they are addressing. This means that any officer making a Public Interest Certificate on the basis of the Guidelines has a tightly-controlled discretion, which is appropriate and proportionate in the circumstances.

In the Department of Social Services, the power to issue public interest certificates is only delegated to senior officers in the Department.

The objectives of the Public Interest Certificate Guidelines broadly fall under the categories of law enforcement (including criminal law, proceeds of crime and threats to Commonwealth staff and property), safety (such as stopping abuse or violence to a homeless young person, and preventing a threat to the life, health or welfare of a person or locating a missing person), welfare (by assisting with income management, ensuring that correct public housing support is received, and assisting with the administration of a deceased estate) and supporting children's education (by ensuring that a child is attending school and that schools have adequate resources).

All of these objectives require that some limitations are placed on the right to privacy in order to address these substantial and often pressing issues.

Another broad objective of the Public Interest Certificate Guidelines is to assist with accountability to Parliament. Policies and programmes are examined to ensure that they are achieving their intended outcomes and are being used appropriately, efficiently and effectively. Accountability to Parliament requires that Ministers have access to sound and comprehensive evidence on which policies and programmes can be developed, implemented and amended over time. In order to achieve this objective, it is necessary to conduct research, statistical analysis and policy development, and progress matters of relevance within portfolio responsibilities.

Ministers require briefing to be accountable to Parliament, to consider complaints or issues raised by a person and to address a mistake of fact. On some occasions, these briefings require protected personal information to be disclosed in order to address the matter being resolved.

Although these requirements mean that some privacy limitations are introduced, they each have a demonstrated and rational connection to the objective of achieving accountability to Parliament.

The attachment to this letter contains more details about the legitimacy of the objectives and the rational connection with the limitations.

Reasonable and proportionate measure for achieving objectives

The limitations on the right to privacy introduced by the Public Interest Certificate Guidelines are minimal when considered in the context of the private and public benefits achieved by each of the objectives.

For example, the provisions in the Guidelines applicable to research and statistical analysis, policy development and briefings to Ministers enable more effectively targeted services to Australians.

Benefits to people whose information is accessed using Public Interest Certificate Guidelines far outweigh the limits to privacy. Examples include resolving cases of missing persons, improving child education, child protection, stopping abuse or violence to a homeless young person, obtaining entitlement to compensation and ensuring that correct benefits are provided by public housing.

When the benefits of these limitations are considered together with safeguards taken to protect personal information, I consider these limitations to be both reasonable and proportionate to achieve the objectives. The attachment to this letter contains further information attesting to the measures being reasonable and proportionate for the achievement of the objectives.

Safeguards to protect personal information

I note the Committee's concerns about the application of the *Privacy Act 1988* (the Privacy Act) to certain recipients of protected information.

Whilst not every recipient of information under a Public Interest Certificate will be subject to the Privacy Act, State and Territory privacy legislation will apply to many recipients of protected information.

While there will be individuals and organisations not subject to any privacy legislation, again I draw the Committee's attention to the criminal sanctions under the *Social Security (Administration) Act 1999* (for example, section 204) and similar provisions in the other three legislative regimes.

Least restrictive rights approach

The least restrictive rights approach is used when providing access to personal information under Public Interest Certificate Guidelines.

Information is only disclosed where necessary and is limited where possible to de-identified information. However, it is not always practicable to disclose de-identifying information for research purposes where, for example, there is a need to follow up with participants for studies that are conducted over a number of years or when linking data between databases.

Determinations

The Committee has queried why methods for further protecting information are not set out in the Guidelines themselves. The purpose of the Guidelines is to list the grounds on which information can be disclosed by the Secretary (or delegate). The administrative processes pursuant to which information should be disclosed are addressed on a case-by-case basis. In relation to disclosures for research purposes, it is standard practice to require undertakings of confidentiality to be provided by the recipients and members of research teams.

Disclosure of personal information relating to homeless children

I note that Convention on the Rights of the Child refers to the need for the disclosure to be in the best interests of the child, rather than that disclosure will not result in harm to the child.

As you have stated, the circumstances when the information can be disclosed include:

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

Under point 1, I consider that it is in the best interest of the child to not be subject to abuse or violence. It is also not in the best interests of the child to witness abuse or violence being inflicted on another person.

Regarding point 2, I again consider that it is in the child's best interest to receive their correct entitlements to help them to support themselves. It is not in children's interests to allow for overpayments to occur as this may reduce their income later, if repayments are required to be made to the government.

Regarding point 3, I consider that it is in the best interests of the child to facilitate reconciliation in circumstances where harm would not result to the child.

In relation to point 4, I anticipate that a child's parents would only be contacted where this is legally necessary and subject to consideration of the risk of harm to the child.

As outlined above, each of the objectives are aimed at achieving a legitimate objective and there are rational connections between the limitation and objectives. The limitations are relatively minor compared with the benefits resulting from promoting the best interests of the child. Consequently the limitations are both proportionate and reasonable.

Thank you for conveying the Committee's views to me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

ATTACHMENT

SUPPORTING INFORMATION

This attachment contains further information on the following points:

- legitimate objectives;
- rational connection with limitations on privacy; and
- reasonable and proportionate measures for achieving objectives.

Proceeds of crime, research, statistical analysis and policy development, administration of the National Law and public housing

These provisions have been drafted to ensure that very specific kinds of public interest disclosures can be made.

The objectives that these provisions have been drafted to achieve have been detailed in the explanatory statements and Statements of Compatibility with Human Rights accompanying the four instruments under review. As noted in paragraph 1.25 of the Committee's report, the provisions address legitimate objectives and are rationally connected to these stated objectives.

The measures adopted in these provisions are reasonable and proportionate to the right to privacy. While they impose a limitation on the right to privacy they do so only to a limited and clearly defined degree and it is not open to a delegate to disclose information unless the delegate is satisfied that the clear criteria contained in these provisions have been satisfied. The provisions have been drafted so as to only allow for specific kinds of disclosures. A decision-maker is therefore limited in their ability to disclose information under these provisions.

There are clear limitations on when information can be disclosed and the identity of the recipients of the information.

The administration of the National law, proceeds of crime and public housing provisions are drafted to ensure that information can only be provided to a very limited range of recipients with a legitimate interest in receiving protected information in certain circumstances.

The Department's practice in relation to research disclosures is to disclose information to reputable research institutions including university research schools with expertise in the field of social policy research. Disclosure is facilitated by deeds of confidentiality entered into with all recipients of the information. These deeds of confidentiality reinforce the fact that misuse of protected information is a criminal offence.

Enforcement of laws

The 'enforcement of laws' provisions (e.g. section 9 of the Social Security Guidelines) only allow for disclosure in specified circumstances. Disclosure needs to be for the legitimate purpose of assisting law enforcement agencies in combating serious criminal activity. There are clear restrictions on when these provisions apply and the provisions therefore do not give a decision-maker an unlimited discretion to release protected information. These provisions have been appropriately adapted and place restrictions on the extent to which information can be disclosed. The provisions only allow for disclosure of protected information to a limited range of recipients. Only individuals or entities involved in the enforcement of the laws referred to in the provisions will be able to receive protected information under these provisions.

The enforcement of laws provisions in the Guidelines operate in a similar manner to the exception to Australian Privacy Principle (APP) 6 contained in APP 6.2(e).

Threats to life, health or welfare

Provisions in the Guidelines regarding disclosure to prevent or lessen threats to life, health or welfare give the Secretary (or delegate) the authority to release information in situations where disclosure is for the health and wellbeing of members of the public. It is therefore consistent with human rights such as the right to health.

This provision operates in a similar manner to the permitted general situation set out in Item 1 of the table in section 16A of the *Privacy Act 1988*. It ensures that information can be disclosed to avoid threats to the health and wellbeing of individuals.

Mistake of fact

Provisions to correct a mistake of fact serve the legitimate objective of ensuring accuracy and integrity in the Department's programmes and can only be used in limited circumstances. The provisions regarding the disclosure of protected information are designed to correct a mistake of fact and are therefore reasonable and proportionate and serve a legitimate objective.

Brief a Minister

The provisions for the disclosure of protected information to brief the Minister are only available in limited and clearly defined circumstances.

The provisions only authorise disclosure to the Minister and do not authorise the dissemination of protected information to a broader audience. These provisions are therefore reasonable and proportionate as the scope for disclosure is limited by the criteria that a decision-maker must satisfy before disclosing information.

Disclosure of identifying information to the Minister can be necessary to provide responses to members of the public who have raised questions or issues with the Minister in regard to their payments. Further, only de-identified information will be provided to the Minister where it is not necessary to disclose information about a person's identity. However, de-identifying protected information will not ensure the information ceases to be protected information. 'Protected information' is a broader concept than 'personal information' under the Privacy Act 1988 and even de-identified information will need to be disclosed under a public interest certificate made in accordance with the Guidelines.

Missing or deceased persons

Provisions regarding missing or deceased persons also serve a legitimate public purpose and have been drafted to allow for disclosure only where this is necessary to assist relevant authorities in identifying missing or deceased persons. There is a limitation on when this provision can be used. Information cannot be disclosed if there are reasonable grounds to believe that a deceased or missing person would not have wanted their information disclosed. The provisions are reasonable and proportionate and a decision-maker does not have an open discretion to disclose information. The decision-maker must be satisfied that the criteria in these provisions have been met before relying upon them to disclose protected information.

The ability to disclose information to assist in locating missing persons supports a person's right to health. When a person is missing they can often be without adequate food, water or medical assistance. The disclosure of relevant information to appropriate authorities may assist in locating the person and ultimately ensuring they receive appropriate assistance. Provisions in the Guidelines regarding the disclosure of protected information about missing persons operate in a similar manner to the permitted general situation set out in Item 3 of the table in section 16A of the *Privacy Act 1988*.

School attendance and school infrastructure

The compatibility with human rights of the school attendance and enrolment and school infrastructure provisions has been addressed in relation to the 2014 Guidelines for the disclosure of family assistance protected information. The Statement of Compatibility with Human Rights for the 2014 Family Assistance Guidelines (F2014L00973) can be accessed on the Federal Register of Legislative Instruments (FRLI).

Reparations

Provisions in the Guidelines regarding reparations are beneficial in nature. They allow for the disclosure of protected information where the information will be used by a State, Territory or the Commonwealth Government for the purpose of contacting a person in respect of compensation or other forms of recompense in various reparation processes, including the 'stolen wages' reparations in Queensland.

Family Responsibilities Commission

The provisions regarding the disclosure of protected information for the purposes of the establishment and operation of the Family Responsibilities Commission (FRC) provide for relevant protected information to be disclosed where it is necessary for the purpose of the establishment of the FRC as well as in assisting in the performance of the FRC's functions and exercise of its powers. The provision of protected information facilitates the Cape York Welfare Reform Trials. Disclosure supports the FRC's decision-making, enabling the FRC to correctly identify persons who are within its jurisdiction and ensuring that conferences are held, and decisions are made, on a valid basis. This provision has been drafted to ensure that information can only be disclosed in limited circumstances and for the legitimate objective of facilitating the activities of the FRC. The provision is reasonable and proportionate and serves a legitimate public policy objective.

Vulnerable welfare payment income management

Provisions in the Social Security Guidelines regarding the vulnerable welfare payment income management measure, research and statistical analysis and the APS Code of Conduct were the subject of a statement of compatibility for the 2014 Social Security Guidelines (F2014L01514) and these can be found on FRLI.

Public utilities

Provisions in the Guidelines allowing for the disclosure of protected information to a public utility will only apply in very limited circumstances. The provisions will only apply where a person has previously consented to their original public utility company providing information for the purposes of confirming their entitlement to a concession. A Statement of Compatibility with Human Rights was prepared in relation to the Social Security (F2013L01466) and Student Assistance (F2013L01556) guidelines for 2013 and these can be accessed on FRLI.

Child protection

Provisions in the guidelines regarding child protection allow for the disclosure of information about a parent or relative of a child to State or Territory Child Protection agencies where the agency is seeking to contact the parent or relative. For example, the provisions may apply when a child protection agency is seeking to contact a parent to assist in a court case. Disclosures can only be made under this provision for the legitimate objective of assisting a child protection agency. The provision only allows for disclosure to agencies that carry out child protection functions. Disclosures can only be made for the limited purpose of assisting an agency in getting in contact with the parents of the child.

Matters of relevance

Provisions in the Guidelines for the disclosure of protected information for matters of relevance allow for the disclosure of protected information in circumstances where a person is receiving support or assistance through the welfare system and through other programmes administered by the Department. This allows the Department to use a person's information to help them receive assistance or support through community services funded by the Department. This provision is consistent with the right to Social Security.

Appendix 2

Guidance Note 1 and
Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

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

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

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

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

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

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

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

Phone: 02 6277 3823
Fax: 02 6277 5767

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

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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

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

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

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

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

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

Strict liability and absolute liability offences

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

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

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

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

Mandatory minimum sentencing

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

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

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

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

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

Civil penalty provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When a civil penalty provision is 'criminal'

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

a) Classification of the penalty under domestic law

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

b) The nature of the penalty

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

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

c) The severity of the penalty

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

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

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

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

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

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

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

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

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

Criminal process rights and civil penalty provisions

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

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

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

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

Phone: 02 6277 3823
Fax: 02 6277 5767

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