Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 25 August 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

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

This chapter includes the committee's consideration of 21 bills introduced between 7 and 17 July 2014.

Australian Sports Anti-Doping Authority Amendment Bill 2014

Portfolio: Health
Introduced: House of Representatives, 16 July 2014

Purpose

1.1 The Australian Sports Anti-Doping Authority Amendment Bill 2014 (the bill) seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act) to align Australia's anti-doping legislation with the revised World Anti-Doping Code and International Standards that come into force on 1 January 2015. Key measures in the bill include:

- authorising the making of regulations to allow the Chief Executive Officer (CEO) to implement the new prohibited association anti-doping rule violation;
- extending the time period in which action on a possible anti-doping rule violation must commence from eight to ten years from the date the violation is asserted to have occurred;
- expanding Australian Sports Drug Medical Advisory Committee (ASDMAC) membership to appoint three people for the sole purpose of reviewing decisions, where requested, by ASDMAC in relation to applications for therapeutic use exemptions;

- requiring that at least one ASDMAC primary member possess general experience in the care and treatment of athletes with impairments;
- simplifying information sharing provisions in the ASADA Act to improve the exchange between relevant stakeholders of information that would assist in identifying and substantiating doping violations;
- requiring that ASADA maintain a public record of Anti-Doping Rule Violations (ADRV) to be known as the 'violations list'; and
- allowing ASADA to respond to public comments attributed to an athlete, other person or their representatives with respect to a doping matter.

Committee view on compatibility

Context of human rights assessment

1.2 The committee notes that the powers conferred on ASADA are to support the enforcement of the World Anti-Doping Agency (WADA) code. The WADA code is incorporated into many contractual agreements between athletes and national sporting federations. Any such contracts therefore bind athletes to the association rules and incorporated WADA code provisions by reason of the athletes' contractual 'consent'. However, as that consent is the condition for the athlete being allowed to engage in the relevant sport, concerns have been expressed that such consent may not be truly voluntary and effective as a waiver of relevant human rights.

1.3 Notwithstanding such concerns, the committee notes that the extensive powers given to ASADA are primarily intended to be used in support of the private law contractual obligations between athletes and other persons and their sports federations, and are not intended to facilitate the investigation of criminal offences.

1.4 The committee considers that this context is relevant to any assessment of the proportionality of the measures contained in the bill and the principal Act.

Freedom of association

1.5 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to freedom of association with others, understood as being to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

1.6 This right supports many other rights, such as freedom of expression, religion, assembly and political rights. Without freedom of association, the effectiveness and value of these rights would be significantly diminished. The existence of associations, including those that peacefully promote ideas and values that may not accord with the views of the majority, is recognised as a cornerstone of democracy. The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations, including:

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

1.7 The right to freedom of association may only be limited if necessary for one of the following prescribed purposes:

- to respect the rights of others;
- to protect national security;
- to protect public safety or public order; and
- to protect public health or morals.

1.8 In addition, the limitation must be imposed by law and be reasonable and proportionate.

New prohibited association anti-doping rule violation

1.9 As outlined above, the bill would permit the ASADA CEO to implement the new prohibited association anti-doping rule violation (ADRV). Prohibited association would occur where an athlete associates with an athlete (or other person) who has been banned from sport, or been criminally convicted or professionally disciplined for conduct which would be an ADRV.

1.10 The statement of compatibility notes that the measure engages and limits the right to freedom of association,[1] and describes it as an important measure for the protection of public health and morals:

1 Explanatory memorandum (EM), p 8.

> The inclusion of this [anti-doping rule] violation is important in the protection of public health and morals. The very purpose of Code is to protect the fundamental right of an athlete to participate in doping-free sport and thus promote health, fairness and equity for all athletes globally.[2]

1.11 The committee notes that for a limitation on the right to freedom of association to be permissible the measure must be 'necessary' and not merely important. The public health and morals ground for limiting the right to freedom of association has typically been used in cases where it has been necessary to quarantine individuals to inhibit the spread of infectious and contagious diseases, or to prevent persons reasonably suspected or convicted of engaging in serious criminal activity from associating with each other.

1.12 In light of this, the committee considers that there is a significant question as to the compatibility of the measure with the right to freedom of association, insofar as it may not be regarded as 'necessary' to protect public health and morals. However, the committee notes that any risk of impermissible limitation of the right is proposed to be minimised through the inclusion of a requirement to 'read down' the new prohibited ADRV. The statement of compatibility advises:

> …to minimise any risk of this [anti-doping rule] violation impermissibly limiting the right to freedom of association, a provision will be included in the ASADA Regulation to the effect that the new ADRV only applies insofar as it is not inconsistent with Article 22 of the ICCPR.[3]

1.13 In light of the above discussion, the committee considers that this requirement will constitute an important and necessary safeguard to ensure that the measure operates compatibly with the right to freedom of association. However, given its importance in ensuring that the legislation is compatible with Australia's human rights obligations, the committee considers that it would be preferable for the 'reading down' provision to be contained in the bill rather than be prescribed by legislation.

1.14 The committee therefore recommends that the bill be amended to include a requirement that the new ADRV will apply only insofar as it is consistent with the right to freedom of association protected under article 22 of the ICCPR.

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2 EM, p. 8.

3 EM, p. 9.

Right to a fair hearing

1.15 The right to a fair trial and fair hearing are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

Limitation period for bringing actions in relation to ADRVs

1.16 The bill proposes to extend the period within which action may be taken in relation to a suspected ADRV from eight years to 10 years, in order to bring the limitations period into line with article 17 of the WADA Code 2015. The previous limitation period of eight years is considerably longer than the statutory limitation periods that apply in relation to other contractual or civil law claims in Australia, and the proposed period of 10 years is even longer.

1.17 The committee notes that, in this context, the extension of the applicable limitations periods may engage and limit the right to a fair hearing. In human rights terms, limitations periods may be understood as preserving the 'equality of arms' of parties to litigation, insofar as they prevent a defendant being required to defend a charge or suit in circumstances where their ability to do so has been compromised by the passage of time. However, the statement of compatibility for the bill provides no assessment of the compatibility of the measure with human rights.

1.18 The committee therefore requests the advice of the Minister for Sport as to the compatibility of the bill with the right to a fair hearing, and particularly:

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

Prohibition against retrospective criminal laws

1.19 Article 15 of the International Covenant on Civil and Political Rights (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, which means that the right can never be justifiably limited. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

1.20 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).

New prohibited association anti-doping regulation—additional penalties on coaches and support staff

1.21 The committee notes that the proposed prohibited association ADRV may have the effect of imposing an additional penalty on individuals who have already been criminally convicted and served their sentence. For example, an individual may have committed a drug offence as an athlete and been subject to a penalty, and subsequently been engaged professionally as a coach. To the extent that the new ADRV would prohibit sports people associating with coaches who have committed criminal offences which may be ADRVs in the last six years, this may impose an additional penalty on the coach where an athlete is no longer permitted to use their services.

1.22 In human rights terms, the application of an additional penalty to a person who has been convicted of a criminal offence may constitute a violation of the prohibition against retrospective criminal laws.

1.23 The committee therefore seeks the advice of the Minister for Sport as to whether the prohibited association ADRV is compatible with the prohibition on retrospective criminal laws.

Carbon tax repeal package

Portfolios: Environment, Treasury and Immigration and Border Protection
Introduced: House of Representatives, 14 July 2014

1.24 The carbon tax repeal package consists of the following eight bills (the bills), which seek to remove the carbon pricing mechanism:

- Clean Energy Legislation (Carbon Tax Repeal) Bill 2014;
- True-Up Shortfall Levy (General) (Carbon Tax Repeal) Bill 2014;
- True-Up Shortfall Levy (Excise) (Carbon Tax Repeal) Bill 2014;
- Customs Tariff Amendment (Carbon Tax Repeal) Bill 2014;
- Excise Tariff Amendment (Carbon Tax Repeal) Bill 2014;
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Bill 2014;
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Bill 2014; and
- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2014.[1]

1.25 The committee considered substantially similar bills in its *Ninth Report of the 44th Parliament*.[2]

1.26 The committee considers that the bills are compatible with human rights and has concluded its examination of the bills.

1.27 However, in relation to the Clean Energy Legislation (Carbon Tax Repeal) Bill 2014, the committee reiterates its concerns regarding the application of the civil standard of proof in relation to civil penalties that may be 'criminal' for the purposes of human rights law, as outlined in the *Ninth Report of the 44th Parliament*.[3]

1 The committee notes that the bills were passed by both Houses of the Parliament, and received Royal Assent on 17 July 2014.

2 With the exception of the Clean Energy Legislation (Carbon Tax Repeal) Bill 2014, each of the bills is identical to those considered previously.

3 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014), Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No. 2], pp 16-17.

Competition and Consumer Amendment (Industry Code Penalties) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 17 July 2014

1.28 The Competition and Consumer Amendment (Industry Code Penalties) Bill 2014 (the bill) seeks to amend the *Competitions and Consumer Act 2010* to:

- allow regulations to be made prescribing a pecuniary penalty not exceeding 300 penalty units for the breach of a civil penalty provision of an industry code; and
- allow the Australian Competition and Consumer Commission (ACCC) to issue an infringement notice (of 50 penalty units if the person is a body corporate and 10 penalty units in any other case) where it has reasonable grounds to believe a person has contravened a civil penalty provision of an industry code.

1.29 The committee notes that, while the amendments do not of themselves impose pecuniary penalties, proposed new section 51ACF and subsection 51AE(2) would allow for regulations to apply civil penalties to breaches of the Franchising Code. With reference to *Interim Practice Note No. 2*, the committee notes that the statement of compatibility for the bill provides no assessment of whether any applied civil penalty provisions may be regarded as 'criminal' for the purposes of human rights law and, if so, whether they would be compatible with the guarantees of criminal process rights under article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1.30 However, noting the regulatory context to which the bill applies, and that a statement of compatibility assessment would be required for any such regulations, the committee considers that the bill is compatible with human rights and has concluded its examination of the bill.

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

Portfolio: Justice
Introduced: House of Representatives, 17 July 2014

Purpose

1.31 The Bill contains a number of amendments to the *Commonwealth Places (Application of Laws) Act 1970*, *Criminal Code Act 1995*, *Customs Act 1901*, *Financial Transaction Reports Act 1988*, *International Transfer of Prisoners Act 1997* and the *Surveillance Devices Act 2004*. These include:

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

Committee view on compatibility

1.32 The bill contains six schedules which relate to distinct policy areas and issues. The committee has therefore organised its analysis of each of the schedules separately below.

Schedule 1 - Import ban on psychoactive substances

Right to a fair trial and fair hearing rights

1.33 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in

proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

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

New offence of importing 'psychoactive substance'

1.35 Schedule 1 would introduce a new offence of importing a 'psychoactive substance' into the *Criminal Code Act 1995*.[1] 'Psychoactive substance' is defined in Schedule 1 to mean 'any substance that, when a person consumes it, has the capacity to produce a psychoactive effect'. Proposed section 320.2(2) sets out exemptions from the offence if the 'substance' fits within one of eleven described categories. These categories include:

- food within the meaning of the *Food Standards Australia New Zealand Act 1991*,
- tobacco within the meaning of the *Tobacco Advertising Prohibition Act 1992*,
- goods listed within the meaning of the *Therapeutic Goods Act* 1989,
- goods represented to be for therapeutic use,
- agricultural chemicals set out in the schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*,
- a controlled drug, and
- a prohibited import within the meaning of the *Customs Act 1901*.

1.36 A defendant wishing to rely upon these exceptions bears an evidential burden in relation to the matter.

1.37 The statement of compatibility rightly identifies that the proposed evidentiary burden engages the right to be presumed innocent as contained in article 14(2) of the ICCPR.[2] An offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.38 Reverse burden 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

1 Proposed section 320.2(1).

2 See, Explanatory Memorandum (EM), pp 9-10.

defendant's right to a defence. In other words, such provisions must be reasonable, necessary and proportionate to a legitimate objective.

1.39 The statement of compatibility effectively identifies the legitimate objective of the evidentiary burden as being to 'assist in protecting public health'. The statement of compatibility justifies the limitation on the right to be presumed innocent as follows:

> Placing the evidential burden on a defendant in court proceedings to demonstrate the intended use of a substance is necessary to assist in protecting public health. Requiring the importer to identify these matters will prevent the importation of unknown, unassessed and potentially dangerous substances which are intended for human consumption.
>
> If the onus was on the prosecution to prove intended use, it would have to prove beyond reasonable doubt that the imported substance did not fit within each of the eleven excluded categories before a charge could be made out. Under the Bill, the defendant only bears the evidential burden to show that the imported substance fell into one of the categories of exempt goods.[3]

1.40 The statement of compatibility concludes that the limitation on the presumption of innocence is a 'reasonable and proportionate way of preventing people from importing prohibited psychoactive substances and protecting public health'.[4] The committee acknowledges the legitimate interest of government in the regulation of matters of public health, the right to life and the rights of children as set out in the statement of compatibility. However, the committee considers that the statement of compatibility has not provided sufficient information to show that the limitation on the right to be presumed innocent is justified in these particular circumstances.

1.41 The committee considers that that the statement of compatibility has not shown why a reverse burden for the offence in proposed section 320.2 is necessary to achieve the stated objective of 'promoting public health'. The committee notes that in criminal cases the prosecution ordinarily carries a heavy burden of proof as part of the operation of the presumption of innocence. It is the committee's view that it is necessary to ensure that the defendant's right to be presumed innocent is not overridden merely by claims of greater convenience or ease.

1.42 As a further justification for the reverse burden in proposed section 320.2, the statement of compatibility asserts that the exceptions in section 320.2(1) are not 'essential elements' of the offence.[5] However, the committee notes that an overly legalistic analysis focusing on 'essential elements' may fail to sufficiently

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3 EM, p. 10.

4 EM, p. 10.

5 EM, p. 10.

acknowledge the context of the offence as a whole and the limitations it may place on the right to be presumed innocent. The committee is of the view that where a statutory exception, defence or excuse to an offence is provided, this must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent.

1.43 The statement of compatibility, by way of justification, further provides that whether a 'substance' falls within an exemption would be 'peculiarly within the knowledge of the importer'.[6] It further asserts that if 'the importation is legitimate, the defendant would have ready knowledge of the relevant facts required to discharge the evidential burden in relation to an exemption.'[7] However, it is unclear to the committee as to why such information would be 'peculiarly' within the knowledge of the defendant as compared to many other criminal offences where the onus of proof rests with the prosecution to prove each element of the offence beyond reasonable doubt including the required *mens rea*.

1.44 The committee considers that the statement of compatibility has not demonstrated that the proposed limitation on the presumption of innocence by virtue of section 320.2 is no more restrictive than required to achieve the purpose as needed under international human rights law.

1.45 The committee observes that proposed section 320.2 is being introduced at the same time as proposed section 320.3 which criminalises importing substances represented to be serious drug alternatives. The committee notes that the statement of compatibility assesses the limitation on the presumption of innocence in relation to proposed sections 320.2 and 320.3 together. However, in the committee's view, a detailed and separate analysis for each provision would have assisted the committee in its assessment of each measure.

1.46 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, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.[8]

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

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6 EM, p. 10.

7 EM, p. 10.

8 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 [accessed 8 July 2014].

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

New offence of importing substances represented to be serious drug alternatives

1.48 Proposed section 320.3 provides that a person commits an offence if the person imports a substance and 'the presentation of the substance includes an express or implied representation that the substance is a serious drug alternative'. A 'serious drug alternative' is defined as a substance which has 'a psychoactive effect that is the same as, or is substantially similar to, the psychoactive effect of a serious drug' or is a 'lawful alternative to a serious drug'. Proposed section 320.3(3) sets out exemptions from the offence in 320.3(1) if the 'substance' fits within one of eleven described categories. Proposed section 320.3(3) mirrors the exceptions to the offence in 320.2(1) which are discussed above.

1.49 The statement of compatibility correctly identifies that the proposed reverse evidentiary burden engages and limits the right to be presumed innocent as contained in article 14(2) of the ICCPR.[9] However, the committee considers that the statement of compatibility has not provided sufficient information to show that a limitation on the right to be presumed innocent is justified in these particular circumstances. The committee's analysis above in relation to proposed section 320.2 is also relevant to the analysis of proposed 320.3(3).

1.50 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, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.[10]

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

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

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9 EM, p. 10.

10 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 [accessed 8 July 2014].

Prohibition against retrospective criminal laws – quality of law

1.52 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) prohibits retrospective criminal laws. This prohibition supports the long-recognised criminal law principle 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.

1.53 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.

New offence of importing psychoactive substance

1.54 As noted above, Schedule 1 will introduce a new offence of importing a 'psychoactive substance' into the *Criminal Code Act 1995* (proposed section 320.2(1)). Proposed section 320.2(2) sets out exemptions from the offence if the 'substance' fits within one of eleven described categories.

1.55 The committee notes that human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible for people to understand in advance the legal effect of their actions.

1.56 The committee considers that article 15 of the ICCPR may be engaged to the extent that the proposed law is not sufficiently clear to ensure people know what conduct is prohibited. The committee notes that the statement of compatibility did not address 'quality of law' issues or whether rights under article 15 of the ICCPR are engaged.

1.57 The committee acknowledges the challenges for government in responding to the emergence of new psychoactive substances. However, in the committee's view, the extremely broad definition of what constitutes a 'psychoactive substance' combined with the complex list of eleven exceptions from the offence in section 320.2(1) may be insufficiently precise for the purpose of international human rights law.

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

Schedule 2 – Firearm Trafficking Offences

Right to security of the person and freedom from arbitrary detention

1.59 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and freedom from arbitrary detention. This includes the right of a person:

- to liberty and not to be subjected to arbitrary arrest or detention;
- to security;
- to be informed of the reason for arrest and any charges;
- to be brought promptly before a court and tried within a reasonable period, or to be released from detention; and
- to challenge the lawfulness of detention.

1.60 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those that are in accordance with procedures established by law, provided that the law itself and the enforcement of it are not arbitrary.

Right to a fair trial and fair hearing rights

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

1.62 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)). Additionally article 14(5) provides that everyone convicted of a crime has the right to have their sentence and conviction reviewed by a higher tribunal.

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

1.63 Schedule 2 would introduce new offences of trafficking prohibited firearms and firearm parts into and out of Australia into the *Criminal Code Act 1995* (proposed Division 361). The proposed amendments also extend the existing offences of cross-border disposal or acquisition of a firearm and taking or sending a firearm across borders within Australia in Division 360 of the Code to include firearm parts as well as firearms. A mandatory minimum five-year term of imprisonment for the new

offences in Division 361 as well as existing offences in Division 360 would also be inserted.

1.64 The statement of compatibility correctly identifies the right to freedom from arbitrary detention as being engaged by the introduction of mandatory minimum five year sentences.[11] The committee notes that detention may be considered arbitrary where it is disproportionate to the crime. The statement of compatibility identifies the legitimate objective being pursued as 'ensuring offenders receive sentences that reflect the seriousness of their offending.' The statement of compatibility further reasons that:

> Failure to enforce harsh penalties on trafficking offenders could lead to increasing numbers of illegal firearms coming into the possession of organised crime groups who would use them to assist in the commission of serious crimes.[12]

1.65 The committee notes the strong interest of government in regulating the trafficking of firearms from the perspective of public safety and systemic harms. The committee notes that the statement of compatibility has provided some analysis of the proportionality of the proposed mandatory sentencing measures including that the penalties do not impose a minimum non-parole period on offenders and thereby preserves some of the court's discretion as to sentencing.

1.66 However, the committee considers that the statement of compatibility has failed to provide a full analysis of why mandatory minimum sentences are required to achieve the legitimate objective being pursued. In particular there is no analysis as to why the exercise of judicial discretion, by judges who have experience in sentencing, would be inappropriate or ineffective in achieving the objective of appropriately serious sentences in relation to firearm-trafficking crimes.

1.67 The committee considers that mandatory sentencing may also engage article 14(5) of the ICCPR which provides the right to have a sentence reviewed by a higher tribunal. This is because mandatory minimum sentencing impacts on judicial review of the minimum sentence. The statement of compatibility does not address the potential engagement of article 14(5).[13]

1.68 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary for the attainment of a legitimate objective.

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11 EM, p. 14.

12 EM, p. 15.

13 See, eg A v Australia (2000) UN doc A/55/40, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

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

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

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

1.70 As noted above, Schedule 2 would introduce new offences of trafficking prohibited firearms and firearm parts into and out of Australia into the *Criminal Code Act 1995* (proposed Division 361). The proposed amendments introduce a statutory defence that the conduct is justified or excused by or under law.

1.71 Absolute liability applies to one element of the proposed offences. That is, the importation or export of the firearm or part was prohibited under the *Customs Act 1901* absolutely or that the importation or export of the firearm or part was prohibited under the *Customs Act 1901* unless certain requirements were met. The proposed amendments also apply strict liability to the element of the proposed offences that the importation or export would be prohibited unless certain requirements were met and the person has failed to meet any of those requirements.

1.72 The effect of applying strict liability to an element of an offence means that no fault element needs to be proven by the prosecution but the defence of mistake of fact is available to the defendant. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved and the defence of mistake of fact is not available.

1.73 The statement of compatibility notes that the application of strict liability and absolute liability to elements of the new offences engages and limits the right to be presumed innocent.[14] The application of absolute liability and strict liability to elements of offences engages the presumption of innocence where it allows for the imposition of criminal liability without the need to prove fault. However, strict liability offences and 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. The statement of compatibility has identified the overall objective of the proposed offences as 'necessary to ensure that criminals

14 EM, p. 15, 17.

cannot evade trafficking offences and penalties by breaking firearms down and trafficking their constituent parts'.[15]

1.74 The statement of compatibility justifies the application of absolute liability for the element of the offence that the importation or exportation of the firearm was prohibited or prohibited unless the requirements for export or import had been met, on the basis that it is 'appropriate and required.'[16] The statement of compatibility states that the element of the offence is 'a precondition to the act of import or export and the state of mind of the defendant with respect to that condition is not relevant, as the defendant's state of mind is relevant to the intent to traffic element of the offence'.[17] However, the committee considers the fact that a defendant's state of mind is relevant to one element of an offence does not mean that it may not also be relevant to another element of the offence.

1.75 The statement of compatibility further asserts that the application of strict liability for an element of the offence that import or export requirements had not been met is 'appropriate'.[18] The statement of compatibility asserts that:

> it is reasonable to expect that those involved in the movement of firearms are aware that there are controls on importing firearms and firearm parts, or at least know enough to make enquiries.[19]

1.76 However, the committee is concerned that insufficient information has been provided to support the proposition that this expectation would be reasonable in the context of a limitation of a right. The committee further notes the context of the statutory defence to the offences which is provided in 361.4. This defence provides that if the person was under a mistaken but reasonable belief that the conduct was justified or excused by or under a law and had the conduct been so justified or excused the conduct would not have constituted an offence. The committee notes that the availability of these kinds of defences may be relevant to an assessment of whether limitations on the right to be presumed innocent are proportionate.

1.77 The statement of compatibility contends that if it was overly onerous for the prosecution to establish an offence, it could undermine the deterrence aspect of the offences.[20] However, while noting the desirability of ensuring that offence provisions are effective in pursing their legitimate regulatory goals, the committee does not consider that it has been provided with sufficient information to be able to conclude

15 EM, p. 14.

16 EM, p. 16.

17 EM, p. 16.

18 EM, p. 17.

19 EM, p. 17.

20 EM, p. 17.

that there is a necessary connection between the achievement of the objective of the legislation and the proposed limitation on the presumption of innocence.

1.78 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

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

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

Schedule 3 – International Transfer of Prisoners

Right to a fair trial and fair hearing rights

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

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

1.81 The international transfer of prisoner scheme is regulated under the *International Transfer of Prisoners Act 1997* (ITP Act). It is a voluntary scheme, which requires the formal consent of the prisoner, Australian Attorney-General, the relevant foreign country, and, if applicable, the relevant Australian state or territory to or from which the prisoner wishes to transfer.

1.82 The proposed amendments would insert a new provision that 'declares all unviable applications … to be closed.'[21] The proposed new section 10A provides that the Attorney-General need not take any steps for making a decision on an application for a transfer of a prisoner where the application does not satisfy eligibility requirements[22] or where a required consent has not been obtained.

1.83 The statement of compatibility acknowledges that the right to a fair hearing is engaged.[23] It states that the proposed provision:

21 EM, p. 19.

22 Set out in paragraphs 10 (a), (c), (e) and (f) of the ITP Act.

23 EM, p. 19.

> would resolve the current situation where the Attorney-General is required to make a decision on applications where the only possible option is to decline because one or more of the requirements under section 10 of the ITP Act have not been fulfilled.[24]

1.84 The statement of compatibility further asserts that:

> While this measure removes a decision that is technically reviewable under the ADJR Act [*Administrative Decisions (Judicial Review) Act* 1977], in effect the limitation confers no disadvantage and facilitates faster resolution for the prisoner.[25]

1.85 However, the committee does not consider that there has been sufficient information provided to justify this potential limitation on the right to a fair hearing. The committee notes that information about whether there are other safeguards in place with respect to judicial review would assist the committee in its consideration of the proposed measure. Specifically the committee would like further information as to who will make the assessment that an application falls within the terms of proposed new section 10A(1) and whether this assessment will be reviewable on the merits.

1.86 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, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

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

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

24 EM, p. 19.

25 EM, p. 19.

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

1.88 Schedule 4 will amend section 20 of the ITP Act to limit administrative reviews to applications where the Attorney-General has chosen to exercise his or her discretion. The proposed amendment clarifies that the Minister has a discretion to propose variations to proposed conditions of transfers but is under no obligation to do so where such variations are unlikely to be acceptable to the other county. [26]

1.89 The statement of compatibility notes that the measure engages the right to a fair hearing.[27] The statement of compatibility explains that:

> The flexibility remains for the Attorney-General to seek variation of terms where such a variation is able to be considered by the other country. This measure is similarly aimed at facilitating quicker resolution of applications where the conclusion is foregone, and does not otherwise limit ministerial consideration of applications where there is a possibility a variation to the terms originally proposed may be acceptable to the other country.[28]

1.90 However, the committee is of the view that insufficient information has been provided as to who decides that a conclusion is 'foregone' and in what circumstances. The committee notes that the proposed new subsection 20(5) does not provide any specific criteria to guide the Minister in the exercise of the discretion; the standard of a 'foregone conclusion' appears only in the statement of compatibility. The committee considers that the statement of compatibility does not provide a comprehensive assessment of whether the measure constitutes a limitation on human rights in pursuit of a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility 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'.[29] 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.

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26 EM, p. 19.

27 EM, p. 19.

28 EM, p. 20.

29 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 [accessed 8 July 2014].

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

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

Imposing a discretionary one year limit on reapplications

1.92 Currently there are no limits imposed on how often a prisoner may reapply for transfer. Proposed section 10A(2) provides that the Attorney-General does not have to take any steps for making a decision in relation to a transfer request if the application has been made within 12 months of a previous application.

1.93 The statement of compatibility acknowledges that the proposed change engages the right to a fair hearing.[30] The statement of compatibility asserts that the measure:

> is designed to address reapplications where there is no substantive change in circumstances, and does not preclude the Attorney-General from exercising his or her discretion to consider applications within the year where special circumstances or new information does manifest, notwithstanding the one-year timeframe. This will assist in managing the expectations of prisoners and allowing feasible applications to be progressed in a more timely manner and reduce unnecessary burdens on the resources required to process ITP applications.[31]

1.94 While acknowledging the stated efficiency goals that may be engendered by the proposed measure, the committee is of the view the statement of compatibility has failed to undertake a full assessment of the measure from the perspective of potential limitations on human rights. The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical

30 EM, p. 20.

31 EM, p. 20.

data to demonstrate that [it is] important'.[32] 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.

1.95 The committee further observes that the statement of compatibility indicates that the measure 'does not preclude the Attorney-General from exercising his or her discretion to consider applications within the year where special circumstances or new information does manifest [sic], notwithstanding the one-year timeframe.' However, the proposed new section 10A(2) does not contain language to this effect. The committee recommends that such language be included in the provision.

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

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

Schedule 4 – Slavery offences: jurisdiction

Prohibition against slavery and forced labour

1.97 The prohibition against slavery, servitude and forced labour is contained in article 8 of the International Covenant on Civil and Political Rights (ICCPR).

1.98 The prohibition against slavery and forced labour is absolute and it may not be subject to any limitations.

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

1.100 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological. This does not include lawful work required of prisoners or those in the military; work required during an

32 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 [accessed 8 July 2014].

emergency threatening the community; or other work or service that is a part of normal civic obligation (for example, jury service).

1.101 The obligation on the state is not to subject anyone to such treatment itself, and also to ensure there are adequate laws and measures in place to prevent private individuals or companies from subjecting people to such treatment (such as laws and measures in place to prevent trafficking).

Right to an effective remedy

1.102 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires States parties to ensure access to an effective remedy for violations of human rights. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, States parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

Slavery offences – universal jurisdiction

1.103 Schedule 4 of the Bill makes an amendment to the jurisdiction of slavery offences under section 270.3 of the *Criminal Code* clarifying that the offences have universal jurisdiction (described in the *Criminal Code Act 1995* as 'Extended geographical jurisdiction category D').[33] Universal jurisdiction empowers law enforcement agencies to investigate and prosecute international crimes such as slavery where the alleged offence was not committed by an Australian citizen or resident, within Australian territory, and had no effect in Australia.

1.104 The committee considers that the proposed clarification that universal jurisdiction applies, promotes the right to freedom from slavery and the right to effective remedy for survivors of human rights abuses. The committee notes that it will assist to ensure persons are free from slavery and that alleged perpetrators of slavery offences may be brought to justice in Australia in appropriate cases even where the acts comprising the alleged offence took place outside Australia.

1.105 **The committee considers that the proposed measure promotes human rights.**

33 '15.4 Extended geographical jurisdiction—category D
If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
(a) whether or not the conduct constituting the alleged offence occurs in Australia; and
(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.'

Schedule 5 – Validating airport investigations

Right to security of the person and freedom from arbitrary detention

1.106 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and freedom from arbitrary detention. This includes the right of a person:

- to liberty and not to be subjected to arbitrary arrest or detention;
- to security;
- to be informed of the reason for arrest and any charges;
- to be brought promptly before a court and tried within a reasonable period, or to be released from detention; and
- to challenge the lawfulness of detention.

1.107 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those that are in accordance with procedures established by law, provided that the law itself and the enforcement of it are not arbitrary.

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

1.108 Schedule 5 validates things done by a member of the AFP, and special members, during the course of investigations at designated State airports from 19 March 2014 to 16 May 2014.[34] The proposed provisions seem to be aimed at addressing the fact that regulations granting investigation and arrest powers were repealed before the commencement of replacement regulations.

1.109 The committee notes the relationship between the various Commonwealth and State powers that may have been available to be drawn on at various times is complex. The description of the situation in the statement of compatibility does not provide a readily understandable account of the specific powers that were purportedly exercised but which appear as a matter of law not to have been available to be exercised during the relevant period. It would assist the committee in its review of the bill if these details were provided.

1.110 The statement of compatibility acknowledges that the measures engage and limit the right to security of the person and freedom from arbitrary detention. The statement of compatibility provides that the limitation is necessary to ensure 'that there is adequate security and policing in airports'.[35] The statement of compatibility asserts that the 'limitations are proportionate in that they are appropriately circumscribed'[36] by pointing to the safeguards in relation to an arrest as provided for

34 See, Schedule 5, s 2.

35 EM, p. 24.

36 EM, p. 25.

in the *Crimes Act*.[37] The committee notes that the presence of safeguards will generally be important to assessing whether the proposed limitations on a right are permissible.

1.111 However, the statement of compatibility fails to adequately explain how the proposed measures, that is, retrospectively validating the exercise of AFP and special member powers, are consistent with the right not to be subject to arbitrary arrest. The committee notes that the statement of compatibility does not directly address the possibility that the absence of legal powers from 19 March 2014 to 16 May 2014 may have rendered arrests and detention that may have taken place during that time arbitrary under international human rights law.

1.112 The committee considers that the right not to be arbitrarily detained under article 9(1) of the ICCPR requires that arrest and detention must be specifically authorised and sufficiently circumscribed by law. The committee is of the view that it would have been appropriate to consider the impact of the potential lack of powers of law enforcement personnel in circumstances where the legislation is retrospectively validating their conduct.

1.113 The committee further considers that there has been insufficient information provided as to how the respective validation of possibly unlawful AFP conduct is necessary to 'ensure there is adequate policing at airports'. The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility 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'.[38] 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.

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

- **whether the proposed changes are aimed at achieving a legitimate objective;**

37 See EM, p. 25.

38 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 [accessed 8 July 2014].

- **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.**

Prohibition against retrospective criminal laws

1.115 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without a prior 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.

1.116 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 applicable at the time the acts were committed. Further, if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender.

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

1.117 As noted above, Schedule 5 validates things done by members of the AFP, and special members, during the course of investigations at designated State airports from 19 March 2014 to 16 May 2014. As previously noted, the proposed provisions seem to be aimed at addressing the consequences of the fact that regulations granting investigation and arrest powers were repealed before the commencement of replacement regulations.

1.118 The statement of compatibility identifies the prohibition against retrospective criminal laws as engaged. However, it reasons that Schedule 5 does not give retrospective effect to a criminal offence which did not constitute an offence at the time it was committed. It notes that:

> The application of the substantive Commonwealth and applied State offences at designated state airports was unaffected by the repeal of the 1998 Regulations and the introduction of the 2014 Regulation.[39]

1.119 The statement of compatibility nevertheless acknowledges that the measures may 'indirectly affect liability for a criminal offence given that it validates Commonwealth powers available to members of the AFP during the investigation of a State offence'.[40] The committee notes that no information has been provided as to the circumstances in which this may arise. The committee assumes, for example, that

39 EM, p. 25.

40 EM, p. 25.

it may involve offences of resisting the exercise of 'powers' by members of the AFP or special members which had no legal basis at the time of the conduct.

1.120 Noting that as outlined in the statement of compatibility AFP members were, 'for the most part, able to access alternative State powers to investigate',[41] the committee queries whether the proposed measures are necessary, particularly given the absolute nature of the right at issue. The committee does not consider that the statement of compatibility has given sufficient information to enable the committee to determine that the measure is compatible with the prohibition on retrospective criminal law.

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

Right to life

1.122 The right to life is protected by article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements to it:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks;
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

1.123 The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances. For example, the use of force may be proportionate if it is in self-defence, for the defence of others or if necessary to effect arrest or prevent escape (but only if necessary and reasonable in the circumstances).

1.124 In order to effectively meet this obligation, states must have in place adequate legislative and administrative measures to ensure police and the armed forces are adequately trained to prevent arbitrary killings.

Prohibition against torture, cruel, inhuman or degrading treatment

1.125 Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering. Prolonged solitary confinement, indefinite detention

41 EM, p. 25.

without charge, corporal punishment, and medical or scientific experiment without the free consent of the patient, have all been found to breach the prohibition on torture or cruel, inhuman or degrading treatment.

1.126 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely;
- it requires an effective investigation into any allegations.

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

1.127 As noted above, Schedule 5 validates things done by a member of the AFP, and special members, during the course of investigations at designated State airports from 19 March 2014 to 16 May 2014.

1.128 The statement of compatibility states that that the proposed amendment engages the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The statement of compatibility briefly discusses the potential engagement of these rights in the context of retrospective validation of arrest powers and concludes 'any potential limitation' imposed on these rights are 'reasonable, necessary and proportionate'.[42]

1.129 However, the prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute under the ICCPR. The right cannot be limited under any circumstances. Therefore any analysis of a potential engagement of the prohibition on torture, cruel, inhuman or degrading treatment or punishment should proceed on the basis that the right cannot be limited. The committee notes that the use of reasonable force in the context of arrest powers subject to usual safeguards would not usually be expected to be incompatible with this right. It is difficult for the committee to assess the compatibility of the measures in the absence of further information about the impact of the measure on the right resulting from the retrospective validation of 'things done' by a member of the AFP or special member.

1.130 In relation to the right to life, the committee notes that in order to meet this obligation usually states must have in place adequate legislative and administrative measures to prevent arbitrary killings by the police. In this context the statement of compatibility does not substantially address the consequences of how and to what extent the proposed legislation would affect the right to life for the relevant period 19 March 2014 to 16 May 2014.

42 EM, p. 25.

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

Right to an effective remedy

1.132 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. States 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.

1.133 States parties are required to make reparation to individuals whose rights have been violated. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

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

1.134 As noted above, Schedule 5 validates things done by a member of the AFP, and special members, during the course of investigations at designated State airports from 19 March 2014 to 16 May 2014.

1.135 Given the potential absence of a legal basis to powers of investigation and arrest during the period 19 March 2014 to 16 May 2014 the right to an effective remedy may be engaged. The right to an effective remedy may be engaged to the extent that the lack of legal basis for AFP conduct resulted in violations of human rights. For example, the right not to be arbitrarily detained contained in article 9(1) of the ICCPR requires that arrest and detention must be specifically authorised and sufficiently circumscribed by law. The committee notes that there is no consideration in the statement of compatibility as to whether the retrospective validation of 'things done' by the AFP engages and limits the right to an effective remedy.

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

Right to a fair trial and fair hearing rights

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

1.138 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)). Additionally article 14(5) provides that everyone convicted of a crime has the right to have their sentence and conviction reviewed by a higher tribunal.

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

1.139 As noted above, Schedule 5 validates things done by a member of the AFP, and special members, during the course of investigations at designated State airports from 19 March 2014 to 16 May 2014.

1.140 The committee considers that article 14 may be engaged by the proposed Schedule 5. This is because Schedule 5, item 2(3) provides that the retrospective validation does not affect concluded proceedings, but would appear to leave open the possibility that it might affect the rights of parties to existing proceedings and also future proceedings. The committee is therefore concerned that the legislation may affect the rights of these parties to proceedings. The committee notes that there is no consideration in the statement of compatibility as to whether the retrospective validation of 'things done' by the AFP engages and limits rights under article 14 of the ICCPR.

1.141 **The committee therefore seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with article 14 of the ICCPR.**

Customs Amendment Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 17 July 2014

1.142 The Customs Amendment Bill 2014 (the bill) seeks to amend the *Customs Act 1901* (the Act) to:

- allow class-based authorisations to include future offices or positions that come into existence after the authorisation is given;
- extend customs controls to those places at which ships and aircraft arrive in Australia in accordance with section 58 of the Act;
- provide greater flexibility in relation to the reporting of the arrival of ships and aircraft in Australia and reporting of stores and prohibited goods on such ships and aircraft;
- improve the application processes for several permissions under the Act (including to support initiatives to enable online applications for these permissions);
- extend customs powers of examination to the baggage of domestic passengers on international flights and voyages, and to domestic cargo carried on an international flight or voyage; and
- enhance the interaction of the infringement notice scheme with the claims process under the Act in relation to prohibited imports.

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

1.144 However, the committee notes that the bill would introduce a strict liability offence, making it an offence to unload, unship or use ship or aircraft stores in contravention of the terms of an approval issued by an authorised officer (proposed new section 127(9)). While the statement of compatibility identifies and provides a justification for the proposed offence, it does not address the question of the standard of proof that a defendant would have to discharge in order to make out the available defence of honest and reasonable mistake of fact.

1.145 The imposition of a legal or evidential burden of proof on a defendant to establish a defence is a limitation of the presumption of innocence (article 14(1) of the ICCPR) because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.146 The committee therefore draws to the minister's attention the requirement, as set out in Practice Note 1, that statements of compatibility include sufficient detail of provisions which impact on human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification for any reverse burden provisions in a bill.

Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2014

Sponsor: Senator Scott Ludlam
Introduced: Senate, 17 July 2014

1.147 The Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2014 (the bill) seeks to amend the *Defence Act 1903* to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel are not sent overseas to engage in warlike actions without the approval of both Houses of the Parliament.

1.148 The committee considered a substantially similar bill in its *Ninth Report of the 44th Parliament*.[1]

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

1 See Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014), p. 20.

Guardian for Unaccompanied Children Bill 2014

Sponsor: Senator Hanson-Young
Introduced: Senate, 16 July 2014

1.150 The Guardian for Unaccompanied Children Bill 2014 (the bill) would establish an independent statutory Office of the Guardian for Unaccompanied Non-citizen Children, and make consequential amendments to the *Immigration (Guardianship of Children) Act 1946* and *Migration Act 1958*. The role of the office is described as advocating for the best interests of non-citizen children who arrive in Australia or Australian external territories to seek humanitarian protection, who are not accompanied by their parents or another responsible adult.

1.151 The committee considers that the bill promotes the rights of children and is therefore compatible with human rights. The committee has concluded its examination of the bill.

International Tax Agreements Amendment Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 17 July 2014

1.152 The International Tax Agreements Amendment Bill 2014 (the bill) would amend the *International Tax Agreements Act 1953* to give legislative effect to the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* and its *Protocol*, and make technical amendments.

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

1.154 The committee notes that the statement of compatibility for the bill provides an exemplary assessment of the bill's compatibility with the right to privacy, in accordance with the committee's usual expectation that assessments are based on a thorough and evidence-based analysis of whether a limitation is reasonable, necessary and proportionate in pursuit of a legitimate objective.

Labor 2013-14 Budget Savings (Measures No. 1) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 16 July 2014

Purpose

1.155 The Labor 2013-14 Budget Savings (Measures No. 1) Bill 2014 (the bill) seeks to amend the *Clean Energy (Income Tax Rates Amendments) Act 2011* to repeal personal income tax cuts legislated to commence on 1 July 2015.

1.156 The bill also seeks to amend the *Clean Energy (Tax Laws Amendments) Act* 2011 to repeal associated amendments to the low-income tax offset, also legislated to commence on 1 July 2015.

Background

1.157 The bill is a reintroduction of measures previously included in the following bills:

- the *Clean Energy (Income Tax Rates and Other Amendments)* Bill 2013, introduced on 13 November 2013 (the third reading of that bill was negatived by the Senate on 20 March 2014 and it therefore did not proceed); and
- the *Clean Energy (Income Tax Rates and Other Amendments)* Bill 2013 [No. 2], introduced on 23 June 2014 (the second reading of that bill was negatived by the Senate on 9 July 2014 and it therefore did not proceed).

1.158 The committee's comments on the previous bills are contained in its *First Report of the 44th Parliament*,[1] *Eighth Report of the 44th Parliament*,[2] and *Ninth Report of the 44th Parliament*.[3]

Committee view on compatibility

Right to an adequate standard of living

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

1.160 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

1 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, p. 1.

2 See, Parliamentary Joint Committee on Human Rights, *Eight Report of the 44th Parliament*, 24 June 2014, pp 34-35.

3 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, 15 July 2014, pp 13-14.

unjustifiably take any backwards steps that might affect living standards; and to 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.

Effect of repealing measures

1.161 As noted above, the bill seeks to repeal amendments to section 159N of the *Income Tax Assessment Act 1936* that were to apply from 2015-16. Those amendments were to decrease the maximum amount of the low-income tax offset (LITO) to $300, increase the threshold in subsection 159N(1) to $67 000, and decrease the withdrawal rate of the LITO in subsection 159N(2) to one per cent. The amendments proposed by this bill mean that instead of these changes applying from the 2015-16 income year, the maximum amount of the LITO remains at $445, the threshold in section 159N(1) remains at $66 667, and the withdrawal rate of the LITO in subsection 159N(2) remains at 1.5 per cent.

1.162 In line with its previous comments on the measures contained in the bill, the committee notes that neither the statement of compatibility nor the explanatory memorandum provides any summary information about or assessment of the impact of these changes, particularly on persons on lower incomes. Without such information it is not possible to assess whether the changes are compatible with the right to an adequate standard of living.

1.163 The committee notes the requirement that, where a right may be limited, the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. 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.

1.164 The committee therefore seeks the advice of the Parliamentary Secretary to the Treasurer as to whether the bill is compatible with the right to an adequate standard of living.

Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2014

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 16 July 2014

1.165 The Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2014 (the bill) seeks to amend the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* to:

- clarify that the National Maritime Safety Regulator (NMSR) has the function of surveying vessels and dealing with matters relating to the survey of vessels by accredited surveyors;
- enable the NMSR to exercise discretion when considering the suspension, revocation and variation of vessel certificates; and
- amend the review rights of the NMSR and marine safety inspectors.

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

Military Rehabilitation and Compensation Amendment Bill 2014

Portfolio: Veterans' Affairs
Introduced: House of representative, 19 July 2014

Purpose

1.167 The Military Rehabilitation and Compensation Amendment Bill 2014 (the bill) seeks to amend the *Military Rehabilitation and Compensation Act 2004* to enable the Military Rehabilitation and Compensation Commission (the commission) to retrospectively recalculate the amounts payable for certain claims for transitional permanent impairment compensation. The bill would enable the commission to apply a new methodology for calculating compensation, which arose from the review of Military Compensation Arrangements.

1.168 The committee considers that the bill promotes the right to social security (noting in particular the provision that no person will be disadvantaged by the application of the new methodology) and is therefore compatible with human rights. The committee has concluded its examination of the bill.

Motor Vehicle Standards (Cheaper Transport) Bill 2014

Sponsor: Senator Milne
Introduced: Senate, 10 July 2014

1.169 The Motor Vehicle Standards (Cheaper Transport) Bill 2014 (the bill) seeks to set carbon emissions standards for new passenger vehicles and light commercial vehicles purchased in Australia from 2017.

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

1.171 However, the committee notes that the bill would introduce a strict liability offence, relating to the failure to give certain information (proposed new section 15). The offence will not apply where a person has a 'reasonable excuse' for any such failure, with the defendant carrying a reverse evidential burden in relation to establishing whether a reasonable excuse existed.

1.172 The imposition of a legal or evidential burden of proof on a defendant to establish a defence is a limitation of the presumption of innocence (article 14(1) of the ICCPR) because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.173 The committee notes that, while the statement of compatibility justifies the introduction of the strict liability offence on the basis of the 'difficulty of the regulator proving intention and the ease of complying with the provision,[1] the demonstration of a limitation as permissible generally requires that proponents of legislation provide reasoned and evidence-based assessment of whether the measure is reasonable, necessary and proportionate in pursuit of a legitimate objective. In this case, a fuller analysis of the proposed strict liability offence would have assisted the committee in its assessment of the bill.

1 Explanatory memorandum (EM), p. 5.

Social Services and Other Legislation Amendment (Student Measures) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 17 July 2014

1.174 The Social Services and Other Legislation Amendment (Student Measures) Bill 2014 (the bill) seeks to amend two measures relating to student entitlements including:

- allowing for an interest charge to be applied from 1 January 2015 to certain debts incurred by recipients of austudy payment, fares allowance, youth allowance for full-time students and apprentices, and ABSTUDY Living Allowance where the debtor does not have or is not honouring an acceptable repayment arrangement; and
- replacing the current student start-up scholarship with an income-contingent loan from 1 January 2015.

1.175 The committee notes that the bill re-introduces measures which were previously included in the Social Services and Other Legislation Amendment Bill 2013, introduced to the Parliament on 20 November 2013.

1.176 The committee's comments on that bill, and the Minister's subsequent response, were reported in the *First Report of the 44th Parliament* and *Second Report of the 44th* Parliament. Specifically, the committee sought information as to whether the measure could be regarded as reasonable, necessary and proportionate in pursuit of a legitimate objective. The Minister for Social Services' response explained that the shift from Student Start-up Scholarships to Student Start-up Loans was 'a fiscally responsible alternative to grant payments for increasing participation in higher education';[1] and that the shift would enable the government to ensure that higher education is accessible to all Australians. The minister's response also outlined how the change could be regarded as reasonable and proportionate to achieving the stated objective.[2]

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

1.178 However, the committee draws to the attention of the Minister its expectation that, where a measure is re-introduced, additional information

1 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, p. 170.

2 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, p. 170.

previously provided in response to a request by the committee be included in the statement of compatibility for the re-introduced measure.

Tax and Superannuation Laws Amendment (2014 Measures No. 4) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 17 July 2014

1.179 The Tax and Superannuation Laws Amendment (2014 Measures No. 4) Bill 2014 seeks to amend the *Income Tax Assessment Act 1997* to*:*

- amend the statutory debt limits for the thin capitalisation rules;
- increase the *de minimis* threshold for thin capitalisation limits;
- provide for a new gearing debt test for inbound investors; and
- prevent the double counting of certain non-taxable Australian real property assets that can distort the application of the Principal Asset Test.

1.180 The bill would also:

- amend the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to make non-portfolio returns on equity to Australian resident companies exempt of Australian income tax;
- amend the *Income Tax Assessment Act 1997* and *Taxation Administration Act 1953* to require taxpayers to be issued with an annual tax receipt for the income tax assessed to them; and
- amend 15 Acts to make style changes, repeal redundant provisions, correct anomalous outcomes and make technical corrections.

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

Building and Construction Industry (Improving Productivity) Bill 2013

Portfolio: Employment
Introduced: House of Representatives, 14 November 2013

Purpose

1.182 Introduced with the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, the bill: re-establishes the Australian Building and Construction Commissioner (ABC Commissioner) and the Australian Building and Construction Commission; enables the minister to issue a Building Code; provides for the appointment and functions of the Federal Safety Commissioner; prohibits certain unlawful industrial action; prohibits coercion, discrimination and unenforceable agreements; provides the ABC Commissioner with powers to obtain information; provides for orders for contraventions of civil remedy provisions and other enforcement powers; and makes miscellaneous amendments in relation to: self-incrimination; protection of liability against officials; admissible records and documents, protection and disclosure of information; powers of the Commissioner in certain proceedings; and jurisdiction of courts.

Background

1.183 The committee reported on the bill in its *Second Report of the 44th Parliament.*

Committee view on compatibility

Right to equality and non-discrimination

Distinctiveness and the need for certain specific measures

1.184 The committee sought further information from the Minister for Employment on the basis on which the Minister had concluded that the problems identified by the Royal Commission in its report of 2003 persist on a scale that would justify the adoption of a separate legislative regime for sectors of the building and construction industry. In particular, given that reforms similar to those proposed were adopted in 2005 and were in force until 2012, the committee sought details of any assessment undertaken by government of the impact of those laws and subsequent laws on the practices which are addressed by the bill, as well as an analysis of the critiques made of the claims about the beneficial impact or otherwise of the legislation.

1.185 The committee also sought empirical data comparing the nature and incidence of unlawful behaviour in other industries.

Minister's Response

History of lawlessness in the building and construction industry

For many years, the building and construction sector provided the worst examples of industrial relations lawlessness. Projects were delayed, costs blew out and investment in our economy and infrastructure was jeopardised.

In response to ongoing issues raised by the media and within the sector, the then government established a Royal Commission led by the Hon. Terence Cole QC. Its terms of reference were to conduct the first national review of the conduct and practices in the building and construction industry. The Royal Commission collected evidence and deliberated for 18 months and reported in February 2003.

The Final Report of the Cole Royal Commission found that the industry was characterised by unlawful conduct and concluded that:

> *These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular.*[1]

The Cole Royal Commission recommended an industry-specific regulator with the power to compel evidence on the grounds that industry participants were discouraged from reporting unlawful behaviour due to threats and intimidation. At the time it was noted that such powers were by no means unique and were already granted to other Commonwealth regulators.

The Cole Royal Commission recommended that penalties for breaches of workplace laws in the building and construction industry be higher than in other industries, due to the prevalence of such conduct.

Government response

In response to the recommendations of the Cole Royal Commission, the Howard Government established the Office of the Australian Building and Construction Commissioner (ABCC) in 2005. As recommended by Justice Cole, the ABCC's underpinning legislation gave the ABC Commissioner the powers to compel witnesses to attend an examination or produce documents where the Commissioner reasonably believed that the person had information or documents relevant to an investigation into a suspected contravention of workplace laws. The legislation also enabled the courts to impose tough penalties that acted as a deterrent to unlawful behaviour.

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1 *Royal Commission into the Building and Construction Industry* (2003), Volume 1, p. 6.

Abolition of the ABCC by the Labor Government

In 2012, Labor abolished the ABCC. It was replaced with the Fair Work Building Industry Inspectorate (or Fair Work Building and Construction), which exercised significantly weakened powers and its budget was slashed by one-third. Fines for unlawful industrial action were reduced by two-thirds and industry specific laws were repealed.

It did this despite the fact that productivity in building and construction has significantly increased and industrial action had significantly decreased.

Economic and Industrial Performance of the Industry

When the ABCC existed, the economic and industrial performance of the building and construction sector significantly improved. During its period of operation, the ABCC provided economic benefits for consumers, higher levels of productivity, and significantly less days lost to industrial action.

Productivity

Australian Bureau of Statistics (ABS) 2013 data[2] show that from 2004-05 (the year before the ABCC started) to 2011-12 (its final year of operation):

the labour productivity index for the construction industry rose from 83 to 100, which represents a 20 per cent increase;

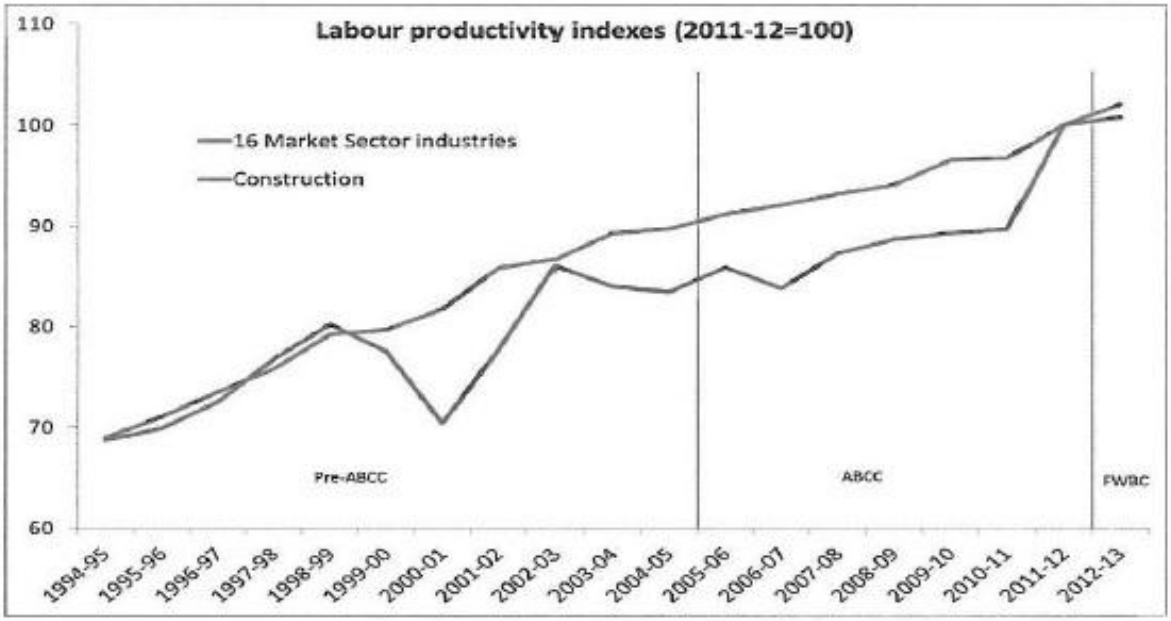
in contrast, the 16 Market Sector industries index rose from 90 to 100, an increase of 11 per cent.

the multifactor productivity index for the construction industry rose from 89 to 100, which represents a 12 per cent increase;

in contrast, the 16 Market Sector industries index fell from 102 to 100.

The same data show that, following the abolition of the ABCC, both labour productivity and multifactor productivity in the construction industry were flat.

2 Australian Bureau of Statistics (2013), *Estimates of Industry Multifactor Productivity*, Cat No 5260.0.55.002.



Industrial Disputes

As shown in the ABS 2014 graph below[3], during the period when the Australian Building and Construction Commission was in operation (1 October 2005 to 31 May 2012), the quarterly average industrial dispute rate in the construction industry was 9.6 working days lost per 1000 employees (WDL/OOOE), and this is around double the dispute rate for all industries (4.2 WDL/OOOE) over the same period.

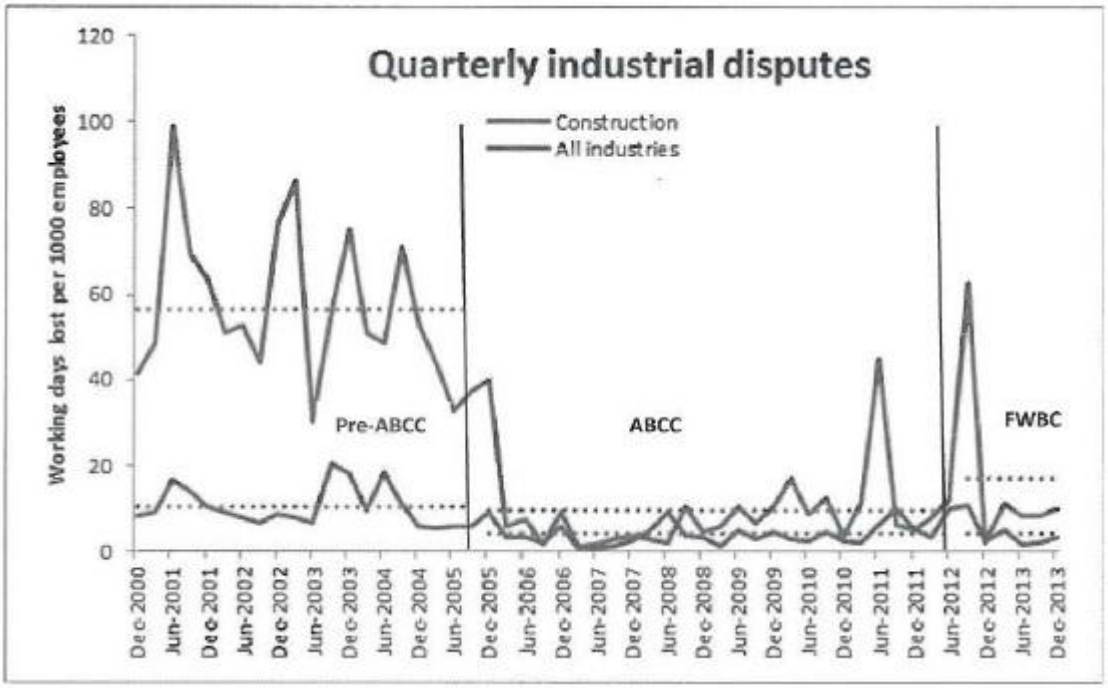
However, for the periods before the Australian Building and Construction Commission commencement and after its abolition, the quarterly average industrial dispute rate in the construction industry was not only much higher than the quarterly average in the industry when the regulator was in operation, it was also much higher than the quarterly average of all industries for the same period.

For the five years before the Australian Building and Construction Commission commencement (i.e. December quarter 2000 to September quarter 2005), the quarterly average industrial dispute rate in the construction industry was 56.7 working days lost per I 000 employees. This was five times the all industries figure of 10.4 working days lost per I 000 employees over the same period.

Since the abolition of the Australian Building and Construction Commission (1June2012), the quarterly average industrial dispute rate in construction

3 Australian Bureau of Statistics (2014), *Industrial Disputes, Australia*, December quarter 2013, Cat. No. 6321.0.55.001.

is 17.2 working days lost per 1000 employees, which is four times the all industries quarterly average of 4.3 working days lost per 1000 employees over the same period.



In its submission of January 2014 to the Productivity Commission *Public Infrastructure* inquiry, the Victorian Government stated that productivity is negatively impacted by industrial disputes and that unlawful behaviour continues to beset the construction industry, including illegal picketing, with the industry regularly losing more working days to industrial disputes than the average of all other private sector industries.[4]

It should be noted that the ABS industrial dispute figures do not include community pickets that can disrupt building and construction projects.

The construction industry continues to be plagued by instances of unlawful industrial action. More recently, there have been widespread allegations of corruption and potentially criminal behaviour in the building and construction industry. The allegations include death threats being made against a former CFMEU official for raising concerns about his union colleagues helping a notorious Sydney crime figure win work on construction sites. Examples of recent unlawful action in the sector that

4 Victorian Government submission (2014) - Productivity Commission *Public Infrastructure* Inquiry, p. 48.

further justify the need for the Australian Building and Construction Commission, together with recent allegations of corruption, are summarised at Attachment A.[5]

In its draft report on the *Public Infrastructure* inquiry, the Productivity Commission found cases prosecuted by the Australian Building and Construction Commission and Fair Working Building and Construction indicate widespread unlawful conduct and adverse industrial relations cultures in the industry.[6]

The Productivity Commission also highlighted how the threat of industrial action, which may not be reflected in the ABS disputes figures, may result in work practices and other conduct inimical to productivity, costs and business performance.[7]

The report also highlighted how the ABS statistics on industrial disputes exclude many aspects of worksite industrial disputation, such as work-to-rules, go-slows and overtime bans. Nor does the ABS data measure the effects of disputes in locations other than where the stoppages occur, such as stand-downs due to lack of materials, pickets, disruption of transport services and power cuts, despite these having effects on the utilisation of labour and capital.

The Productivity Commission concludes in its draft report that, in relation to this sector, "the available industrial dispute data are likely to underestimate the prevalence and severity of industrial relations disharmony".[8]

The Master Builders Association, in its 2013 supplementary submission to the Senate Education and Employment Legislation Committee Inquiry on the Australian Building and Construction Commission Bills, has also detailed the significant direct and indirect costs of industrial action in the construction industry, whether protected or unprotected. It stated that the economic damage of a day lost "is not in the hundreds of dollars but tens of thousands for the less critical projects, to hundreds of thousands of dollars for complex or critical phases of construction. These would be the direct costs...the ·other costs that need to be also taken into account are

5 The full text of the attachment can be viewed in Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 19-26.

6 Productivity Commission (2014), Draft Report: *Public Infrastructure*, p. 405.

7 Ibid, p. 405.

8 Ibid, p. 442.

> liquidated damages imposed by the client for not completing the project on time".[9]
>
> High rates of industrial action, whether protected or unprotected, are evidence of a lack of cooperation between industry parties. Australia's building and construction industry workforce was rated as the most "adversarial" and uncooperative in terms of workplace culture when compared with other international construction industries by AECOM in 2012.[10]
>
> The ongoing lawlessness in the building and construction sector over many years in Australia provides important context for the measures in the Bill. An independent regulator with strong and effective powers is essential to address these issues. To the extent that the Bill engages fundamental rights and freedoms, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill.[11]

Committee response

1.186 **The committee thanks the Minister for his response and has concluded its consideration of the matter.**

Right to freedom of association and right to form and join trade unions

1.187 The committee requested a range of information to assist in its consideration of whether the proposed measures are compatible with the right to freedom of association. The committee wrote to the Minister for Employment to request that, where a bill gives rise to issues that have been considered by ILO supervisory bodies (particularly where those bodies have made adverse comments about human rights compatibility in relation to current Australian legislation or similar provisions of previous Australian laws):

- the committee's attention be drawn to those views in the statement of compatibility; and
- the statement of compatibility include the details of the government's formal response to those views (where available) as well as the government's position on whether it agrees or not with the ILO bodies' expert assessment.

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9 Master Builders Association (2013), *Supplementary Submission to Senate Education and Employment Legislation Committee Inquiry on ABCC Bills*, pp 5-6.

10 AECOM (2013), *The Blue Book*, p. 6.

11 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 1-6.

Minister's Response

In 2005, the ILO Committee on Freedom of Association (the ILO Committee) made a number of observations as part of its consideration of the *Building and Construction Industry Improvement Act 2005*.[12] The Howard Government provided a comprehensive response to the ILO Committee's report, and the Coalition Government supports the content of this response, noting the changes to the workplace relations legislative framework since then.

First, the ILO Committee requested that the former government take steps to modify the unlawful industrial action provisions of the *Building and Construction Industry Improvement Act 2005* so as to ensure its compliance with the principles of freedom of association. In its response, the former government submitted that the provisions of the *Building and Construction Improvement Act 2005* (sections 36, 37 and 38) reflected Australia's ILO obligations, including freedom of association principles. The former government's response noted that these provisions had to be read in the context of the *Workplace Relations Act 1996* and that protected industrial action taken in accordance with that Act would not be subject to these sections. The response also noted that the *Building and Construction Industry Improvement Act 2005* supported freedom of association principles by prohibiting discrimination on the basis that employees were covered by, or had proposed to be covered by, a particular kind of industrial instrument.

The ILO Committee also requested that the former government adopt measures to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry. The former government's response highlighted the Cole Royal Commission's findings that an entrenched culture of lawlessness existed in the building and construction industry and that higher penalties were required to address that culture. The response also noted that the quantum of any penalty would be determined by the courts and that the level of penalties to be applied would be made without regard to a person's status as a union member.

Second, the ILO Committee requested that the former government take steps with a view to revising section 64 (project agreements not enforceable) of the *Building and Construction Industry Improvement Act 2005* to ensure that the determination of the level of bargaining be left to the discretion of the parties. The former government submitted that

12 lLO Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of developments - Report No 338*, November 2005.

section 64 supported the right of parties to negotiate at an enterprise level by preventing project agreements that were designed to deny employers and their employees the right to develop terms and conditions that suited their circumstances through trying to secure 'pattern' outcomes. Furthermore, the former government's response noted that the existing workplace relations framework provided avenues for multi-business agreements, such as through the multiple business and greenfields provisions of the *Workplace Relations Act 1996*.

Third, the ILO Committee requested that the former government take steps with a view to promoting collective bargaining as provided in ILO Convention No 98. In particular, the ILO Committee requested that the former government 'review ... the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles'.[13] The former government's response noted that a Building Code had yet to be issued under the *Building and Construction Industry Improvement Act 2005* so it was not able to comment on the proposed content of such a code, and that the National Code and Guidelines were consistent with Australia's ILO obligations and freedom of association principles.

Finally, the ILO Committee requested that the former government implement safeguards into the *Building and Construction Industry Improvement Act 2005* to ensure that the functioning of the ABC Commissioner and inspectors did not lead to interference in the internal affairs of trade unions. The former government's response noted that the Act established criteria which the ABCC must satisfy before exercising its power to obtain information and that these provided important protections and safeguards. Furthermore, the response noted that the Act placed strong safeguards around what a person may do with protected information that was obtained during the course of official employment, including a maximum penalty of 12 months imprisonment for unauthorised recording or disclosure of such information. Finally, the former government's response noted that a right of appeal to the Courts before handing over documents did exist and had been utilised multiple times. In light of these considerations, the former government considered that the existing safeguards in the *Building and Construction Industry Improvement Act 2005* were comprehensive and appropriate.[14]

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13 ILO Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of developments - Report No 338*, November 2005 at para 452.

14 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 6-7.

Committee response

1.188 **The committee thanks the Minister for his response.**

1.189 However, the committee is of the view that there remain outstanding issues with respect to the compatibility of the proposed measures with the right to freedom of association.

Proposed prohibition on picketing and restrictions on industrial action

1.190 The committee notes that the right to strike including picketing activities are protected under the right to freedom of association.[15] The right to strike, however, is not absolute and may be limited in certain circumstances. The committee notes that the precise formulation of when the right may be permissibly limited varies according to the terms of the provision in the ICCPR (article 22), ICESCR (article 8) and the ILO conventions.

1.191 The committee notes that ILO standards as a specialised body of law may inform the guarantees set out in the ICCPR and ICESCR. The ILO supervisory bodies have indicated that the right to strike may be limited on the basis of acute national emergencies, the provision of essential services or in the case of violence.[16] The ILO Committee of Experts on the Application of Conventions and Recommendations has

15 See, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2314863 (accessed 5 August 2014); ILO CEACR, Individual Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No. 98), Australia, 99th session, 2009, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2298985 (accessed 5 August 2014); ILO, *General Survey on freedom of association and collective bargaining*, 1994 [128].ILO, Freedom of association committee, report in which the committee requests to be kept informed of development - Report No 320, *Case No 1963 (Australia), March 2000,* [218]; Bernard Gernigon, Alberto Odero and, Horacio Guido, ILO Principles Concerning the Right to Strike, 1998 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf (accessed 5 August 2014); ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth edition, 2006, [649]. See also, UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/4, 12 June 2009, p. 5.

16 See, ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth edition, 2006, [547]-[563], [570 – 594].

specifically stated that 'restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful.'[17]

1.192 With respect to picketing, the committee notes that the proposed measures go substantially beyond this kind of limitation. The committee notes that the statement of compatibility and the Minister's response argues that the prohibition on picketing pursues the legitimate objective of 'prohibiting picketing activity that is designed to cause economic loss to building industry participants for industrial purposes'.[18] The committee notes that pickets by their very nature may be likely to cause economic losses if used effectively.[19] Given the general protections afforded to picketing activity, it cannot be a legitimate purpose under international human rights law to prohibit the very kind of conduct that is protected. The committee notes that much of the analysis in the Minister's response proceeded on the basis that picketing or industrial action in or of itself was illegitimate under international human rights law.

1.193 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. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.194 The committee further notes that Australia already has in place substantial regulation of industrial action under the *Fair Work Act* 2009 and the *Competition and Consumer Act* 2010 which goes beyond what UN supervisory bodies have considered

17 ILO, *General Survey on freedom of association and collective bargaining*, 1994 [174].

18 Explanatory memorandum p.58.

19 See, ILO, *General Survey on freedom of association and collective bargaining*, 1994 [137], [592]. See, also, the ILO Freedom of Association Committee comments on the role of the right to strike: 'The committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests'. See, also, ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth edition, 2006, [521], [592].

permissible for the purposes of the right to freedom of association.[20] As noted in the Minister's response, picketing activity does not constitute 'protected industrial action'[21] under the *Fair Work Act*. The committee further notes that these activities are also regulated under civil and criminal laws relating to protest actions.[22] In this context and in light of other regulation the committee is concerned that the proposed measures do not appear to be necessary or proportionate in pursuit of a legitimate objective.

1.195 In addition to the proposed prohibition on picketing activity, the committee notes that the bill also seeks to introduce other measures that may be potentially considered to further limit the right to strike including those measures contained in proposed sections 8, 48 and 49. The committee is similarly concerned that the proposed measures do not appear to be necessary or proportionate in pursuit of a legitimate objective.

1.196 **The committee therefore seeks the further advice of the Minister as to whether the proposed prohibition on picketing and further restrictions on industrial action are compatible with the right to freedom of association, and particularly:**

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20 See, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3144188 (accessed 5 August 2014); See, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101st ILC session, 2013 (accessed 5 August 2014) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698628 ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2314863 (accessed 5 August 2014); ILO CEACR, Individual Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No. 98), Australia, 99th session, 2009, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2298985 (accessed 5 August 2014). See also, UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/4, 12 June 2009, p. 5.

21 The *Fair Work Act* provides a limited right to strike or to take 'protected industrial action' in prescribed circumstances. Persons taking 'protected industrial action' are given legislative protection from proceedings against them for breach of contract or industrial tort in respect of the protected action.

22 See, for example, *Crimes Act* 1900 (NSW) s 5445C (which sets out the offence of unlawful assembly); *Summary Offences Act* 1988 (NSW) s 6 (which sets out the offence of obstruction of people or traffic).

- **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 organise and bargain collectively

Prohibition on project agreements

1.197 The committee sought an explanation from the Minister for Employment as to how, in light of the views expressed by the ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations, proposed new section 59 can be viewed as consistent with the right to freedom of association and to bargain collectively guaranteed by article 8 of the ICESCR, article 21 of the ICCPR and applicable ILO conventions.

Minister's Response

> As noted by the Committee, the ILO Committee requested that the former government revise section 64 of the *Building and Construction Industry Improvement Act 2005* (replicated in clause 59 in the current Bill) to ensure that the determination of the bargaining that takes place is left to the discretion of the parties as is required by Article 4 of ILO Convention No. 98 - Right to Organise and Collective Bargaining Convention.
>
> It is the Government's view that clause 59 supports the right of parties to determine that bargaining takes place without undue interference. It is a unique characteristic of the building and construction industry that a wide array of employers, employees and contractors will often be operating together at a single site. Project agreements, which are commonly used on building sites, can deny employers and their employees the freedom to negotiate and implement agreements that best suit their own circumstances by trying to secure site-wide outcomes. This is not appropriate in light of the wide variety of work that is undertaken at building sites.
>
> Most importantly, clause 59 will only prohibit project agreements that are not Commonwealth industrial instruments. This leaves scope for site-wide agreements that are made under the Fair Work Act 2009 (the Fair Work Act), such as multi-enterprise agreements and greenfields agreements. The Government considers that these mechanisms provide sufficient flexibility to parties in the building and construction industry to implement

site-wide agreements while reflecting the primacy of enterprise-level agreement-making in the federal workplace relations system.[23]

Committee response

1.198 **The committee thanks the Minister for his response.**

1.199 However, the Committee notes that the measure nevertheless limits the right to organise and bargain collectively as understood in international human rights law. The committee considers that a provision which prohibits a type of agreement, project agreements, does not support the right to organise and collectively bargain. Based on the information provided and in light of determinations by UN supervisory bodies as to the scope of obligations, the committee is unable to determine that the proposed limitations on this right are reasonable, necessary and proportionate.

1.200 **The Committee therefore considers that proposed section 59 is likely to be incompatible with the right to organise and bargain collectively.**

Right to freedom of assembly and freedom of expression

1.201 The committee sought clarification from the Minister for Employment as to the compatibility of the provisions prohibiting picketing with the right to freedom of assembly and freedom of expression.

Minister's Response

Clause 47 of the Bill provides that a person must not organise or engage in an unlawful picket. The term unlawful picket is defined to include action:

(a) that:

(i) has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site; or

(ii) directly prevents or restricts a person accessing or leaving a building site or an ancillary site; or

(iii) would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site; and

(b) that:

(i) is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant; or

23 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, p. 7.

(ii) is motivated for the purpose of advancing industrial objectives of a building association; or

(iii) is unlawful (apart from this section).

The prohibition on unlawful picketing is not restricted to building industry participants. Instead, clause 47 prohibits pickets which attempt to prevent persons entering or leaving a building site or ancillary site where that action is motivated by an industrial purpose or is otherwise unlawful. In practice, the people undertaking this action for one of the specified purposes are most likely to be building industry participants, but the prohibition is also intended to cover situations where industrially motivated action is being undertaken under the guise of unrelated community protests.

The Committee has noted that the building and construction industry is not the only industry that faces picketing action. It is the Government's view that the greater prevalence of picketing action in the building and construction industry combined with the disproportionately significant impact that picketing of a building site has on workers and their employers warrants differential treatment.

The legitimate objective of differential treatment through the adoption of industry specific laws is justified as construction sites are greatly impacted by picketing action, because even minor delays in the carrying out of critical tasks (e.g. concrete pouring) can have major effects on the timing and financial viability of projects. The approach taken in clause 47 of the Bill is logically connected to that aim as it will ensure that fast and effective remedies are available to both the regulator and to those in the building industry affected by unlawful picketing action. Finally, the approach taken in clause 47 is a proportionate response as it is restricted to actions which actually prevent access to or egress from a building site by workers and management, or aim to intimidate a person accessing or leaving a building site. Furthermore, to the extent that clause 47 covers picketing that is 'otherwise unlawful', the prohibition is proportionate as it simply allows for an easier enforcement of an occupier's rights and the imposition of a civil penalty in relation to action that may otherwise be tortious in character.

Fair Work Act

The issue of whether picketing could constitute industrial action (and thus be 'protected industrial action' for the purposes of the Fair Work Act) is considered in Breen Creighton and Andrew Stewart's *Labour Law: Fifth Edition*, which notes that in *Davids Distribution Pty Ltd v NUW* (1999) FCR 463 the Full Court of the Federal Court held that picketing does not

constitute industrial action within the meaning of the Act.[24] In reaching this decision, the Full Court of the Federal Court considered that parliament could not have intended to "authorise interference with the rights, not only of the employer, but also of other affected persons who, but for the immunity, would have a right of action at common law".[25] As stated by Creighton and Stewart:

> *What the Full Court appears to have had in mind was that, if such picketing constituted 'industrial action', it could in turn be regarded as protected action if the appropriate procedures were followed, at least in the context of negotiating an agreement under the Act. But the decision should also mean picketing cannot be made the subject of a s 418 order; although of course that would not prevent employers or other parties seeking relief at common law, or under other provisions...that do not hinge on the presence of 'industrial action'.*

The application of the Fair Work Act to picketing activity in the building and construction industry is limited by the requirement that 'industrial action' be undertaken by 'employees'. This limitation provides scope for members of unions to undertake picketing action with an intention to disrupt work at a construction site with impunity as long as they are not employees at the site in question. It is this behaviour in particular that the Bill is seeking to address.

A recent example of action that falls within this category was the blockading of the Myer Emporium site in Melbourne in August and September 2012 by members of the CFMEU. The blockade resulted in violence in the streets of Melbourne, with militant protestors intimidating the community and confrontations between picketers and police, including attacks on police horses. The blockade resulted in serious disruptions to the community and employees were unable to enter or leave the site without the presence of a contingent of police. The dispute also disrupted three other Grocon sites in Melbourne (including the Comprehensive Cancer Centre project in Parkville). The blockade was not lifted until 7 September 2012. On 24 May 2013, the Supreme Court found the CFMEU guilty on all five charges of contempt of court orders following proceedings initiated by Grocon. On 31 March 2014, the CFMEU was penalised $1.2 million for its contempts and was ordered to pay costs. The blockade did not involve the actual employees who were engaged to work on the site,

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24 Creighton, W. B., & Stewart, A. (20 I 0). *Labour law: Fifth Edition*. Annandale, NSW: Federation Press at [22.30].

25 *Davids Distribution Pty Ltd v NUW* (1999) FCR 463 at 491.

which meant that while the action breached a range of laws, it did not constitute ' industrial action' for the purposes of the Fair Work Act.[26]

Committee response

1.202 **The committee thanks the Minister for his response.**

1.203 The Minister's response in relation to the right to freedom of assembly and freedom of expression clarifies that the prohibition on pickets is not limited to 'building industry participants' but is aimed at preventing pickets which attempt to prevent persons entering or leaving a building site. The committee notes in this context that there are potentially a range of protest activities that may be covered by these provisions.

1.204 As stated in the Minister's response, picketing activity does not constitute 'protected industrial action'[27] under the *Fair Work Act*. The committee further notes, however, that these activities are already regulated under civil and criminal laws relating to protest actions.[28] The committee notes in respect to the example provided in of the CFMEU Grocon picket, much of this alleged conduct including any violence is regulated under existing criminal laws.[29] In this context and in light of other regulation of protests and public order in Australia the committee is concerned that the proposed measures do not appear to be necessary or proportionate in pursuit of a legitimate objective.

1.205 **The committee therefore seeks the further advice of the Minister as to whether the proposed prohibition on picketing is compatible with the right to freedom of assembly and freedom of expression, and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**

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26 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 7-9.

27 The *Fair Work Act* provides a limited right to strike or to take 'protected industrial action' in prescribed circumstances. Persons taking 'protected industrial action' are given legislative protection from proceedings against them for breach of contract or industrial torts in respect of the protected action.

28 See, for example, *Crimes Act* 1900 (NSW) s 5445C (which sets out the offence of unlawful assembly); *Summary Offences Act* 1988 (NSW) s 6 (which sets out the offence of obstruction of people or traffic). See, also, *Competition and Consumer Act* 2010, s45D, *Maritime Union of Australia and oths v Patrick Stedores Operations Pty Ltd and Anor* [1998] VICSC.

29 See, *for example, Summary Offences Act* 1966 (Vic) s 4(e), 52(1); *Public Order (Protection of Persons and Property)* Act (Cth).

- **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 privacy

Coercive information-gathering powers

1.206 The committee wrote to the Minister to seek clarification as to whether the coercive information-gathering powers were compatible with the right to privacy.

1.207 The committee further requested that, if the coercive investigative power is to be retained, Part 2 of Chapter 7 of the bill be amended so that the power to issue an examination notice does not lie within the sole discretion of the ABC Commissioner, but should be subject to independent review including the type of safeguards which were recommend by the Wilcox review and included in the FWBI Act.

Minister's Response

The role of examination notice powers in enforcement activities

The ability of the ABC Commissioner to exercise coercive examination powers was a central recommendation arising from the 2003 Cole Royal Commission. As noted by the Committee, this recommendation was made on the basis that it is necessary to ' penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden.'[30] This power has been used effectively by the ABCC and, to a lesser extent, the Fair Work Building Industry Inspectorate with a total of 210 examinations having been conducted as at 27 February 2014. Of these:

- 102 examinations relate to 43 matters in which penalty proceedings have been instituted in a court;
- 5 examinations relate to a section 67 (ABC Commissioner to publish non-compliance) report published by the ABCC;
- 101 examinations relate to other closed matters (no court proceedings or section 67 report); and
- 2 examinations relate to one ongoing investigation.

The information obtained through examination notices allows the regulator to determine whether breaches of the law have occurred and to make an informed judgement about whether to commence proceedings or

30 *Royal Commission into the Building and Construction Industry* (2003), Volume 11, p. 38.

take other steps to ensure compliance with the law. The Fair Work Building Industry Inspectorate has advised that information obtained through the examination notice process has been important in around a quarter of its decisions to initiate proceedings. In other cases, the information obtained through the notice has led to a decision not to proceed with court action, thereby sparing the proposed respondent from the burden of court proceedings and avoiding unnecessary use of the regulator's and the court's resources.

The Committee has also questioned whether the coercive examination powers contained in the Bill are reasonable and proportionate measures.

As has been noted, the Cole Royal Commission initially recommended these powers following an extensive investigation of both the lawlessness facing the industry and the challenges that would face the ABCC upon its establishment. A practical example of this was provided in a case study in the former Building Industry Taskforce's report entitled 'Upholding the Law - Findings of the Building Industry Taskforce'. In October 2002, a picket was formed at the Patricia Baleen Gas Plan in Morwell as a result of 'frustrated negotiations' between a head contractor and a number of employee organisations. Despite return-to-work orders from the Australian Industrial Relations Commission and the Federal Court, some employees chose to continue the strike. The Taskforce found that:

> *"...key parties and witnesses in this dispute would not provide any information. In the absence of powers to compel people to provide information, the Taskforce had to refer the matter to the Australian Competition and Consumer Commission...by using the coercive powers under section 155 of the [Trade Practices Act 1974], the ACCC was able to...develop a Brief of Evidence for action before the Federal Court".*[31]

The ongoing necessity of the power to issue examination notices was recognised by Justice Murray Wilcox in his 2009 report entitled *Transition to Fair Work Australia for the Building and Construction Industry*, where he stated that:

> *"It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course.*

31 Building Industry Taskforce, *Upholding the Law - Findings of the Building Industry Taskforce* 2005, p. 5.

> *I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [FWBC] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove. "*[32]

While recognising the necessity of the coercive examination powers, Justice Wilcox recommended that a range of safeguards be adopted. In making this recommendation, Justice Wilcox noted that none of his proposed safeguards "need delay an investigation" and that their adoption would ensure that the power is not used unnecessarily and that the interrogated person is treated fairly and courteously.[33] The Bill has adopted a number of safeguards around the examination notice process, with the exception of Justice Wilcox's recommendation that the examination notices be issued by an independent person, namely an Administrative Appeals Tribunal Presidential Member.

This is because the requirement for the Director of the Fair Work Building Industry Inspectorate to apply to an Administrative Appeals Tribunal Presidential Member has substantially reduced the use and effectiveness of the examination notice process. In light of this practical experience, it is the Government's view that Justice Wilcox's goal of ensuring the power is not used unnecessarily and that the interrogated person is treated fairly and courteously can be met through the safeguards in the Bill.

A range of oversight measures ensure that persons on whom an examination notice is served are treated fairly and courteously and that there is strong and effective oversight of the process. This includes the use/limited use immunity that applies in respect of the information, record or document produced or answer given under an examination notice by the person the subject of the notice. Note also the proposed protection from liability arising from compliance with an examination notice in the Bill.

Further, the Commonwealth Ombudsman will have a continuing oversight of the examination process. Transparency will be assured by the legislative requirement that the Commonwealth Ombudsman be given a report, a video recording and a transcript of all examinations. The Commissioner's power to give a written notice to a person can only be delegated to a Deputy Commissioner (or to a Senior Executive Service employee if no

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32 Justice Murray Wilcox (2009), *Transition to Fair Work Australia for the Building and Construction Industry Report*, p. 3.

33 Ibid.

Deputy Commissioners are appointed), ensuring that the application of this power is only undertaken by the people most accountable for its use.

Importantly, the issuing of examination notices by the Australian Building and Construction Commission will continue to be subject to external judicial oversight.

Any person questioned by the Australian Building and Construction Commission using the powers:

- will have the right to have a lawyer present;
- will have at least 14 days notice that they will need to appear; and
- will have reasonable travel expenses paid to appear at examinations.

It is therefore the Government's view that the approach adopted by the Bill is both reasonable and proportionate in light of its legitimate objectives and that effective and appropriate safeguards are included.

Differential treatment for the building and construction industry

Commonwealth legislation that relates to workplaces (such as the Fair Work Act and the *Work Health and Safety Act* 2011) is designed to have general application to all workplaces within Australia.

Within this legislative framework, however, it is important to recognise that particular sectors have unique characteristics that are not fully catered for in legislation that is of general application. In these circumstances it is appropriate to apply differential treatment to these particular groups. The Fair Work Act contains provisions that relate specifically to workers in the textile, clothing and footwear industry in order to enhance existing protections for vulnerable workers in this sector.

The *Work Health and Safety Act 2011* provides similar examples of differential industry approaches. While that Act contains a general duty of care that all persons conducting a business or undertaking are required to comply with, it is recognised that particular activities and particular industries are faced with unique risks that require differential treatment. This has resulted in a range of more stringent requirements around the licensing of major hazard facilities, for example, in recognition of the risks posed by these facilities and the potential harm that they could cause to workers and the community at large. Such differential treatment is reasonable and necessary to support the over-arching policy objectives of the workplace relations and work health and safety regimes.

The objective of the Bill is to restore the application of the rule of law in the building and construction industry in the form of a more stringent enforcement regime. As has already been noted, the Bill is based on the

former *Building and Construction Industry Improvement Act 2005* which gave effect to the recommendations of the Cole Royal Commission.

As outlined in more detail above, the Cole Royal Commission established that building sites and construction projects were marked by intimidation, lawlessness, thuggery and violence. The Cole Royal Commission recommended differential treatment for the industry on the grounds that "widespread disregard for the laws of the Commonwealth Parliament should not be tolerated. The solution is to provide an incentive for participants in the industry to comply with the law, and penalties that deter those who would be disposed to contravene it."[34] The necessity of differential enforcement for the building and construction industry is evidenced by the improved performance of the sector. ABS data show that the *Building and Construction Industry Improvement Act 2005* improved industry productivity and there was a significant reduction in days lost through industrial action.

The need for differential treatment of parties in relation to penalty levels is an established aspect of Commonwealth legislation, with the 2011 *Guide to Frame Commonwealth Offences* stating that "each offence should have its own single maximum penalty that is adequate to deter and punish a worst case offence, including repeat offences".[35] In its discussion on this point, the Guide states that:

> *"A maximum penalty should aim to provide an effective deterrent to the commission of the offence ... [a) higher maximum penalty will be justified where there are strong incentives to commit the offence..."*[36]

In light of this evidence, and the unique characteristics of the building industry that are outlined in the introduction to this response, it is the Government's view that the more stringent enforcement regime that is being implemented in the proposed Bill is appropriate, reasonable and proportionate in the circumstances.

Committee response

1.208 **The committee thanks the Minister for his response.**

34 *Royal Commission into the Building and Construction Industry* (2003), Volume 9, Page 237.

35 *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 Edition, Attorney-General's Department, Commonwealth Government, Page 37.

36 Ibid, Page 38.

1.209 However, committee does not consider that the information provided demonstrates that the measures are reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.210 The committee notes that the proposed powers under section 61 are extremely extensive and may require a person to provide information, documents or attend before the ABC Commission under an examination notice. It would be an offence which is punishable by two years' imprisonment for failure to comply with an examination notice. The committee notes the ILO Committee on Freedom of Association has criticised similar measures under the former ABCC regime:

> As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.[37]

1.211 The Minister's response provides that the coercive powers are warranted due to levels of 'secrecy' and the Cole Royal Commissions findings of 'lawlessness, thuggery and violence' in the construction industry.

1.212 The committee notes, however, that the proposed coercive powers largely operate with respect to alleged breaches of industrial law for which civil penalties may be imposed. The proposed coercive investigation powers are not targeted at violence or property damage which is regulated under existing criminal laws. The committee notes that similarly extensive coercive powers are generally not available to the police in the context of criminal investigations. It remains unclear to the committee why such extremely extensive coercive powers which go beyond those that are usually available in a criminal investigatory context would be proportionate to the investigation of industrial matters. The committee considers that coercive powers granted to an investigatory body need to be appropriate and necessary for the contraventions it is required to investigate. Indeed the committee notes that these proposed coercive investigative powers may arise in the context of alleged

37 ILO Committee on Freedom of Association, Case No 2326 (Australia), June 2006, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908526 (last accessed 7 August 2014).

conduct by persons which may be a permissible and legitimate exercise of the right to strike as protected under international human rights law.[38]

1.213 While the Minister's response addresses some safeguards that may be available in relation to the exercise of the measure, the absence of external review of an examination notice at the time it is made may substantially reduce the adequacy of these safeguards. The committee notes the Minister's response provides that the requirement to apply for an examination notice from the Administrative Appeals Tribunal Presidential Member under current laws has substantially reduced the use and effectiveness of the process. The committee notes that no information was provided as to how the current regime was unworkable or ineffective. The committee considers that the extremely broad scope of the coercive powers create significant limitations on the right to privacy with minimal safeguards with respect to their operation.

1.214 **The committee therefore cannot conclude, in the absence of additional safeguards, the measure is compatible with the right to privacy.**

Disclosure of information

1.215 The committee considered that the limitations on the right to privacy by proposed section 61(7) and by section 105 have not been demonstrated to be a proportionate measure.

Minister's Response

> Clause 61 (7) provides that the ABC Commissioner's ability to give examination notices that may require the disclosure of information or documents is not limited by any provision of any other law that prohibits the disclosure of information, except to the extent that the provision expressly excludes the operation of clause 61 (7).

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38 See, for example, UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/4, 12 June 2009, p. 5: 'The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8). The Committee recommends that the State party continue its efforts to improve the realization of workers rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87 . In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action and consider amending the Fair Work Act. 2009.'

The Government's view is that the proportionality of this measure must be considered in light of the unique challenges posed by the building and construction industry. As has been demonstrated above, the ability of the ABC Commissioner to exercise compulsory information gathering powers was a central recommendation arising from the 2003 Cole Royal Commission. In particular, the Cole Royal Commission found that the building and construction industry presents a particular regulatory challenge due to the persistence of intimidation and violence within the industry and a culture of secrecy that made it extremely difficult for regulators to enforce the rule of law. The ability of the regulator to obtain all information or documents relevant to an investigation, including those the disclosure of which may otherwise be limited by other laws, is critical to bringing respect for the rule of law to the building and construction industry.

In recognition of the broad scope of this power, clause 106 of the Bill sets out what a person may do with information that has been obtained through the use of the examination notice power in clause 61. In particular, clause 106 provides that it is a criminal penalty for a person to make a record of information obtained as a result of an examination notice or disclosure such information except in a narrow range of circumstances. This is an important safeguard that supports the proportionality of the examination notice process generally and the operation of clause 61(7) specifically.

Finally, information obtained under an examination notice is subject to use and derivative use immunity in relation to both criminal and civil proceedings (discussed in more detail below). As such, it is the Government's view that the limitation on the right to privacy proposed by clause 61(7) is proportionate due to the unique challenges posed by the building and construction industry and the strong safeguards that have been adopted around the use of this information.

The ABC Commissioner and the Federal Safety Commissioner will be responsible for deciding whether the disclosure is appropriate, providing a significant safeguard around the potential disclosure of information obtained by a person prescribed by clause 105. Information may be disclosed to the Minister or the Department in a limited range of circumstances, or to another person if the ABC Commissioner or the Federal Safety Commissioner reasonably believes that it is necessary and appropriate to do so for the purposes of the performance of their functions or the exercise of their powers, or where the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or Territory.

As discussed above, it is important that the ABC Commissioner and the Federal Safety Commissioner are able to disclose information to a wide range of law enforcement officials. In practice, information is likely to be disclosed to:

- the Australian Securities and Investments Commission;
- the Australian Competition and Consumer Commission;
- the Australian Crime Commission;
- Comcare, and state and territory work health and safety regulators;
- the Fair Work Ombudsman;
- the Federal Police; and
- State and Territory police.

It is not appropriate to provide a list of particular laws because of the complexity of the building industry and the wide range of laws that are relevant to its operation. The disclosure provisions are reasonable and proportionate measures in pursuit of the Bill's objective to increase respect for the rule of law in the building and construction industry and to facilitate Law enforcement activities of other relevant agencies.[39]

Committee response

1.216 **The committee thanks the Minister for his response.**

1.217 However, the committee does not consider that the information provided demonstrates that the measures are reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.218 With respect to proposed section 61(7), the Minister's response does not demonstrate that the coercive information gathering powers need to override any other law that prohibits the disclosure of information. The committee notes that the override provision measure in proposed section 61(7) may go beyond addressing any asserted issues of overcoming 'secrecy'. The committee notes that the specifics of the measure have not been addressed in either the statement of compatibility or the response provided by the Minister.

1.219 It is the committee's usual expectation that where a limitation on a right is proposed there should be 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

39 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 9-15.

must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.220 With respect to proposed section 105, which allows disclosure of information to third parties, the committee continues to have concerns as to the human rights compatibility of this measure. The committee notes that the Minster's response has not comprehensively assessed why the measure is required beyond the assertions that disclosure is 'important'.

1.221 The committee further notes that the information provided does not demonstrate that there would be sufficient safeguards in place in relation to the measure. The committee notes that giving the responsibility to the ABC Commissioner and the Federal Safety Commissioner in relation to third party disclosure cannot be considered a sufficient safeguard in or of itself especially given the broad scope of the powers and lack of specified limitations in relation to particular laws.

1.222 **The committee therefore seeks the further advice of the Minister as to whether the proposed override provisions in proposed sections 61(7) and 105 are compatible with the right to privacy, and particularly:**

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

Powers of entry into premises

1.223 The committee considered that the powers of entry and related powers raised issues of compatibility with the right to privacy guaranteed by article 17 of the ICCPR. The committee sought further information from the Minister about the lack of requirements of consent or warrant and why procedural safeguards for the exercise of such powers have not been included.

Minister's Response

> The powers of inspectors to enter premises in the Bill are primarily based on the provisions of the Fair Work Act, with some minor amendments to reflect the approach taken in the *Building and Construction Indust1y Improvement Act 2005*. The approach in the Bill is therefore consistent with a long history of inspector powers in workplace relations legislation, going as far back as the *Conciliation and Arbitration Act 1904*.[40] Similar

40 *Conciliation and Arbitration Act 1904*, section 41.

powers are also found in other industrial legislation such as the *Work Health and Safety Act 2011*.

It is the Government's view that entry of premises only by consent or warrant is inappropriate in an industrial relations context where inspectors will primarily use their entry powers to follow up on confidential unofficial complaints or formal claims, to make inquiries, to provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, it would significantly impair the ability of inspectors to efficiently and effectively investigate and resolve claims. Furthermore, limited resources would have to be diverted from investigation and compliance work to the task of obtaining warrants.

The Committee has noted that the Senate Scrutiny of Bills Committee sought advice on whether senior executive authorisation for the exercise of the powers had been considered. While this would provide an additional safeguard for the use of these powers by inspectors such a requirement would also significantly impair the ability of inspectors to efficiently and effectively utilise their powers to investigate claims. In particular, the unpredictable nature of industrial action in the building and construction industry means that inspectors may be called upon to utilise their powers and exercise functions at very short notice and any administrative constraints upon their ability to do this would severely hamper their effectiveness.

The Senate Scrutiny of Bills Committee also sought views on whether consideration had been given to developing guidelines for the implementation of inspector powers, especially given the persons who exercise these powers need not be trained law enforcement officers. The transitional arrangements contained in the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 provide for the continuity of appointment of Fair Work Building Industry Inspectors and Federal Safety Officers. As such, ABC Inspectors and Federal Safety Officers will continue to be well trained, highly professional individuals who undergo extensive professional development to ensure they exercise their powers and perform their functions in an appropriate manner. The level of responsibility and the powers they can exercise, however, are not comparable to those of law enforcement officers. It is therefore not considered necessary to adopt such formal guidelines.

Where the ABC Commissioner or the Federal Safety Commissioner is of the view that parameters need to be placed around the use of these powers or exercise of these functions the Bill provides that he or she will be able to give directions of both general application or in relation to particular cases. The Commissioners will also be able to adopt administrative guidelines to inform inspectors on the use of their powers and exercise of their

functions. Any such document would be designed to provide practical, up-to-date advice to inspectors which would only be possible if the document is able to be updated easily to best reflect the issues facing the inspectorate. This would not be possible if the document was a legislative instrument.

On the basis of the above careful analysis and consideration, the Government is satisfied that the inclusion of entry powers for inspectors without warrant or consent serve the legitimate objective of ensuring that participants in the building and construction industry observe the workplace relations laws that apply to that industry. These entry powers will contribute to the achievement of that objective by ensuring that inspectors are able to respond to issues as they arise in a timely and effective manner without undue obstruction or burden. This is a reasonable and proportionate measure as it represents a continuation of long-standing inspector powers in industrial legislation, such powers can be subject to directions from the Commissioners and the use of these powers will be subject to oversight by the courts.[41]

Committee response

1.224 **The committee thanks the Minister for his response and had concluded its examination of the matter.**

Right to a fair hearing

Imposition of a burden of proof on the defendant

1.225 The committee has sought further information from the Minister for Employment about the practical operation of existing provisions in the Fair Work Act 2009 that are similar to the proposed new section 57 (in particular sections 361 and 783) and in particular whether any difficulties have arisen for defendants on whom a legal burden has been placed that have affected their right to a fair hearing under article 14(1) of the ICCPR.

Minister's Response

A recent example of the operation of section 361 of the Fair Work Act is provided by the case of *State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160*. One of the primary considerations facing the Federal Court when hearing this appeal was whether the state of Victoria had attempted to coerce a building industry contractor in contravention of section 343 of the Fair Work Act.

41 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 14-15.

In relation to a breach of section 343 of the Fair Work Act, section 361 of the Fair Work Act provides that:

> *(1) If*
>
> *(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and*
>
> *(b) taking that action for that reason or with that intent would constitute a contravention of this Part;*
>
> *it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.*

In this case, the defendant (the State of Victoria) sought to rebut the presumption in section 361 of the Fair Work Act through the testimony of Ms Catherine Cato as to her actual intentions as the person responsible for liaising with Eco Recyclers (the party it was alleged that Victoria was attempting to coerce). The State of Victoria was able to collect and present this evidence before the Court and, in considering the presumption in section 361 of the Fair Work Act in light of the evidence led by the defendant, Justices Buchanan and Griffiths found that:

> *"When the evidence is considered as a whole, it seems clear that there was no evidence of any direct statement by M~ Cato to the effect that she wished Eco to vary the Eco Agreement, much less that she set out to achieve that result by prevailing over Eco to achieve it.* [42]

Furthermore, the Full Bench's decision in this matter clarified the operation of the reverse onus by stating that Victoria was required to prove, on the balance of probabilities, the non-proscribed reason that it alleged was the operative reason for its actions rather than disprove the various alternative reasons that may be alleged. In particular, Justices Buchanan and Griffiths stated that:

> *"The primary judge also reasoned (at {243}-[246]) that Ms Cato must be taken to have intended Eco would take steps to vary the Eco Agreement because she should be taken to have intended the likely consequences of her actions. In our respectful view, this approach to the ascertainment of Ms Cato's motivation, and the attribution to her of an intent thereby to coerce Eco and its employees, was also erroneous. The search was/or Ms Cato's real or actual intent or*

42 *State of Victoria v Construction, Forestry, Mining and Energy Union [2013) FCAFC 160* at para 84.

> *intents...[t]he State bore the onus of displacing the presumption put in place by s 361 of the FW Act, but it was not required to displace an attributed intent derived from presumptions of a different kind. "*

This example has been provided to assist the Committee in its consideration of clause 57 because it can be expected that courts will take a similar approach in relation to clause 57. This will ensure that the clause will not operate unfairly or present practical difficulties for defendants.[43]

Committee response

1.226 **The committee thanks the Minister for his response and has concluded its consideration of this matter.**

Right against self-incrimination

Coercive evidence-gathering powers

1.227 The committee sought further information from the Minister for Employment about the use that has been made of the compulsory evidence gathering powers under the 2005 Act and the Fair Work Act 2009, as well as further explanation of how, in light of that experience and the passage of over a decade since the Royal Commission report, the abrogation of the privilege against self-incrimination is justifiable.

Minister's Response

In relation to examination notices issued under the *Building and Construction Industry Improvement Act 2005* and subsequently under the *Fair Work (Building Industry) Act 2012*, a total of 210 examinations have been conducted as at 27 February 2014. Of these:

- 102 examinations relate to 43 matters in which penalty proceedings have been instituted in a court;
- 5 examinations relate to a section 67 (ABC Commissioner to publish non-compliance) report published by the ABCC;
- 101 examinations relate to other closed matters (no court proceedings or section 67 report); and
- 2 examinations relate to one ongoing investigation.

The number of examinations per financial year are as follows:

43 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 15-16.

Year	No. of examinations
2005-2006	27
2006-2007	21
2007-2008	54
2008-2009	59
2009-2010	37
2010-2011	6
2011-2012	4
2012-2013	0
2013-2014	2
Total	**210**

Aside from the examination notice power, clause 77 provides that both Federal Safety Officers and ABC inspectors are able to require a person, by notice, to produce a record or document as part of their day-to-day investigative and compliance functions. This is consistent with the power of inspectors to require persons to produce records or documents contained in section 712 of the Fair Work Act. The use of evidence gathering powers by inspectors under both the Building and Construction Industry 2005 and the Fair Work Act are not reported as they are used as part of the day-to-day operations of the inspectorate.

As highlighted by the Committee, the Cole Royal Commission considered that the abrogation of the privilege against self-incrimination was necessary on the grounds that the regulator would otherwise not be able to adequately perform its functions due to the closed culture of the industry. Although more than a decade has passed since the final report of the Cole Royal Commission was tabled in Parliament in March 2003, the findings of the Cole Royal Commission are as relevant today as they were at the time of their initial publication. Industrial action still remains significantly higher than in other sectors of the Australia economy with the current rate of construction disputes at four times the all industries average as outlined in detail at pp3-4 of this submission.

The privilege against self-incrimination is clearly capable of limiting the information that may be available to inspectors or the regulator, compromising their ability to monitor and enforce compliance with the law. The gathering of information will be a key method of allowing inspectors to effectively investigate whether the Bill or a designated building law is being complied with and to collect evidence to bring

> enforcement proceedings. It means that all relevant information is available to them. If the ABCC is constrained in its ability to collect evidence, the entire regulatory scheme for the industry may be undermined. Finally, the approach adopted in the Bill is also consistent with the approach in section 713 of the Fair Work Act, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010*.[44]

Committee response

1.228 **The committee thanks the Minister for his response.**

1.229 However, the committee remains concerned based on the information provided as to whether the proposed measure is compatible with the right against self-incrimination. The Minister's response asserts, citing rates of industrial disputes, that the findings of the Cole Royal Commission with respect to the removal of the privilege against self-incrimination remain as relevant today. The committee notes, however, that the existence or non-existence of industrial dispute does not in and of itself provide a justification for the removal of the right against self-incrimination. Similarly, the committee further notes that the statistics provided in relation to the number of examinations alone do not support a finding that the limitation on the right against self-incrimination is or remains justified.

1.230 Notwithstanding such issues, the committee acknowledges that the availability of the right against self-incrimination would make it more difficult for the ABCC to monitor and enforce compliance with the domestic regime. The committee notes that there are limits to the right against self-incrimination in section 713 of the Fair Work Act, as well as the *Work Health and Safety Act 2011* and the *Competition and Consumer Act 2010.* However, the committee is nevertheless concerned that given broad scope of the coercion powers that the serious limitation on the right against self-incrimination may be disproportionate.

1.231 **The committee considers, in the absence of further information, that the proposed measures are likely to be incompatible with the right against self-incrimination.**

Civil penalty provisions

1.232 The committee considers that the pecuniary penalty for Grade A civil penalty violations, which carries a maximum penalty of $34,000 (or 200 penalty units) for an individual, might reasonably be characterised as criminal for the purposes of human rights law. As a result, proceedings for their enforcement would be required to comply with the guarantees that apply to criminal proceedings under articles 14 and

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44 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 16-17.

15 of the ICCPR, including the right to be presumed innocent, the right not to be tried or punished twice for the same offence and the right to the privilege against self-incrimination.

Minister's Response

The Government reiterates the view expressed in the Statement of Compatibility with Human Rights that the Bill's civil penalties should not be considered criminal penalties for the purposes of international human rights law. This position is based on an assessment of the penalties in the Bill against the criteria that have been promulgated by the Committee in its *Practice Note 2 (Interim)*.[45]

That said, it is the Government's view that the Bill complies with the requirements of articles 14 and 15 of the· ICCPR. In particular:

- All persons against whom a contravention of a civil penalty provision is alleged under the Bill are equal before the courts, and all persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal in the form of the Federal Court, the Federal Circuit Court, a Supreme Court of a State or Territory and a District Court, or Country Court, of a State.
- Anyone alleged to have contravened a provision of the Bill will be presumed innocent until proven guilty according to the law. While the Bill does impose a burden of proof on defendants in some situations, as discussed above it is the Government's view that this is an appropriate and proportionate measure in support of a legitimate objective.
- Persons alleged to have contravened a provision of the Bill will:
  - be informed promptly and in detail of the allegations against them in accordance with the applicable rules of court;
  - have adequate time and facilities to prepare their defence;
  - be tried without undue delay;
  - be tried in their presence and with legal representation if they so choose;
  - be free to examine, or have examined, witnesses and to bring witnesses of their own;

45 *Building and Construction Industry (Improving Productivity) Bill 2013*, Statement of Compatibility with Human Rights, pp 56-58.

- to have the assistance of an interpreter if he or she cannot speak the language used in the court; and
- not be compelled to testify against himself or herself or to confess guilt, subject to the abrogation of the privilege against self-incrimination discussed above that, in the government's view, is a proportionate measure in support of a legitimate objective.

- Anyone found by a court to have contravened a provision of the Bill will have the right to have their conviction appealed by a higher court.
- No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law. Clause 89 of the Bill provides that criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil remedy provision regardless of whether an order has been made under the bill in relation to the contravention. This is a standard provision of Commonwealth legislation, with comparable provisions existing in both the Fair Work Act and the *Work Health and Safety Act 2011*. This recognises the importance of criminal proceedings and criminal penalties in dissuading and sanctioning contraventions and ensures that criminal remedies are not precluded by earlier civil action.[46]

Committee response

1.233 **The committee thanks the Minister for his response and has concluded its consideration of the matter.**

46 See Appendix 1, Letter from Senator Eric Abetz, Minister for Employment, to Senator Dean Smith, dated 02/05/2014, pp 17-18.

Migration Legislation Amendment Bill (No. 1) 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 27 March 2014

Purpose

1.234 The Migration Legislation Amendment Bill (No.1) 2014 (the bill) consists of six schedules of amendments to the *Migration Act 1958 (Migration Act)* and the *Australian Citizenship Act 2007*. Key changes include:

- amending the existing limitations on applying for a further visa under sections 48, 48A and 501E of the Migration Act to include situations where the first visa applications was made on behalf of a non-citizen, even if the non-citizen did not know of, or did not understand, the nature of the application due to a mental impairment or because they were a minor (Schedule 1);
- providing that a bridging visa application is not an impediment to removal under subsection 198(5) (Schedule 2);
- extending debt recovery provisions for detention costs to all convicted people smugglers and illegal foreign fishers (Schedule 3);
- amending the role of authorised recipients for visa applicants; and the Migration Review Tribunal and Refugee Review Tribunal's obligation to give documents to authorised recipients (Schedule 4);
- providing access to, and use of, material and information obtained under a search warrant in migration and citizenship decisions (Schedule 5); and
- amending the procedural fairness provisions that apply to visa applicants (Schedule 6).[1]

Background

1.235 The committee reported on the bill in its *Seventh Report of the 44th Parliament.*

Committee view on compatibility

Non-refoulement obligations

Risk of refoulement –extension of statutory bar on further visa applications

1.236 The committee recommended that the bill be amended to provide for independent merits review of decisions to deny subsequent protection visa applications by minors and persons with a disability.

1 Explanatory memorandum (EM), p. 2.

Minister's Response

Migration Legislation Amendment Bill (No. 1) 2014 – Schedule 1

The Committee has raised a number of concerns in relation to the amendments included in this schedule.

Schedule 1 extends the current law

The amendments in Schedule 1 are not an extension of the provisions they seek to amend; rather, they aim to put the intended and longstanding operation of those provisions beyond doubt. This is in response to the Full Federal Court's decision in *MIBP v Kim* [2014] FCAFC 47, which is now the subject of an application for special leave to appeal in the High Court. This judgment was handed down since the Statement of Compatibility was prepared.

It has been successive governments' longstanding position, prior to the decision in *MIBP v Kim*, that the provisions in question operate to limit or prohibit further visa applications in circumstances where the applicant has previously been refused a visa. That is, provided the earlier visa application that was refused was in fact validly made, then the relevant application bar would apply as a matter of legal consequence.

At common law, a parent or a legal guardian has the power to make a decision on behalf of their child, provided the child does not have the capacity in their own right to make that decision. Whether a child has capacity depends upon the attainment of sufficient understanding and intelligence to understand fully what is proposed. In the migration context, an application for a visa can be made by a parent or legal guardian of a person under 18.

Similarly, where a person has an intellectual disability and is considered to not have the competence to make a decision, the discretion is vested in the person's legal guardian.

Therefore, if an application is made in the name of the child or the intellectually disabled person and signed by the child or the person's parent or guardian, it will be a valid application that is to be treated as having been made by the child or the person. So much was accepted by the Full Federal Court in *MIBP v Kim* in finding that the application made by the child applicant in that case was valid, notwithstanding that the Full Federal Court also found the applicant's lack of knowledge meant that she was not prevented from making another application in her own right.

"The committee therefore recommends that the bill be amended to provide for independent merits review of decisions to deny subsequent protection visa applications by minors and persons with a disability."

There is currently no general right of merits review of a determination that a Protection visa application is invalid because the applicant is affected by the application bar in section 48A.

> If a person is determined to be affected by the application bar in section 48A and disagrees with that determination, it is open to the person or their parent or guardian acting on their behalf to seek judicial review of that determination.
>
> There is no exercise of discretion. An officer under the Migration Act makes a finding regarding the facts and the application of s48A applies by operation of law.[2]

Committee response

1.237 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.238 However, the Minister's response simply outlines the current operation of section 48A and the current general absence of merits review. The committee's recommendation was made because the amendments have the effect of applying the statutory bar irrespective of whether or not the applicant knew of, or understood, the nature of the application due to a mental impairment or because they were a minor. In the committee's view, given the vulnerable nature of these groups, coupled with their unique circumstances, it is not possible to ensure protection from unlawful non-refoulement whilst applying a universal statutory bar. The bar will prohibit proper consideration of protection visa applications in circumstances where the previous visa application was unsatisfactory.

1.239 In particular, the committee notes that the statutory bar would apply even in circumstances where the previous application did not specifically address the protection claims of the child or person with a disability as they were included as a dependant family member.

1.240 **Accordingly, the committee considers that the amendments in Schedule 1 are incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.**

Risk of refoulement –amendments to prevent repeat bridging visa applications

1.241 The committee has requested the advice of the Minister for Immigration and Border Protection on the compatibility of Schedule 2 of the bill with Australia's non-refoulement obligations under the ICCPR and CAT.

Minister's response

> Non-refoulement obligations are provided for under the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT). An implied non-refoulement obligation is provided for under the International Covenant on Civil and Political Rights (ICCPR):

2 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, p. 2.

ICCPR article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

CAT article 3(1):

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The changes in Schedule 2 modify the existing text of subsection 198(5) of the Migration Act to ensure that an application for a bridging visa in certain circumstances by a person in detention does not prevent removal. By doing so, this also prevents the possibility of those individuals remaining in detention indefinitely where they have no further immigration claims or avenues of appeal, but refuse voluntary removal and cannot currently be involuntarily removed due to an ongoing Bridging visa application.

Schedule 2 also creates subsection 198(5A), which complements subsection 198(5) and prevents an officer from removing an unlawful non-citizen from Australia if the non-citizen has made a valid application for a Protection visa (even if the application was made outside the time allowed under subsection 195(1) for these applications) and either the grant of the visa has not been refused, or the application has not been finally determined.

The government ensures compliance with its non-refoulement obligations through legislation and administrative practice.

Where certain risk factors are present, the department conducts a pre-removal clearance prior to removal. A pre-removal clearance is a risk management tool to help ensure that Australia acts consistently with its non-refoulement obligations arising under:

- the Convention and Protocol relating to the Status of Refugees (Refugees Convention);
- the ICCPR and its Second Optional Protocol; and
- the CAT.

Primarily the pre-removal clearance is used to identify whether the person has any protection claims that have not already been fully assessed. For persons who have previously had protection claims assessed by the department, the pre-removal clearance process includes consideration of any change in relevant country information or any change in the person's circumstances prior to removal, to ensure that there are no protection obligations owed by Australia and to inform removal planning and case resolution.

> If it is found that an individual is affected by non-refoulement issues, that individual would not be removed from Australia. For example, if, as a result of that assessment, it is determined that not all of an individual's protection claims have been assessed, their case may be referred for my consideration under section 48B of the Migration Act.
>
> If it is determined that an individual has not previously made protection claims, the department would check whether the person has been made aware that they can pursue the department's protection processes. Even if the individual chooses not to submit their claims through the department's protection processes, an individual would not be removed from Australia.
>
> These processes are not impacted by the introduction of Schedule 2, and consequently do not affect Australia's non-refoulement obligations under the ICCPR and CAT.[3]

Committee response

1.242 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.243 The Minister's response confirms that the only protection against unlawful refoulement of individuals with valid protection claims who, for example, have not or have been unable to initiate a protection claim due to other provisions of the Migration Act are the administrative pre-removal clearances procedures of the department.

1.244 As the committee has consistently argued, such procedures are not sufficiently stringent to provide a thorough assessment of protection claims, and are not subject to 'independent, effective and impartial' review as required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT.

1.245 **Accordingly, the committee considers that the amendments in Schedule 2 are incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.**

Obligation to consider the best interests of the child

Extension of statutory bar on further visa applications

1.246 The committee requested 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, how the measures are:

3 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 7-8.

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

> A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.
>
> The proposed amendments will ensure that parents cannot exploit and use their children as a means of delaying their own departure from Australia following a visa refusal, by repeatedly making visa applications on behalf of their children.[4]

Committee response

1.247 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.248 The committee in its *Seventh Report of the 44th Parliament* noted that the statement of compatibility did not provide sufficient analysis to allow the committee's assessment of the compatibility of the measure. Accordingly, the committee sought more information from the minister. The committee is of the view that sufficient information and analysis has not been provided in the response.

1.249 The committee highlights the Attorney-General's Department's advice on how to prepare statements of compatibility where rights are limited:

> Where rights are limited, explain why it is thought that there is no incompatibility with the right engaged:
>
> a) Legitimate objective: Identify clearly the reasons which are relied upon to justify the limitation on the right. Where possible, provide empirical data that demonstrates that the objectives being sought are important.
>
> b) Reasonable, necessary and proportionate: Explain why it is considered that the limitation on the right is (i) necessary and (ii) within the range of reasonable means to achieve the objectives of the Bill/Legislative Instrument.

4 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, p. 3.

c) Cite the evidence that has been taken into account in making this assessment.[5]

1.250 The Minister's response has not provided this necessary information.

1.251 **Accordingly, based on the information provided, the committee considers that the measure is likely to be incompatible with the rights of children to have their best interests a primary consideration in all decisions affecting them.**

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

Failure to question the validity of prior visa application

1.252 The committee requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the right of the child to be heard in judicial and administrative proceedings and, particularly, whether the measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

The amendments in Schedule 1 are aimed at achieving the objectives as set out on page 1.

When sections 48, 48A and 501E were introduced into the *Migration Act 1958* (the Migration Act), the Parliament intended that they would be engaged in respect of a person in the migration zone if all of the following conditions are fulfilled:

- there was a visa application that was made;
- the application was valid; and
- the visa had been refused.

Whether or not a visa application that has been made is valid should be decided based on an assessment of the objectively determinable criteria that have been prescribed in the Migration Act and the *Migration Regulations 1994* (the Regulations), such as whether the application was made on a prescribed application form or whether the prescribed visa application charge has been paid. It was never intended to be based on a subjective inquiry into the applicant's state of mind or, in the case of a child, whether the child has capacity to decide whether to make the application, or knows the application is being made on their behalf.

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5 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 [accessed 8 July 2014].

> The proposed amendments in Schedule 1 would mean that a child would be prevented from making a further visa application in their own right (whether that further application relates to a Protection visa or some other visa). However, this does not mean that the child would be denied the right to be heard in a judicial or an administrative proceeding. In the case of a child who has personal protection claims, I am able to intervene under section 48B of the Migration Act to enable the person acting on the child's behalf to make a further Protection visa application so that the child's personal protection claims may be assessed and their best interests would be a primary consideration. In other cases where ministerial intervention is not available, the child may seek judicial review of the decision that the purported further application is invalid, if the child, or their parent or guardian, believes that decision is wrongly decided.
>
> In relation to the Committee's concern that the amendments create an assumption about the validity of the visa application made by the child without consideration of the child's age, relationship with the person who made the application on their behalf, or the extent to which the application is consistent with the wish of the child, I believe this concern is unfounded.
>
> Where doubt exists about whether the person making the application on behalf of the child is indeed the parent or the legal guardian of the child, my department's practice is to request evidence of the person's authority to make such an application; my department does not simply accept the application made on behalf of the child as valid without query when there is such a doubt. Further, it is standard in the visa application forms to request the signatures of all applicants who are 16 years of age or over (16 years being the age accepted by Australian courts, for example in the context of medical treatment, as the age when a child attains competence). Therefore, in circumstances where an older child is included in an application and that child has signed the application form acknowledging that they have read the application and confirm the information given therein, there is some assurance that the child is aware of and consents to being included in the visa application.[6]

Committee response

1.253 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.254 The committee notes that the objectives set out on page 1 are not necessarily legitimate objectives for the purpose of international human rights law. The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of

6 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 3-4.

why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility 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'.[7] 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.

1.255 Whilst the committee acknowledges the Minister's ability to intervene under section 48B, the committee notes that such decisions are non-compellable and non-reviewable. As the committee has consistently stated, such procedures are an insufficient safeguard to ensure that individuals are not-refouled in breach of Australia's non-refoulement obligations under the ICCPR and the CAT.

1.256 The committee considers that the Minister's response does not adequately address the committee's concern that the statutory bar relies on an assumption that the first application on behalf of the child is 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 regardless of the department's policy practices.

1.257 In terms of the relationship between the child and the applicant the response only considers circumstances where a decision maker has a doubt about the applicant being a parent or legal guardian. The committee further notes that the reliance on decision makers having doubts about an applicant before further checks are undertaken as to a person's authority to make an application on behalf of a child would appear inconsistent with obligations to ensure rigorous determination of the validity of a visa application before applying a blanket statutory bar.

1.258 In relation to the child's age the committee notes that the response only deals with the requirement for those aged 16 or over to sign the application. The primary obligation under the CRC is to support decision making by minors consistent with their maturity and capacity. The response gives no information as to any individual assessment of a child's maturity or capacity. Moreover, the committee does not consider procedures and policies that provide 'some assurance' that a child is aware of and consents to a visa application is sufficiently rigorous for maintaining Australia's non-refoulement obligations.

7 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 [accessed 8 July 2014].

1.259 **Accordingly, the committee considers that the measures in Schedule 1 are likely to be incompatible with the rights of the child to be heard in judicial and administrative proceedings**.

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

Requirement to support persons with a mental impairment to make an informed decision about lodging a visa application

1.260 The committee has requested the advice of the Minister for Immigration and Border Protection on the compatibility of Schedule 1 of the bill with the requirement to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Minister's response

The Committee has requested information about:

• whether the term 'mental impairment' includes both mental and intellectual impairment;

• how many cases involve visa applications made on behalf of persons with intellectual or mental impairment; and

• what procedures are in place for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making a decision in relation to a visa application, and the nature and the extent of any support necessary or provided to such persons.

'Mental impairment' as inserted in the proposed amendments is not defined. However, when read in their entirety, it is clear that the objective of the amendments is to ensure that a person who has been refused a visa while in Australia cannot make another application (for the same or a different visa), on the basis that they did not know about or understand the nature of the refused visa application that was made on their behalf. In this context, therefore, 'mental impairment' refers to a person's limited cognitive capacity or competence, to know and understand that they are making a visa application.

It is not possible to provide the number of cases involving applications made on behalf of persons with intellectual or mental impairment, without retrieving and physically examining all past applications. Whether or not an application is made by an intellectually or mentally impaired person – either by themselves or on their behalf – may not be something that can be easily ascertained at the time of application.

In the majority of cases my department might only become aware of the intellectual or mental disability of a visa applicant post a medical assessment for the purposes of their visa application.

> Given the positive identification of a person's intellectual or mental disability may not be possible until the conduct of health checks, it may not be possible for my department to provide support to an intellectually or mentally disabled person in order that they may make an informed decision about making the application. It is also difficult for my department to provide support to such a person in making a decision on whether to continue an application already made, as such a person is almost invariably a dependent applicant in an application made by a responsible family member or guardian. **It is reasonable and appropriate to allow the responsible family member or guardian to exercise that responsibility, including making decisions about visa applications for the intellectually or mentally disabled person, without interference from my department.**
>
> As for the Committee's comment that persons with intellectual and mental impairment may be particularly vulnerable as asylum seekers and should be supported in making decisions about the lodgement of visa applications, including support to assist their understanding of the technical nature and the consequences of such an action, I can confirm that there is support in the form of government funded Immigration Advice and Application Assistance Scheme (IAAAS). Although the government has recently decided to cease the provision of IAAAS to asylum seekers who arrived in Australia illegally, many IAAAS providers continue to offer immigration assistance on a pro bono basis. In addition, the government is intending to assist a small number of vulnerable people with their primary application. The availability of IAAAS to asylum seekers who arrived in Australia legally remains unaffected. Applicants may arrange private application assistance from a registered migration agent. Applicants who have arrived lawfully and are disadvantaged and face financial hardship may be eligible for assistance with their primary application under the IAAAS.
>
> Whilst no specific government funded support is available to intellectually or mentally disabled persons who are not asylum seekers, to the extent that support is available to such a person through their responsible family member or guardian and the department respects and allows for the exercise of this responsibility without unwarranted interference, there is no inconsistency with Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD).[8] .[emphasis added]

Committee response

1.261 **The committee thanks the Minister for Immigration and Border Protection for his response.**

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8 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 4-5.

1.262 The committee notes that the Minister's response:

- highlights the challenges for the department in identifying individual visa applicants who have a mental impairment and appropriately managing and assessing their claims; and
- indicates that limited support is available for individuals with a mental impairment to make their protection visa application.

1.263 The committee notes that Australia has particular obligations under article 12 of the CRPD. In particular, the Committee on the Rights of Persons with Disabilities has emphasised the responsibility of States parties to move away from substitute decision-making and to replace it with 'supported decision-making, which respects the person's autonomy, will and preferences'. The committee notes specifically that the portion of the response highlighted in bold would seem generally inconsistent with these obligations.

1.264 As the committee noted in its initial consideration of the bill, if a person with an intellectual or mental impairment were not provided with any support required to make an informed decision about lodging a visa application and was then barred from making a subsequent visa application because an application had been lodged 'on behalf' of the person but without the participation of the person in that decision-making process, this would be incompatible with Australia's international legal obligations.

1.265 **Accordingly, the committee considers that the measures in Schedule 1 are 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.**

Right to equality and non-discrimination

Extension of statutory bar on further visa applications

1.266 The committee requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

> The amendments in Schedule 1 are compatible with the right to equality and non-discrimination. To the extent that the amendments will restore the intended operation of sections 48, 48A and 501E so that they will apply universally and equally to every noncitizen in the migration zone who has had a validly made visa application refused while in the migration zone, the proposed amendments are compatible with the right to equality before the law and non-discrimination.

> Indeed, as I stated in the statement of compatibility, even if it could be said that the amendments give rise to a perception of discrimination against people who are mentally impaired, it is a perception only; the effect of the amendments are not inconsistent with Article 5(1) of the CRPD.
>
> As there is no discrimination involved, the issue of legitimate objective, rational connection and proportionality are not relevant.[9]

Committee response

1.267 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.268 The committee notes that it is universally accepted that discrimination may be direct or indirect. The Attorney-General's Department defines indirect discrimination as:

> Occur[ing] when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.[10]

1.269 The committee considers, based on this understanding, that there is not merely a perception of discrimination but that the measure *is* indirectly discriminatory.

1.270 The measure extends the existing statutory bar to explicitly cover persons with a mental impairment and children. Accordingly, it is likely that persons with a disability will be disproportionately affected by this measure. Along with minors, people with a 'mental impairment' are the only group that will be denied the right to make a visa application if an application was made on their behalf, even if they did not authorise, contribute to or consent to the application.

1.271 **Accordingly, the committee considers that the measures in Schedule 1 are likely to be incompatible with the rights to equality and non-discrimination.**

Extension of liability for detention and removal costs

1.272 The committee has requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

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9 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 9-10.

10 http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Rightsofequalityandnondiscrimination.aspx.

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

1.273 The committee also noted its previous comments that the differential treatment of persons in detention (whether or not on a reasonable or objective basis), may amount to a limitation on the right to humane treatment in detention.

1.274 The committee has therefore also requested the Minister's advice as to whether Schedule 3 of the bill is compatible with the right to humane treatment in detention.

Minister's response

Article 26 of the ICCPR provides:

> *[a] all persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The United Nations Human Rights Committee has analysed Article 26 of the ICCPR in its General Comment 18 (HRI/GEN/1/Rev 1, page 26), and stated:

> *non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic general principle relating to the protection of human rights… Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The issue here is whether a law that imposed a liability to pay the costs of detention on, and only on, persons convicted of people smuggling or illegal foreign fishing, would amount to discrimination on the basis of 'other status'.

The equivalent article in the European Convention on Human Rights (Article 14) also prohibits discrimination on virtually identical grounds to those listed in Article 26 of the ICCPR, including 'other status'. In Kjeldsen v Denmark (1976) 1 EHRR 711, the European Court of Human Rights held that 'status' means a personal characteristic by which persons or groups of persons are distinguishable from each other. In R (Clift) v Home Secretary [2007] 1 AC 484, the House of Lords held that the claimant's classification as a prisoner, by reference to the length of his or her sentence, and which resulted in a difference of treatment, was not a 'status' within the

meaning of Article 14: 'The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.'

The legislation is not concerned with the personal characteristic or status of 'people smuggler' or 'illegal foreign fishers' but with the commission of an offence by a people smuggler or foreign fishers against a law in force in Australia. That would not be treating detainees differently on the basis of 'other status' within the meaning of Article 26 of the ICCPR. The real reason for differential treatment would not be a personal characteristic of the person concerned, but what they have done.

"The committee therefore requests the Minister's advice as to whether Schedule 3 of the bill is compatible with the right to humane treatment in detention"

Article 7 of the ICCPR provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 16(1) of the CAT provides that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 14 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The effect of the measures introduced by these amendments is to ensure that liability to pay the costs of detention, transportation and removal may be enforced even after a person has served the whole or part of the sentence imposed upon them for engaging in people smuggling or illegal fishing activities. The measures extend the liability to pay these costs, which is already enforceable under section 262 of the Migration Act, to people who are or have been detained under section 189 of the Migration Act, including because of subsection 250(2), or have been granted a Criminal Justice Stay visa or any other class of visa.

While differential treatment of persons in detention may in some cases amount to a limitation on the right to humane treatment in detention, to the extent that extending liability in these amendments amounts to differential treatment of persons in detention, it does not also amount to a limitation on the right to humane treatment in detention. All persons in immigration detention, including people convicted of people smuggling or illegal fishing activities who are detained under section 250 of the

> Migration Act, are treated with respect for human dignity and given fair and reasonable treatment within the law.[11]

Committee response

1.275 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.276 The committee's initial analysis, whilst not explicit on this point, was not primarily directed at discrimination on the basis of other status but discrimination on the basis of race or ethnicity. The committee refers to its analysis above in relation to indirect discrimination and specifically notes that persons convicted of people smuggling or illegal foreign fishing in Australia may almost exclusively come from one nation.

1.277 The committee also notes that the analysis in the response that the differential treatment of different categories of prisoner cannot in principle amount to differentiation based on 'other status' was based on case law[12] that was effectively overturned by the European Court of Human Rights.[13]

1.278 **Accordingly, the committee seeks the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination on the grounds of race or ethnicity.**

Right to a fair trial and fair hearing rights

Amendments affecting authorised recipients for visa applicants

1.279 The committee has requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 4 of the bill with the right to a fair trial and fair hearing rights and, in particular, whether these measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

> The Committee has sought clarification and advice about the compatibility of Schedule 4 to the right to a fair trial and fair hearing as provided for in Article 14 of the ICCPR. This stems from the Committee's concern that the proposed amendments in Schedule 4 appear to allow the department to contact a visa applicant directly and circumvent the applicant's solicitor or a migration agent (as the applicant's authorised recipient), and that this

11 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 9-10.

12 *R (Clift) v Home Secretary* [2007] 1 AC 484.

13 *Clift v United Kingdom* [2010] ECHR 1106 (13 July 2010).

would diminish the ability of the solicitor or the migration agent to effectively represent the visa applicant and adversely affect the applicant's right to a fair trial or a fair hearing.

The amendments in Schedule 4 do not engage any rights stated in the seven core human rights treaties. The role of an authorised recipient is separate to, and distinct from, the role of a solicitor or a migration agent. Whereas a solicitor or a migration agent can act for and on behalf of an applicant on matters that fall within the scope of their authority, the role of an authorised recipient is simply to receive documents on behalf of the applicant. Put differently, a solicitor or a migration agent steps into the shoes of the applicant and is authorised to deal directly with the department, but an authorised recipient acts only as a 'post box' of the applicant. An authorised recipient may, but need not, be a solicitor or a migration agent.

Therefore, in seeking to clarify the role of an authorised recipient, the proposed amendments in Schedule 4 do not in any way affect or diminish the authority of a solicitor or a migration agent to act on behalf of an applicant. Whilst the amendments do clarify that for a 'mere authorised recipient' there is no longer a need to inform them of any direct oral communications made with the applicant (in view of the fact that their role is confined to only receiving documents), for an authorised recipient who is also the applicant's solicitor or migration agent, consistent with normal practice, the department will continue to deal with the solicitor or the migration agent instead of the applicant. To avoid doubt, this means that the solicitor or the migration agent will receive all documents from my department on behalf of the applicant (in their capacity as the applicant's authorised recipient), and will receive oral communications from my department in respect of the applicant (in their capacity as the applicant's solicitor or migration agent).

In so far as the amendments clarifying, for example, that the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT) is obliged to give documents to the review applicant's authorised recipient even when the review application is subsequently found by the relevant Tribunal not to have been validly made, and clarifying that an authorised recipient may not unilaterally vary or withdraw the notice of their appointment other than to update their own address, the amendments should not raise any human rights concerns. The former will simply ensure that a (purported) review applicant's express wish that documents be given to their appointed authorised recipient is not vitiated by technicality (i.e. a finding that the review application was not properly made) and can be lawfully complied with by the MRT or the RRT. The latter will ensure that only the applicant can vary or withdraw the notice appointing the authorised recipient, thus preventing an authorised recipient from abandoning their role by unilaterally withdrawing themselves.

> The proposed amendments in Schedule 4 are technical amendments aimed only at clarifying the role of an authorised recipient, and for this reason do not engage or otherwise affect any of the rights stated in the seven core human rights treaties.[14]

Committee response

1.280 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this issue.**

Removal of common law procedural fairness requirements

1.281 The committee has sought the advice of the Minister for Immigration and Border Protection on the compatibility of Schedule 6 of the bill with the right to a fair trial and fair hearing rights and, in particular, whether the measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

Minister's response

> Part 1 of Schedule 6 proposes to remove common law procedural requirements for 'offshore' visa applications and bring offshore visa applications within the scope of statutory procedural fairness requirements under section 57 of the Migration Act. An offshore visa application is one that can only be granted when the applicant is outside the migration zone and in relation to which there is no right of merits review under Part 5 or 7 of the Migration Act.
>
> The Committee has queried my assessment that the proposed amendment is compatible with Article 13 of the ICCPR. Upon reflection, I do not believe that Article 13 of the ICCPR is engaged by this amendment. The amendment is in connection with applications for visas that can only be granted when the applicant is offshore, so the applicant cannot be lawfully onshore at the time of grant. Therefore, questions of expulsion of those lawfully onshore do not arise.
>
> The objective of the proposed amendment is to provide for a consistent procedural fairness framework for visa decision making. Having both statutory procedural fairness and common law procedural fairness apply depending on the type and the nature of the visa application made, increases the risk of decisions being made that are affected by a jurisdictional error due to my delegate misconstruing the character of the information in question and applying the procedural fairness requirements incorrectly.

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14 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 11-12.

The Committee has expressed the view that the common law test of requiring adverse information that is 'relevant, credible and significant' to be put to an applicant is not more difficult or onerous to apply compared to the standards set out in section 57 of the Migration Act. It could be argued that the common law test is both more onerous and conceptually more difficult for delegates to grasp and apply correctly.

For example, under section 57 it is clear that adverse information needs to be put to the applicant for comment only if, inter alia, it would be the reason, or part of the reason, for refusing to grant the visa, and most delegates instinctively understand whether or not they would be relying on the adverse information as the reason or part of the reason for refusing the visa application. Under the common law, however, my delegate is obliged to put any adverse information that is 'relevant, credible and significant' to the applicant, even in circumstances where my delegate does not intend to rely on that information as the basis for making a decision to refuse. This creates administrative burden for no apparent gain.

In addition, the concept of 'relevant, credible and significant' is very fluid and it is not always obvious whether a piece of adverse information is relevant, credible and significant. The courts have explained that 'relevant, credible and significant' information includes any issue that is critical to the decision but that is not apparent from the nature of the decision or the terms of the Migration Act and the Regulations, and any adverse conclusion that would not obviously be open on the known material. Whilst this description may seem clear, in practice many delegates struggle with this, particularly in situations where the information in question does not obviously fall within scope.

I see significant benefit in removing the distinction between 'onshore' and 'offshore' applications in so far as the application of procedural fairness is concerned. Having a single and clear set of procedural fairness requirements that is based on legislation provides greater certainty and clarity for delegates and applicants alike, promotes efficiency and consistency in the application of procedural fairness, and reduces the risk of decisions being made that are potentially affected by a jurisdictional error. This is a legitimate objective to which the proposed amendment is rationally connected.

The amendment does not purport to remove procedural fairness requirements from 'offshore' applications altogether in the way that subsection 57(3) of the Migration Act was thought to have done prior to the High Court's decision in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23. All the amendment seeks to do is to bring 'offshore' applications in line with 'onshore' applications so that all visa applications will be subject to the same statutory procedural fairness requirements. To that extent, the proposed amendment is proportionate

to the stated objective and is compatible with the right to a fair trial and fair hearing.[15]

Committee response

1.282 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its consideration of the matter. Nonetheless, the committee is concerned that the approach adopted to harmonise the procedural fairness standard in the consideration of onshore and offshore applications has been to reduce the standard of fairness to a lower standard in all applications.**

Right to privacy

Disclosure of information obtained under search warrants

1.283 The committee has requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 5 of the bill with the right to privacy and in particular whether the measures in Schedule 5 are reasonable and proportionate.

Minister's response

Schedule 5 of the Bill proposes to use the *Crimes Act 1914* (Crimes Act) search warrant material and information that is already in the possession of the Commonwealth to assess, and where appropriate, reassess, a person's visa or citizenship application. As noted in the statement of compatibility, the Schedule 5 amendments engage the right to privacy outlined in Article 17 of the ICCPR, however to the extent that these amendments limit this right, those limitations are reasonable, necessary and proportionate.

The Committee has provided comments regarding how it is 'unclear how decision making will be enhanced by the disclosure of information obtained under coercive powers'. As previously noted in the statement of compatibility, under the Commonwealth Fraud Control Guidelines, the department is currently responsible for the conduct of criminal investigations. Should a search warrant need to be executed in support of a criminal investigation, the department seeks agency assistance from the Australian Federal Police (AFP). Search warrant material and information gained under the search warrant is then transferred to the custody and control of departmental investigators under subsection 3ZQU(1) of the Crimes Act.

While the Crimes Act warrant material and/or information is in the custody or control of the department, without the proposed amendments in this Bill (section 51A(3) of the *Australian Citizenship Act 2007* or proposed

15 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 15-16.

section 488AA(3) of the Migration Act, the material and/or information cannot be used in relation to administrative decision-making.

This use of material and/or information from Crimes Act search warrants was expected, if legislated, to be used by other Commonwealth agencies as prescribed by subsection 3ZQU(2), (3) and (4) of the Crimes Act. This subsection provides that warrant material and/or information seized may be used or provided for any use that is required or authorised by or under another law of the Commonwealth. In order to maintain and enhance the integrity of the migration and citizenship programme, the government is of the view that search warrant material and/or information in the custody or control of my department should also be able to be used in administrative decisions made under the Migration Act and Regulations decision making. Should the information be relevant to a decision as outlined in the proposed amendments, it is both reasonable and proportionate to achieving the objective of enhancing the integrity of the migration and citizenship programmes.

There may be other situations where search warrant material and/or information collected, for example by the AFP without the involvement of the department, is disclosed to the department as the material and/or information is relevant to decisions outlined in the proposed amendments. As the AFP investigates serious and/or complex crime against Commonwealth laws, its revenue, expenditure and property, which can include both internal fraud and external fraud committed in relation to Commonwealth programmes, it is both reasonable and proportionate for the AFP or a Commonwealth officer to disclose search warrant material and/or information to the department for decision-making. It is also pertinent that no agency or officer can be compelled to provide search warrant material and/or information to my department.

The proposed amendments under section 51A(3) of the *Australian Citizenship Act 2007* and section 488AA(3) of the Migration Act do not alter the processes in which decisions are made and have no effect on existing procedural fairness requirements or merits review mechanisms attached to any decisions.

The government takes the matter of fraud extremely seriously and recognises that the threat of fraud is becoming more complex and the department needs the requisite tools to respond to these threats. On this basis, the government is confident that to the extent that it may impact on the right to privacy, it is both reasonable and proportionate in achieving the objective of combating fraud for search warrant material and/or information that is already in the possession of the Commonwealth to be

used to assess, and where appropriate, reassess a person's visa or citizenship application.[16]

Committee response

1.284 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its consideration of this issue.**

16 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 13-14.

Trade Support Loans Act 2014

Portfolio: Industry
Introduced: House of Representatives, 4 June 2014

Purpose

1.285 The *Trade Support Loans Act 2014* establishes the Trade Support Loans Program to provide concessional, income-contingent loans of up to $20 000 over four years to certain apprentices. The loans will be repayable when the individual's income reaches the Higher Education Loan Program repayment threshold.

Background

1.286 The committee reported on the bill in its *Ninth Report of the 44th Parliament.*

1.287 The Trade Support Loans Bill 2014 passed both Houses of Parliament on 15 July 2014 and is now the *Trade Support Loans Act 2014*.

Committee view on compatibility

Right to education

Support for apprentices through the institution of concessional income contingent loan scheme

1.288 The committee has sought the advice of the Minister for Industry as to the compatibility of the bill with the right to education.

Minister's Response

> The availability of the Trade Support Loans will ensure that regardless of socioeconomic status, regional location or cultural background, apprentices in a priority occupation will have access to financial support designed to help them remain in their apprenticeship and complete their qualification. It is therefore my view that the Bill is compatible with the right to education.[1]

Committee response

1.289 The committee thanks the Minister for Industry for his response.

1.290 However, the committee notes that the response does not provide an assessment of whether the Trade Support Loan Scheme offers equivalent protection of human rights to the 'Tools for Your Trade Program' which it was intended to replace.

1 See Appendix 1, Letter from the Hon Ian Macfarlane MP, Minister for Industry, to Senator Dean Smith, dated 04/08/2014, p. 1.

1.291 The committee therefore seeks the advice of the Minister for Industry as to whether the Trade Support Loans Scheme offers equivalent protection of the right to education as the 'Tools for Your Trade Program'.

Rights to equality and non-discrimination

Availability of loans to qualifying apprenticeships on the trade support loans priority list

1.292 The committee has sought the advice of the Minister for Industry as to whether the qualification requirement for the loan through the TSL Priority List is compatible with the rights to equality and non-discrimination.

Minister's Response

> The qualification requirement of the Trade Support Loans programme ensures that anyone in an apprenticeship in a priority occupation who is an Australian resident and resides in Australia and has a tax file number can apply for a loan. These requirements are not discriminatory and do not limit access based on race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. These requirements ensure the objective of increasing skilled workers in priority occupations through income contingent loans is achieved and repayment of the loans is maximised to meet the Commonwealth's budgetary requirements. The qualification requirement is, in my view, compatible with the rights to equality and non-discrimination.[2]

Committee response

1.293 The committee thanks the Minister for Industry for his response.

1.294 The committee notes that discrimination may be direct or indirect. The Attorney-General's Department defines indirect discrimination as:

> Occur[ing] when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.[3]

1.295 In the absence of information about appropriate gender-responsive guidelines, policies or procedures the committee considers that the operation of the Trade Support Loan (TSL) Priority List, has the potential to, in practice, indirectly discriminate against women. This is because the process of listing particular skills or occupations may be neutral on its face but in practice may limit access to the scheme

2 See Appendix 1, Letter from the Hon Ian Macfarlane MP, Minister for Industry, to Senator Dean Smith, dated 04/08/2014, pp 1-2.

3 Attorney-General's Department, Guidance Sheet – rights of equality and non-discrimination, http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Rightsofequalityandnondiscrimination.aspx (Accessed 8 August 2014).

by women given that issues of occupational segregation continue to persist across a number of industries in Australia.[4]

1.296 The committee therefore requests the advice of the Minister for Industry as to whether, in establishing and maintaining the Trade Support Loan (TSL) priority list, there will be appropriate policy safeguards or measures to ensure that the list does not, in practice, indirectly discriminate against women.

Right to privacy

Powers to obtain certain information

1.297 The committee therefore seeks the advice of the Minister for Industry as to whether the powers to obtain certain information are compatible with the right to privacy and particularly:

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

Minister's Response

> The powers to obtain certain information ensures that anyone applying for Trade Support Loans meets the qualification and payability criteria and anyone receiving payments continues to meet the criteria and is able to make repayment through the taxation system once their income reaches the minimum repayment threshold. These powers do not create unlawful or arbitrary interferences with a person's privacy, family, home and correspondence, and they do not create unlawful attacks on a person's reputation. The information collected for the purposes outlined above is not used for anything other than for administering the Trade Support Loans programme, and the information collected is collected, used, disclosed and stored in line with the *Privacy Act 1988* and the Australian Privacy Principles. These powers are, in my view, compatible with the right to privacy.[5]

4 See, for example, NSW Government Family and Community Services, 'Occupational Segregation' http://www.women.nsw.gov.au/women_in_nsw/current_report/work_and_financial_security/topic_4_workforce_segregation/4.1_occupational_segregation (accessed 19 August 2014).

5 See Appendix 1, Letter from the Hon Ian Macfarlane MP, Minister for Industry, to Senator Dean Smith, dated 04/08/2014, p. 2.

Committee response

1.298 The committee thanks the Minister for Industry for his response and has concluded its examination of this issue.

Right to a fair trial and fair hearing rights

Creation of new offences with respect to obtaining information

1.299 The committee has sought the advice of the Minister for Industry as to whether the new offences are compatible the right to a fair trial and fair hearing rights, and particularly:

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

Minister's Response

> The new offences provided for in the Bill are designed to ensure that apprentices only receive Trade Support Loan payments if they are undertaking training in priority occupations in the manner set out in the *Trade Support Loans Act 2014*. The offences also ensure the apprentice can be followed through the taxation system so that they begin to pay back their loan when their income reaches the minimum income threshold. This ensures the Commonwealth's budgetary priorities are met, and that the programme achieves its goal of increased supply of skills in priority occupation areas. The offences do not deny the apprentice's right to a fair and public criminal trial or a fair and public hearing in civil proceedings which include that all persons are equal before courts and tribunals and the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. The new offences are, in my view, compatible with the right to a fair trial and fair hearing rights.[6]

Committee response

1.300 The committee thanks the Minister for Industry for his response and has concluded its examination of this issue.

6 Ibid, p. 2.

Commonwealth Cleaning Services Guidelines Repeal Instrument 2014 [F2014L00861]

Portfolio: Employment
Authorising instrument: Financial Management and Accountability Regulations 2007

Purpose

1.301 The Commonwealth Cleaning Services Guidelines Repeal Instrument 2014 repeals the Commonwealth Cleaning Services Guidelines 2012 [F2013L00435] (guidelines).

1.302 The guidelines required that Australian Government agencies only to enter into a contract for cleaning services in defined locations where a tenderer agreed to certain mandatory requirements relating the pay and working conditions of their employees.

Committee view on compatibility

1.303 The committee notes the Minister for Employment is not required to provide a statement of compatibility in relation to this repeal instrument. However, the committee notes that it is nevertheless obliged to provide an assessment as to the compatibility of the instrument with human rights and that this includes an assessment of the potential impact of the repeal. The committee therefore considers that where a legislative instrument engages human rights (including by repealing measures that appear to promote human rights) it is good practice for an assessment to be provided as to human rights compatibility. It will be difficult for the committee to determine that a legislative instrument is compatible with human rights if information has not been provided by the relevant Minister or rule-maker. The committee notes that the Commonwealth Cleaning Services Guidelines were accompanied by a statement of compatibility contained in the explanatory statement.

1.304 The committee therefore requests that the Minister for Employment prepare an assessment of the compatibility for the instrument with human rights with particular reference to the specific questions outlined below.

Right to an adequate standard of living

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

1.306 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 retrogressive steps that might affect living standards; and to 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.

1.307 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.

Repeal of Commonwealth Cleaning Services Guidelines

1.308 As noted above, the instrument repeals the Commonwealth Cleaning Services Guidelines 2012. The guidelines required Australian Government agencies only to enter into a contract for cleaning services in defined locations where a tenderer or cleaning contractor agreed to certain mandatory requirements. These mandatory requirements provided that cleaning contractors would need to pay employees no less than the applicable minimum rate of pay prescribed in the guidelines.

1.309 The committee notes that under international human rights law governments are required to respect, protect and fulfil human rights. The obligation to respect human rights requires government to not interfere with human rights. The obligation to protect requires government to take measures to prevent others, including companies, from interfering with human rights. The obligation to fulfil human rights requires government to take positive measures to fully realise human rights. The committee is of the view that, in respect to the supply of services to government, the inclusion of contractual requirements to ensure certain pay standards are met by contractors in relation to their employees may have a significant role in protecting and fulfilling the right to an adequate standard of living.

1.310 The committee therefore considers that the legislation engages the right to an adequate standard of living. The committee notes that as current government cleaning contracts subject to the guidelines expire, there is likely to be a reduction in the pay of cleaners working under government contracts. For example, a cleaning services employee (level 1) working in Canberra CBD under the guidelines would receive a minimum of $21.17 per hour. By contrast the minimum wage for a cleaning service employee (level 1) under the modern award is $18.01 per hour.[1] This means that once the current government contract subject to the guidelines expires, this

1 See, Commonwealth Cleaning Services Guidelines 2012 [F2013L00435]; Cleaning Services Modern Award 2010, https://extranet.deewr.gov.au/ccmsv8/CiLiteKnowledgeDetailsFrameset.htm?KNOWLEDGE_REF=216316&TYPE=X&ID=188878748683891658889912894&DOCUMENT_REF=394810&DOCUMENT_TITLE=Cleaning%20Services%20Award%202010&DOCUMENT_CODE=MA000022 (accessed 13 August 2014).

cleaner may be $3.16 an hour worse off (if there is no enterprise agreement in place which provides for wages equal to or better than the rate in the guidelines). The committee is therefore concerned that the repeal of the Commonwealth Cleaning Service Guidelines is a retrogressive measure for the purpose of international human rights law.

1.311 The committee notes that where a limitation on a right or a retrogressive measure is proposed, a clear justification for the measure be provided. This involves an identification of the objective being pursued by the measure, whether there is a rational connection between the measure and the achievement of the objective, and whether overall the measure is a reasonable and proportionate measure for the achievement of the goal. This assessment should also include consideration of whether other less restrictive measures would have achieved the same objective.

1.312 The committee considers that there are serious complexities in relation to the wages of low-paid or vulnerable employees working in sub-contracted industries. The committee notes that in the context of outsourcing or contracting for commercial property services the pay cleaners receive may not merely be a function of the direct employer-employee relationship. This is because if contracts for building services were to be awarded on cheapest price alone then this may mean that cleaning contractor companies who offer higher wages to employees may be considered less competitive than contractors who pay at or below award rates of pay. That is, the pressures on cleaning contractors to offer services to clients including government agencies at the lowest cost possible may have a negative impact on the wages of their employees. The committee notes that government procurement, contracting and assistance processes have also been used by governments internationally to assist in the protection and fulfilment of an adequate standard of living.[2] As noted above, the committee is of the view that the inclusion of contractual requirements as to pay and working conditions of employees may have a significant role in protecting and fulfilling the right to an adequate standard of living.

1.313 The committee therefore requests the advice of the Minister for Employment as to whether the repeal of the guidelines is compatible with the right to an adequate standard of living, 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**

2 See, for example, United State Department of Labor Government Contracts http://www.dol.gov/dol/topic/wages/govtcontracts.htm (accessed 13 August 2014); New York City Comptroller, Prevailing Wage http://comptroller.nyc.gov/general-information/prevailing-wage/ (accessed 13 August 2014).

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

Right to just and favourable conditions of work

1.314 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).[3]

1.315 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of States 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.

1.316 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;
- 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.

1.317 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.

Repeal of Commonwealth Cleaning Services Guidelines

1.318 As noted above, the instrument repeals the Commonwealth Cleaning Services Guidelines 2012. The committee considers that the repeal of the guidelines is likely to engage the right to just and safe conditions at work because the guidelines mandated a range of employment conditions.

1.319 The committee therefore requests the advice of the Minister for Employment as to whether the repeal of the guidelines is compatible with the right to just and favourable conditions of work, particularly:

3 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).

- **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

1.320 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and articles 2 and article 7 of the International Covenant on Economic Social and Cultural Rights. These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.321 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that results in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[4]

1.322 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.323 Articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) further describes the content of these rights and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

Repeal of Commonwealth Cleaning Services Guidelines

1.324 As noted above, the instrument repeals the Commonwealth Cleaning Services Guidelines 2012.

1.325 The committee notes that people employed in the cleaning industry are more likely to be from non-English speaking backgrounds. In this context the committee considers that the measure may engage the rights to equality and non-discrimination. This is because, although neural on its fact, the repeal of the

4 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.

guidelines may have disproportionate negative impacts on people from non-English speaking backgrounds (indirect discrimination).

1.326 The committee therefore requests the advice of the Minister for Employment as to whether the repeal of the guidelines is compatible with the rights to equality and non-discrimination.

Lodgement of Private Health Insurance Information in Accordance with the Private Health Insurance Act 2007 - June 2014 [F2014L00869]

Portfolio: Health
Authorising instrument: Private Health Insurance Act 2007

Purpose

1.327 This instrument details the information required to be reported to the Commissioner of Taxation by the Chief Executive of Medicare about persons who were members of complying private health insurance funds each financial year.

Committee view on compatibility

Right to privacy

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

1.329 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.

Disclosure of personal information

1.330 The statement of compatibility sets out that:

> This legislative instrument does not engage any of the applicable rights or freedoms. It simply provides guidance on the private health insurance information required to be reported to the ATO and the period within which it must be lodged.[1]

1.331 The committee notes that the information that is required to be reported is personal information about individuals and as such that the right to privacy is engaged. In light of the legislative framework the committee considers that any limitation on the right to privacy is reasonable, necessary and proportionate.

1.332 The committee recommends that statements of compatibility on similar measures in the future provide an analysis of the compatibility of the measure with the right to privacy.

1 Explanatory Statement, p. 3.

Social Security (Administration) (Declared income management areas - Ceduna and Surrounding Region) Determination 2014 [F2014L00777]

Portfolio: Social Services

Authorising legislation: Social Security (Administration) Act 1999

Last day to disallow: 1 September 2014 (Senate)

Purpose

1.333 The Social Security (Administration) (Declared income management areas - Ceduna and Surrounding Region) Determination 2014 seeks to establish an income management site within Ceduna and the Surrounding Region in South Australia.

1.334 Income management in the Ceduna and Surrounding Region will follow the same model that was introduced into five sites across Australia on 1 July 2012 as part of the Government's *Building Australia's Future Workforce* (BAFW) package, and later expanded into the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands of South Australia and the Ngaanyatjarra (Ng) Lands and Laverton in Western Australia.

1.335 Income management will apply to vulnerable families and individuals in the Ceduna and Surrounding Region, including:

- people referred for income management by State child protection authorities, where they assess that a child is at risk (the child protection measure);
- people classified as vulnerable welfare payment recipients, including those vulnerable to financial hardship, economic abuse or financial exploitation and homelessness/risk of homelessness, and young people on the unreasonable to live at home rate of payment, or those leaving custody and receiving a crisis payment; and
- people who volunteer for income management (voluntary income management).

Background

1.336 The committee has previously held an inquiry into the Stronger Futures in the Northern Territory Bill 2012 and related legislation,[1] and is currently commencing a new examination into the legislation. The committee's comments draw on its analysis in its earlier report.

1 PJCHR, *Stronger Futures in the Northern Territory Act 2012 and related legislation*, Eleventh Report of 2013, June 2013.

Committee view on compatibility

The rights of equality and non-discrimination

1.337 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). In addition the rights to equality and non-discrimination are protected by article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.338 These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.339 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that results in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[2]

1.340 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.341 Articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further describes the content of these rights and the specific elements that States parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

Racial discrimination

1.342 The statement of compatibility identifies the importance of the rights of equality and non-discrimination, as encompassed within the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It outlines the factors that were used to assess whether income management measures should be applied to the region, specifically regarding:

> …unemployment levels, youth unemployment, skills gaps, educational achievement, the number of people receiving welfare payments, and the length of time people have been on income support payments.[3]

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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 Explanatory memorandum (EM), p. 9.

1.343 It states that these criteria are reasonable, objective and non-race based, and are utilised in order to ensure that the introduction of income management measures is non-discriminatory. It also states that analysis of the area in conjunction with these criteria reveals the significant level of disadvantage of people living within Ceduna and its Surrounding Regions. As such, the statement of compatibility considers these measures to be compatible with the rights of equality and non-discrimination.

1.344 However, the instrument will apply overwhelmingly to Aboriginal communities. Data from the ABS 2011 Census shows that the proportion of Indigenous peoples in Ceduna and Surrounding Regions is significantly higher than in other areas of Australia. Accordingly, the instrument may be considered to have a potentially discriminatory effect under the ICCPR, ICERD and ICESCR. Furthermore, it will fall within the definition of racial discrimination in article 1 of the ICERD, which refers to measures as racially discriminatory if they have 'the purpose or effect' of restricting the enjoyment of human rights.

1.345 As such, in order to be non-discriminatory they will need to be shown to be based on objective and reasonable grounds, and to be a proportionate measure in pursuit of a legitimate objective. The analysis conducted under this test is essentially similar to that considered when assessing whether a restriction on a right is permissible.

1.346 Accordingly, the income management measures must be closely scrutinised and the onus is on the government to demonstrate clearly that it pursues a legitimate objective, that it is based on objective and reasonable criteria, and that it is a proportionate measure to achieve the legitimate objective.

1.347 **The committee therefore seeks the advice of the Minister for Social Services as to whether the income management measures in the Ceduna and Surrounding Regions are compatible with the rights to equality and non-discrimination in light of the potential for indirect racial 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.**

Gender discrimination

1.348 ABS data shows that women in Australia are both more likely than men to be recipients of income support, and also more likely than men to become carers. Accordingly it is more likely that income management measures will affect women more than men within the Ceduna and Surrounding Regions.

1.349 The committee notes that the statement of compatibility fails to consider the impact of the regulation on women. Accordingly, no analysis is provided as to the relative impact of individual measures on women as opposed to men and fails to justify any discriminatory effect.

1.350 **The committee therefore seeks the advice of the Minister for Social Services as to whether income management measures within the Ceduna and Surrounding Regions are compatible with gender equality under the rights 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.**

Right to social security

1.351 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.

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

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and

- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

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

Right to an adequate standard of living

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

1.356 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.

Disempowerment and discrimination under compulsory income management measures

1.357 The statement of compatibility considers income management measures to be compatible with the right to social security, and more specifically, that:

> it provides a mechanism to ensure that certain recipients of social security entitlements use a proportion of their entitlement to acquire essential items, including all of those referred to by the UN Committee. The UN Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access and maintain benefits 'in cash or in kind'.[4]

1.358 The statement of compatibility also states that:

> Income management does not limit a person's right to an adequate standard of living. Instead, it aims to advance this right by ensuring that money is available for priority goods such as food, clothing and housing, and provides a tool to help people budget. Income management can also help people stabilise their lives, so they can care for their children, and join or return to the workforce.[5]

1.359 The committee notes its inquiry into compulsory income management in its Examination of the Stronger Futures in the Northern Territory Act 2012 and related legislation. Evidence from that report suggests that compulsory income management often creates feelings of disempowerment and frustration among those under the scheme. Furthermore, users of the BasicsCard have been seen to face discrimination within their communities. These can be viewed as serious limitations on the rights to social security and an adequate standard of living.

4 EM, p. 7.

5 EM, p. 8.

1.360 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility 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'.[6] 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.

1.361 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. To demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why a measure is necessary in pursuit of a legitimate objective.

1.362 **The committee therefore seeks further advice from the Minister for Social Services as to whether the income management scheme is compatible with the rights to social services and an adequate standard of living, 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 privacy

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

1.364 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.

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6 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 [accessed 8 July 2014].

Right not to have one's privacy, family and home unlawfully or arbitrarily interfered with

1.365 The statement of compatibility does not address the potential impacts upon the right to privacy, and more specifically, the right not to have one's privacy, family and home unlawfully or arbitrarily interfered with.

1.366 The committee considers that the income management regime involves a significant intrusion into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments.

1.367 The committee considers that the imposition of conditions restricting the use that may be made of such payments enforced through the BasicsCard system represents both a restriction on the right to social security and the right not to have one's privacy and family life interfered with unlawfully or arbitrarily.

1.368 The committee recognises the complex nature of the income management regime and the circumstances to which it applies, as well as the difficulty of evaluating the impact of such schemes. However, the committee considers that the explanatory statement does not clearly demonstrate that compulsory income management is a justifiable limitation on the right to privacy.

1.369 **The committee therefore seeks the Minister for Social Services' advice as to whether the restrictions on the autonomy of individuals to control their own finances through income management measures 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 limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

The right to self-determination

1.370 The right to self-determination is protected by article 1 of the ICCPR and article 1 of the ICESCR.

1.371 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development. It is generally understood that the right to self-determination accrues to 'peoples'.

1.372 The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference' and

that 'Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin'.

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

Consultative processes in seeking opinions on income management

1.374 The committee notes that while the statement of compatibility states that consultation regarding local opinion on income management schemes had been undertaken within the region, it fails to specify the details of this process. The right to self-determination requires active decision-making by the relevant local communities. As such, the committee finds the description of consultation inadequate in assessing the regulation's compatibility with the right to self-determination.

1.375 **The committee therefore requests further information from the Minister for Social Services on the consultative process, within the Ceduna and Surrounding Regions area specifically.**

1.376 **The committee also seeks further advice from the Minister for Social Services as to whether the income management scheme is compatible with the right to self-determination, 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.**

Tax and Superannuation Laws Amendment (Green Army Programme) Regulation 2014 [F2014L00842]

Portfolio: Environment
Authorising legislation: Taxation Administration Act 1953 and Superannuation Guarantee (Administration) Act 1992
Last day for disallowance: 4 September 2014 (Senate)

Purpose

1.377 The regulation amends the Superannuation Guarantee (Administration) Regulations 1993 and the Taxation Administration Regulations 1976 to ensure that superannuation is not payable by Green Army service providers to Green Army Programme participants and prescribes that Green Army allowance payments are subject to withholding for tax purposes.

1.378 The green army scheme was set up through the *Social Security Legislation Amendment (Green Army Programme) Act* 2014. The committee reported on this act in its *Third Report of the 44th Parliament* and *Fifth Report of the 44th Parliament*.

Committee's views on compatibility

1.379 The committee notes that the explanatory memorandum states that:

> The *Social Security Legislation Amendment (Green Army Programme) Bill 2014* was assessed against the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The changes introduced by the Amendment Regulation are compatible with that assessment.[1]

1.380 The committee refers to its previous comments in relation to this measure in its *Third Report of the 44th Parliament*[2] and *Fifth Report of the 44th Parliament*.[3] The committee considered that the proposed Green Army scheme engaged the right to social security and right to just and favourable conditions at work.

1.381 **The committee is of the view, based on the previous information provided, that the measure appears to comply with human rights**.

1.382 However, it is the committee's usual expectation that, even in circumstances where the enabling legislation for the scheme has been considered by the committee, a statement of human rights compatibility still needs to be

1 Explanatory memorandum, p. 2.

2 See Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014), p. 11-13.

3 See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014), pp 81-82.

prepared in relation to regulations under the scheme where they engage human rights.

International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013 [F2013L01916]

Portfolio: Foreign Affairs
Authorising legislation: International Organisations (Privileges and Immunities) Act 1963
Last day to disallow: 4 March 2014 (Senate)

Purpose

1.383 This regulation confers privileges and immunities on the International Committee of the Red Cross (ICRC) to give effect to the Arrangement between the Government of Australia and the International Committee of the Red Cross on a Regional Headquarters in Australia, done at Canberra on 24 November 2005. It confers on the ICRC in Australia legal status and such legal capacities as are necessary for the exercise of its powers and the performance of its functions. The regulation is intended to support the work of the ICRC in Australia and the Pacific region.

Background

1.384 The committee reported on the instrument in its *First* and *Ninth Reports of the 44th Parliament.*

Committee view on compatibility

Obligation to extradite or prosecute person suspected of certain international crimes

Immunities from prosecution

1.385 The committee sought further information in relation to the compatibility of Australia's laws on granting privileges and immunities with its obligations under the Convention against Torture (CAT) to prosecute or extradite an individual suspected of torture.

Minister's Response

> ***Compatibility of Australia's laws on granting privileges and immunities with its obligations to prosecute or extradite an individual suspected of torture under Articles 7(1) and (2)[1] of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.***

1 We note that the Committee's response refers to Articles 6(1) and (2) of the CAT. We assume this is a typographic error. The relevant provisions of the CAT are Articles 7(1) and (2).

Australia is committed to its international legal obligations under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, including the obligation to have in place laws which permit the investigation and prosecution or extradition of persons alleged to have committed torture. Australia is also committed to our international legal obligations in respect of privileges and immunities. Australia implements such immunities under its framework of domestic legislation, including the *Foreign States Immunities Act 1985*, the *Diplomatic Privileges and Immunities Act 1967*, the *Consular Privileges and Immunities Act 1972* and the *International Organisations (Privileges and Immunities) Act 1963*, along with the respective regulations for each Act.

The conferral of privileges and immunities

To facilitate the peaceful and efficient conduct of relations between States and their official representatives, certain privileges and immunities have long been recognised to exist under international law and have been given effect in Australian law.

Diplomats, persons on a special mission, high officials of some international organisations and representatives to those organisations are entitled to extensive immunity from criminal jurisdiction pursuant to various treaties and customary international law. The Parliamentary Joint Committee on Human Rights recognised in its earlier comments on the *International Organisations (Privileges and Immunities) Amendment Bill 2013* that 'Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials, as well as on foreign States and their diplomatic and consular representatives.'[2]

The conferral of immunity provides benefits to the sending and receiving States. Diplomatic immunity, for example, helps to create the space for States to conduct discussions to 'promote comity and good relations between States through the respect of another State's sovereignty.'[3] The underlying concept is that foreign representatives can carry out their duties effectively only if they receive some protection from the application of the host country's law in carrying out their official functions. Australian diplomats benefit from similar protection in other countries.

As Sir Ian Brownlie has noted, the conferral of privileges and immunities to international organisations is a widely accepted feature of the international system:

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2 *Fourth Report of 2013: Bills introduced 12-14 March 2013; Select Legislative Instruments registered with the Federal Register of Legislative Instruments 17 - 20 December 2012*, at Paragraph 1.67.

3 Application No 35763/97, Merits, 21November2001, 123 ILR 24, (2002) 34 EHRR 11, para 54, in Nevill, P. "Immunities and the Balance Between Diplomacy and Accountability" (2011), available at http://www.20essexst.com/member/penelope-nevill.

> *in order to function effectively, international organisations require a certain minimum of freedom and legal security for their assets, headquarters and other establishments and for their personnel and representatives of member states accredited to the organisations.*[4]

Conferring privileges and immunities, such as immunity from legal process, including the giving of evidence, can serve the important function of protecting the confidential work and communications of an international organisation. It can be vital to that organisation's ability to perform its mandate, including by ensuring the access required to perform important functions and ensuring the security of its personnel. The conferral by Australia of privileges and immunities to the International Committee of the Red Cross (ICRC), for example, recognises the ICRC's mandate and role as an important partner for Australia in our international humanitarian work. It will help the ICRC to ·continue its work protecting the lives and dignity of victims of armed conflict in line with its working principles of impartiality, independence and neutrality. It is through the recognition of privileges and immunities for the ICRC that States acknowledge their respect for those principles.

Consistency between laws conferring privileges and immunities and obligations to prosecute or extradite under the CAT

The question of whether the obligations to prosecute or extradite under article 7 of the CAT extend to persons who enjoy functional immunity for acts done in an official capacity remains unsettled at international law. The jurisprudence from foreign and international courts on this question is limited and is not determinative. The views of the Committee against Torture are a source of guidance for states, but are not binding and do not represent the views of states. It is clear that a person enjoying functional immunity, once leaving office, can be prosecuted for acts committed prior or subsequent to his or her term in office, and for acts committed in a private capacity during that term in office. Were functional immunity to be relied on during a person's term in office for acts performed in that capacity, its application would be a matter for the Australian courts to determine (as was the case with the UK courts in the Pinochet case[5], to which the Committee has previously referred). It would not be appropriate

4 Ian Brownlie, Principles of Public International Law, Seventh Ed, p.680. This principle is also reflected in Article 105 of the Charter of the United Nations which provides that 'the Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes' and that 'representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation'.

5 *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

to speculate on how Australian courts would approach this issue should it arise for determination.

While the existence of functional immunity may, in some circumstances, limit Australia's ability to extradite or prosecute an individual alleged to have committed torture, it does not mean that a person subject to allegations of torture enjoys impunity. In addition to the limitations on functional immunity outlined above, it is open to the Australian Government to request the ICRC to waive a Delegate's immunity under the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*. A Delegate could also be prosecuted by a court in a jurisdiction where immunity is not enjoyed or by an international criminal tribunal with jurisdiction.[6]

Committee response

1.386 The committee thanks the Minister for Foreign Affairs for her response.

1.387 The committee notes Australia's stated commitment to compliance with its legal obligations under the CAT. The committee is of the view that it is the role of all branches of government to ensure compliance with these obligations. It also notes that the Committee against Torture, the House of Lords, and various national courts have held that immunity does not apply in relation to alleged torture committed by a former official. It also appears to be the view held by the International Court of Justice.[7] The committee accordingly considers that it would better support and ensure compliance with obligations under the CAT to provide for appropriate exceptions to immunities in legislative instruments and legislation.

1.388 The committee therefore recommends that the regulation be amended to provide for exceptions to immunities where an individual is suspected of torture.

1.389 The committee has previously noted that the same issue arises in relation to the principal Act[8] and in relation to the other Commonwealth statutes that confer privileges and immunities on particular persons and categories of persons under Australian law (together the Immunities Acts).[9]

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6 See Appendix 1, Letter from the Hon Julie Bishop MP, Minister for Foreign Affairs, to Senator Dean Smith, dated 11/08/2014, pp 2-3.

7 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012.

8 *International Organisations (Privileges and Immunities) Act 1963 Foreign States Immunities Act 1985*.

9 *Diplomatic Privileges and Immunities Act 1967*, and the *Consular Privileges and Immunities Act 1972*.

1.390 The committee also recommends that the Immunities Acts be amended to provide for exceptions to immunities where an individual is suspected of torture.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 26 June 2014 (Senate)

Purpose

1.391 The regulation amends the Migration Regulations 1994 requirements relating to public interest criterion 4020, English requirements for applicants of the Subclass 457 (Temporary Work (Skilled)) visa, requirements in Part 202 of Schedule 2 and provisions dealing with disclosure of information under regulation 5.34F.

Background

1.392 The committee reported on the instrument in its *Seventh Report of the 44th Parliament*.

Committee view on compatibility

Requirements for assessment of limitations on human rights

Amendments relating to public interest criterion 4020 – legitimate objective and proportionality, and the ten-year exclusion period for refusal under PIC 4020 on identity grounds

1.393 The committee requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the regulation with human rights and, in particular:

- whether the measures aimed at achieving a legitimate objective;
- whether there is a rational connection between the measures and their stated objective; and
- whether the measures are proportionate to that objective.

Minister's response

> *Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1*
>
> The amendments made to Public Interest Criterion (PIC) 4020 in Schedule 1 to the Migration Amendment (2014 Measures No. 1) Regulation 2014 require that:
>
> - an applicant satisfy the Minister as to their identity; and
> - the Minister be satisfied that during the period starting 10 years before the application was made and ending when the Minister makes a decision to grant or refuse the application, neither the applicant, nor any member of the family unit of the applicant, has

been refused a visa because of a failure to satisfy the Minister as to their identity.

There is no human right to enter another country. In exercising the sovereign right to decide who may enter and remain in Australia by being granted a visa, the government has decided to strengthen requirements regarding identity. Issues regarding legitimate objectives, rational connection and proportionality do not apply as there is no impact on a human right. The aim is to strengthen the detection of non-genuine applicants and provide deterrence (being a 10 year exclusion period) to applicants considering identity fraud as a means to facilitate their entry into Australia. Identity fraud has consequences, not only for the department, by bringing the migration programme into disrepute, but for the Australian community. My department has a responsibility to ensure that visas are granted to genuine applicants who cooperate with the department to establish their identity. My department also has a legal responsibility, under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), to identify fraud risk and implement appropriate controls to mitigate that risk.

I note that PIC 4020 applies to all skilled migration, student, business skills, family and temporary visas, but not to Refugee and Humanitarian visas. In respect of people already onshore, Articles 3 and Articles 16(1) of the CRC may be relevant. In respect of Article 3, the best interests of the child are a primary consideration, however, these may be outweighed by other considerations, including the legitimate objective of maintaining integrity in Australia's visa system. As the ultimate aim is to keep families together, the amendments are consistent with Article 16(1) of the CRC.[1]

Committee response

1.394 The committee thanks the Minister for Immigration and Border Protection for his response.

1.395 As a threshold issue, the committee agrees with the Minister's assessment that there is no standalone right to enter another country. The committee notes nevertheless that there is an internationally recognised human right to seek asylum.

1.396 The committee further notes that the relevant international conventions apply to all individuals within Australia's jurisdiction and not just to citizens. The regulation applies to both onshore and offshore applicants. In the committee's view, individuals living in Australia are clearly within Australia's jurisdiction. In addition, the committee is of the view that when the Minister makes a decision whether or not to grant a visa with respect to an offshore visa applicant there is an arguable case that the Minister is exercising Australia's jurisdiction over those individuals.

1 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, p. 17.

1.397 Accordingly, the committee remains of the view that the measures limit the right to a fair hearing under article 14 of the ICCPR.

1.398 In light of the limitation of this right, the committee needs more information to determine that the measure is compatible with Australia's human rights obligations. In this respect, the committee notes Attorney-General's Department advice on how to prepare statements of compatibility where rights are limited:

> Where rights are limited, explain why it is thought that there is no incompatibility with the right engaged:
>
> a) Legitimate objective: Identify clearly the reasons which are relied upon to justify the limitation on the right. Where possible, provide empirical data that demonstrates that the objectives being sought are important.
>
> b) Reasonable, necessary and proportionate: Explain why it is considered that the limitation on the right is (i) necessary and (ii) within the range of reasonable means to achieve the objectives of the Bill/Legislative Instrument.
>
> - Cite the evidence that has been taken into account in making this assessment.[2]

1.399 The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to the compatibility of these measures with the right to a fair hearing.

Amendments relating to public interest criterion 4020 – quality of law test

1.400 The committee requested the advice of the Minister for Immigration and Border Protection on whether the measure, as currently drafted, meets the standards of the 'quality of law' test for human rights purposes.

Minister's response

> The Committee has noted that interferences with rights must have a clear basis in law, and that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible for people to understand when the interference with their rights will be justified.
>
> For the reasons outlined above, the government does not consider that the amendments interfere with human rights and thus the quality of law test for human rights purposes is not relevant.[3]

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2 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 [accessed 8 July 2014].

3 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 17-18.

Committee response

1.401 The committee thanks the Minister for Immigration and Border Protection for his response.

1.402 However, in light of the committee's views set out above, the committee remains concerned that the requirement for visa applicants to prove their identity are not well defined in the regulation. No information on how an applicant may satisfy the Minister as to their identity is specified, with the department having an apparently broad discretion to 'consider a range of identity-related documents…as well as individual applicant circumstances'.[4]

1.403 Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection on whether the measure meets the standards of the quality of law test for human rights purposes.

Best interests of the child

Ten-year exclusion period for refusal under PIC 4020 on identity grounds, and special humanitarian program: requirement that families of minors meet compelling reasons criterion

1.404 The committee sought the advice of the Minister for Immigration and Border Protection on the compatibility of Schedule 1 and 2 of the regulation with the obligation to consider the best interests of the child as a primary consideration and, in particular:

- whether the measures aimed at achieving a legitimate objective;
- whether there is a rational connection between the measures and their stated objective; and
- whether the measures are proportionate to that objective.

Minister's response

> *Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1*
>
> The amendments in Schedule 1 to the Regulation are aimed at achieving the legitimate objective of preventing the entry and stay in Australia of persons who commit identity fraud. The amendments require that an applicant satisfy me or my delegate as to their identity, and that I or my delegate are satisfied that in the 10 years before the application was made, neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy either me or my delegate as to their identity.

4 Statement of compatibility, p. 3.

The reference to 'any member of the family unit' includes children of a person applying for a visa, and so the requirement for there to have been no refusal of a visa for failure to satisfy me or my delegate as to their identity over the past 10 years would apply to children of persons who commit identity fraud, as well as those persons themselves.

My department recognises that there may be circumstances where children may be adversely affected by the fraudulent actions of their parents through no fault of their own. The new identity requirement in PIC 4020 means that children of persons who commit identity fraud will have the same status as, and be able to stay with, their primary caregiver, which is considered to be in their best interests. If in certain circumstances this is not the case, the government is of the view that this would be outweighed by the legitimate objective of maintaining integrity in Australia's migration programme. As the impact on children/a family will be to keep the family together, in fact it is consistent with the principle set out in Article 16(1) of the Convention on the Rights of the Child (CRC).

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 2

The measures in Schedule 2 have as an objective reducing the number of unaccompanied humanitarian minors (UHMs) taking dangerous boat journeys to Australia. It is anticipated that the removal of a straightforward family reunification pathway for UHMs will reduce the likelihood of minors leaving their families and travelling to Australia alone in the hope of later being able to propose their parents and siblings relatively easily under the Humanitarian Programme. The measures help ensure that complete refugee families and others determined by the government in accordance with criteria set by the Parliament to be in need of resettlement, receive highest priority for visas. The measures also aim to reinforce public confidence in the fairness of our family reunion policies, ensuring that those who arrived legally are given first priority.

The obligation under Article 3 of the CRC is for a legislative body to treat the best interests of the child as a primary consideration in any actions concerning children. It is not in a child's best interests to undertake dangerous boat journeys to Australia in the hope of sponsoring a parent or sibling. It may be argued that for a child already in Australia reunification with their family is in their best interest. However the government has taken the view that the objective of discouraging such journeys in the first place outweighs the fact that re-unification may be in their best interests.

The measures affect a cohort of applicants whose applications are proposed by their children who arrived in Australia as unaccompanied minors and irregular maritime arrivals, and were aged under 18 at the time the applications were made. Close to 95 per cent of the minor proposers are now over 18 and beyond the scope of the CRC. As regards the small minority of proposers who are still under 18, where compelling reasons exist for giving special consideration to granting their families visas, those

> applications will be considered accordingly. My department has given generous extensions of time to allow affected applicants and their advisers to prepare additional information in support of their applications.
>
> The amendments do not amount to arbitrary or unlawful interference with the family under article 17(1) of the ICCPR. The principle set out in article 23(1) of the ICCPR, that the family is entitled to protection by society and the State does not create a positive obligation to re-unite families that have chosen to separate themselves across countries.[5]

Committee response

1.405 The committee thanks the Minister for Immigration and Border Protection for his response.

1.406 In respect of Schedule 1, the committee notes that to apply a ten-year ban on further visas by a child in circumstances where the Minister's response indicates that this may be through no fault of the child may appear unreasonable. The committee notes that the obligation to consider the best interests of a child requires legislative frameworks that permit the consideration of each child's best interests. The Minister's response indicates that there is to be no individual consideration of each child's best interests but instead a presumption that it is in the best interests of all children subject to this measure to be barred for 10 years with their family. The committee considers this to be incompatible with Australia's obligations under the CRC.

1.407 The committee also reiterates the Attorney-General's advice to legislative proponents that in any assessment of whether a limitation on a human rights is nevertheless compatible with that right they should:

> Cite the evidence that has been taken into account in making this assessment.[6]

1.408 The committee notes that no empirical evidence is provided that the measure will better protect against the entry and stay in Australia of persons who commit identity fraud than the previous regulation. Nor is there is any evidence provided that to the extent that there is additional protection afforded by this measure that this is not unreasonably at the expense of also prohibiting the legitimate entry of minors who have not committed identity fraud.

1.409 In respect of Schedule 2, the committee notes that the Minister's response suggests an 'anticipation' that the measure will reduce the likelihood of minors

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5 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, dated 05/08/2014, pp 18-19.

6 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 [accessed 8 July 2014].

taking dangerous journeys at sea unaccompanied. Whilst the committee is also concerned that children be protected from danger, an 'anticipation' that a measure will be effective in reducing that danger is insufficient justification for a measure that limits human rights under international law. Moreover, when assessing the proportionality of a measure it is necessary to demonstrate the reasonableness of a measure having regard to all available legislative options. The government 'taking a view' is not sufficient justification for a limitation on the right of children to have their best interests be considered a primary consideration in all decisions affecting them.

1.410 Accordingly, the committee considers that Schedule 1 and 2 of the regulation are likely to be incompatible with the obligation in article 3 of the Convention on the Rights of the Child to consider the best interests of the child as a primary consideration.

The committee has deferred its consideration of the following bills

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

National Security Legislation Amendment Bill (No. 1) 2014