

## Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 30 September 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 10 bills introduced between 22 and 25 September 2014, in addition to one bill which has been previously deferred.

### **Aged Care and Other Legislation Amendment Bill 2014**

### **Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014**

*Portfolio: Social Services*

*Introduced: House of Representatives, 25 September 2014*

#### **Purpose**

- 1.1 The Aged Care and Other Legislation Amendment Bill 2014 (the bill) seeks to:
- amend the *Aged Care Act 1997* to increase basic subsidies to residential care, home care and flexible care providers of aged care services, as implemented from 1 July 2014 through two legislative instruments addressing the subsidy arrangements (the *Aged Care (Subsidy, Fees and Payments) Determination 2014* and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*); and
  - amend the *Healthcare Identifiers Act 2010* to support the implementation from 1 January 2015 of stage 2 of the Aged Care Gateway.
- 1.2 The bill and the Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014 (the bills) together seek to amend the *Health and Other Services (Compensation) Act 1995* and the *Health and Other Services (Compensation) Care Charges Act 1995* to apply existing legislative capacities for residential care to those in home care, in relation to the recovery of past care costs that are provided to a care recipient who receives a compensation payment.

#### **Committee view on compatibility**

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

## **Australian Education Amendment Bill 2014**

*Portfolio: Education*

*Introduced: House of Representatives, 25 September 2014*

### **Purpose**

1.4 The Australian Education Amendment Bill 2014 (the bill) seeks to amend the *Australian Education Act 2013* to:

- allow payment of additional funding in 2014 to schools with large numbers of Indigenous boarding students from remote areas;
- prevent funding cuts to students with disabilities and to other students in some independent special schools and special assistance schools that would otherwise occur from 1 January 2015; and
- correct errors and omissions in the existing legislation and provide funding and regulatory certainty to schools.

### **Committee view on compatibility**

1.5 **The committee considers that the bill promotes the right to education and has therefore concluded its examination of the bill.**

## **Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014**

## **Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014**

*Portfolio: Justice*

*Introduced: House of Representatives, 24 September 2014*

### **Purpose**

1.6 The Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014 and the Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014 seek to amend the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Act 2011* and the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Act 2011* to replace the existing Supervisory Cost Recovery Levy, which funds the regulatory activities of the Australian Transaction Reports and Analysis Centre (AUSTRAC), with a new industry contribution which will fund both the regulatory and financial intelligence unit (FIU) functions of AUSTRAC.

### **Committee view on compatibility**

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

## **Automotive Transformation Scheme Amendment Bill 2014**

*Portfolio: Industry*

*Introduced: House of Representatives, 24 September 2014*

### **Purpose**

1.8 The Automotive Transformation Scheme Amendment Bill 2014 (the bill) seeks to amend the *Automotive Transformation Scheme Act 2009* to:

- implement funding cuts of \$500 million to the Automotive Transformation Scheme (ATS) capped assistance over the financial years 2014-15 to 2017-18; and
- terminate the ATS on 1 January 2018.

### **Committee view on compatibility**

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

## **Migration Amendment (Humanitarian Visa Intake) Bill 2014**

*Sponsor: Senator Sarah Hanson-Young*

*Introduced: Senate, 25 September 2014*

### **Purpose**

1.10 The Migration Amendment (Humanitarian Visa Intake) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* to prevent the preclusion of processing or granting a visa at any time in a financial year when fewer than 20 000 humanitarian visas have been granted.

1.11 The bill would also require the Minister for Immigration and Border Protection to make quarterly statements to Parliament setting out how many humanitarian visas of each class have been granted.

### **Committee view on compatibility**

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

## National Security Legislation Amendment Bill (No. 1) 2014

*Portfolio: Attorney-General*

*Introduced: House of Representatives, 16 July 2014*

### Purpose

1.13 The National Security Legislation Amendment Bill (No. 1) 2014 (the bill) seeks to amend the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) and the *Intelligence Services Act 2001* (the IS Act) to implement the government's response to recommendations of the Parliamentary Joint Committee on Intelligence and Security's *Report of Inquiry into Potential Reforms of Australia's National Security Legislation* (June 2013).

1.14 The bill would expand ASIO's intelligence-collection powers by:

- enabling it to obtain intelligence from a number of computers (including a computer network) under a single computer access warrant, including computers at a specified location or associated with a specified person;
- allowing ASIO to use third-party computers and communications in transit to gain access to a target computer under a computer access warrant;
- establishing an identified person warrant for ASIO to utilise multiple warrant powers against an identified person of security concern;
- allowing the search warrant, computer access, surveillance devices and identified person warrant provisions to authorise access to third-party premises to execute a warrant; and
- allowing the use of force at any time during the execution of a warrant, not just on entry.

1.15 In addition, the bill would:

- introduce an evidentiary certificate regime in relation to special intelligence operations and specific classes of warrants issued under the ASIO Act;
- provide protection from criminal and civil liability for ASIO employees and affiliates, in relation to authorised special intelligence operations, subject to appropriate safeguards and accountability arrangements;
- provide ASIO with the ability to co-operate with the private sector;
- enable breaches of section 92 of the ASIO Act (publishing the identity of an ASIO employee or affiliate) to be referred to law enforcement for investigation;
- enable the minister responsible for ASIS to authorise the production of intelligence on an Australian person who is, or is likely to be, involved in activities that pose a risk to, or are likely to pose a risk to, the operational security of ASIS;

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- expand the power of ASIS to co-operate with ASIO, without ministerial authorisation, when undertaking less intrusive activities to collect intelligence relevant to ASIO's functions on an Australian person or persons overseas in accordance with ASIO's requirements;
  - expand the ability of ASIS to train staff members of a limited number of approved agencies that are authorised to carry weapons in the use of weapons and self-defence;
  - provide that ASIS, in limited circumstances, is not restricted from using a weapon or self-defence technique in a controlled environment (such as a gun club or rifle range or martial arts club);
  - extend the immunity available to a person who does an act preparatory to, in support of, or otherwise directly connected with, an overseas activity of an IS Act agency to an act done outside Australia;
  - increase the penalties for existing unauthorised communication of information offences in the ASIO Act and the IS Act from two to ten years;
  - extend the existing unauthorised communication offences in the IS Act to the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA);
  - create a new offence in the ASIO Act and the IS Act, punishable by a maximum of three years imprisonment, for intentionally dealing with a record in an unauthorised way; and
  - create a new offence in the ASIO Act and the IS Act, punishable by a maximum of three years' imprisonment, for intentionally making a new record of information or matter without authorisation.

### **Committee view on compatibility**

#### ***Multiple rights***

1.16 The committee notes that the measures in Schedules 2 to 6 of the bill engage a number of human rights including:

- the right to security of the person and the right to be free from arbitrary detention;<sup>1</sup>
- the right to an effective remedy;<sup>2</sup>
- the right to freedom of expression;<sup>3</sup>
- the right to freedom of movement;<sup>4</sup>

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

2 Article 2 of the ICCPR.

3 Article 19 of the ICCPR.

- the right to a fair trial;<sup>5</sup> and
- the right to privacy.<sup>6</sup>

*Inadequate statement of compatibility*

1.17 The replacement statement of compatibility for the bill provides the following statement regarding its purpose and approach:

This is a long and highly technical Bill which has a wide range of human rights implications. The purpose of a Statement of Compatibility is to assess generally the measures in the Bill against human rights obligations, and when a right is limited, to analyse how that right is permissibly limited. The approach adopted in this Statement of Compatibility is to set out the key amendments and to address related provisions in each Schedule together against the key rights engaged as related provisions engage the same rights in a very similar way as well as draw attention to safeguards. This approach has been adopted to ensure that the Statement does not become unwieldy and practically illustrates how the provisions operate together.<sup>7</sup>

1.18 Consistent with this approach, the statement of compatibility provides a description of the measures in the bill and generally identifies the human rights engaged by the measures. The committee notes that many of the measures may represent serious limitations. However, such general descriptions as are provided in the statement of compatibility are insufficient for the committee to assess their human rights compatibility.

1.19 In this respect, the committee's expectations regarding statements of compatibility are set out in the committee's Practice Note 1,<sup>8</sup> which states:

The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights....The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.

1.20 Similar guidance on the preparation of statements of compatibility is provided by the Attorney-General's Department, which advises:

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4 Article 12 of the ICCPR.

5 Article 14 of the ICCPR.

6 Article 17 of the ICCPR.

7 Replacement Explanatory Memorandum (REM) 6.

8 See Appendix 2.



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.<sup>9</sup>

1.21 It flows from these requirements that a separate and detailed analysis of each measure that may limit human rights is required to assess its compatibility with Australia's human rights obligations. In the committee's view, by providing a selective and generalised assessment, the statement of compatibility for the bill fundamentally misapprehends the purpose for which such statements are required.

1.22 The committee's particular 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. Accordingly, the committee considers that a detailed and separate analysis is required for each measure listed in paragraphs 1.14 and 1.15 above. In particular, these should provide a reasoned and evidence-based assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.23 In the absence of an assessment of the measures in these terms, the committee will be unable to conclude that the measures are compatible with the rights and freedoms against which the committee conducts its assessments.

1.24 A particular example of the lack of analysis in the statement of compatibility concerns the proposed expansion of ASIO's powers under warrant. The statement of compatibility acknowledges that these amendments engage the right to privacy because they would::

...enable ASIO to exercise a wide range of powers – such as entering and searching people's homes and places of business, searching a person on or near specified premises, accessing their computer or computers at their workplace or computers of friends and associates at their premises, interfering with data and using surveillance devices to record, listen to or

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9 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> [accessed 8 July 2014].

track a person. This involves interference with a person's privacy more generally, but also their home and correspondence. The issuing of warrants also requires the collection and use of personal information.<sup>10</sup>

1.25 In addition, the committee notes that the powers in the bill extend to the interference, in certain circumstances, with the computers and premises of third parties not specifically subject to an ASIO investigation.

1.26 However, while the statement of compatibility describes four warrants as engaging the right to privacy, there is only a single analysis of how the new warrant powers may be regarded as a justifiable limitation on the right. Separately, the statement of compatibility notes that the amendments will permit access to third-party premises not specifically mentioned in a warrant in order to gain entry to premises subject to a warrant, but asserts that any interference with privacy will be 'necessary to ensure the efficient exercise of a warrant that authorises entry to a premises'.<sup>11</sup> However, no information is provided as to how the power will be used and why, for example, it would not be possible to have the third-party premises identified in the original warrant, particularly in circumstances where entry through adjacent premises is merely desirable to reduce risk of detection.<sup>12</sup>

1.27 While the committee acknowledges that the maintenance of national security and the protection of the Australian community may be regarded as a legitimate objective, the proposal to significantly expand ASIO's warrant powers clearly involves substantial limitations on the right to privacy. The purpose of the statement of compatibility is to explain and demonstrate how this particular measure has balanced national security imperatives with the right to privacy, rather than to merely assess generally the measure against human rights obligations.<sup>13</sup>

1.28 In light of the stated objective of the bill, the committee notes that information regarding existing safeguards is of particular relevance to the assessment of its compatibility with human rights. The committee notes that, while the REM provides a detailed overview of the existing safeguards in relation to the operation and actions of ASIO, many of these operate in lieu of (rather than in addition to) traditional common law and statutory mechanisms that curtail the operation of executive agencies and ensure they are appropriately scrutinised. A comparative assessment of existing safeguards in relation to ASIO and the AFP and other agencies with law enforcement and investigative powers is therefore important to assessing the proportionality of the measure.

1.29 In addition, the committee notes that the bill is identified as responding to a report by the Parliamentary Joint Committee on Intelligence and Security (PJCIS),

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10 EM 11.

11 EM 14.

12 EM 12.

13 EM 63.

itself preceded by a detailed discussion paper prepared by the Attorney-General's Department. The committee notes that much of the analysis and justifications for identical or similar measures proposed in those documents is directly relevant to the human rights assessment of the bill. However, this information has not been included in the statement of compatibility despite signpost references to the PJCIS recommendations throughout. The committee would expect that, where the bill effectively adapts or partially implements PJCIS recommendations, the statement of compatibility will identify and assess any such differences as part of the human rights justification for the bill.

**1.30 The committee therefore seeks the advice of the Attorney-General as to whether each of the measures in Schedules 2, 3, 4, 5, and 6 of the bill are compatible with Australia's international human rights obligations, and for each individual measure limiting human rights:**

- **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 torture, cruel, inhuman or degrading treatment***

1.31 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 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.

1.32 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 of such treatment and steps to prevent such treatment occurring.

***Immunity from prosecution for action part of special intelligence operations***

1.33 As set out above, the bill would introduce provisions that would provide for the establishment of special intelligence operations. The bill provides protection from criminal and civil liability for ASIO employees and affiliates, in relation to

authorised special intelligence operations, subject to certain safeguards and accountability arrangements.

1.34 Under proposed section 35C of the bill, the Attorney-General (on request from the Director General of ASIO, or a senior officer) would be able to grant such an authority only if he or she is 'satisfied on reasonable grounds of certain matters', which include:

- (e) any conduct involved in the special intelligence operation will not:
  - (i) cause the death of, or serious injury to, any person; or
  - (ii) involve the commission of a sexual offence against any person; or
  - (iii) result in significant loss of, or serious damage to, property.

1.35 In addition, pursuant to proposed section 35K, an ASIO officer participating in a special intelligence operation would be immune from civil or criminal liability for conduct in the course, and for the purpose, of that operation if:

- (e) [that] conduct does not involve the participant engaging in any conduct that:
  - (i) causes the death of, or serious injury to, any person; or
  - (ii) involves the commission of a sexual offence against any person; or
  - (iii) causes significant loss of, or serious damage to, property.

1.36 The government introduced amendments in the Senate which amended proposed section 35C and 35K. The amendments mean:

...that the proposed scheme of special intelligence operations will include two express exclusions of conduct constituting torture.<sup>14</sup>

1.37 The committee welcomes the introduction of these amendments and their passage by the Senate.

1.38 However, the committee remains concerned that torture is not a defined term in the bill and accordingly would be a matter of statutory interpretation by the courts.

1.39 **For consistency with Australia's international obligations, the committee recommends that the term 'torture' used in the bill be defined by reference to the definition set out in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.**

1.40 In addition, the committee is concerned that acts which may fall short of the definition of torture but may nevertheless constitute cruel, inhuman or degrading treatment may therefore be permitted under the bill. For example, a number of

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14 Further Supplementary Explanatory Memorandum 3.

investigative techniques which cause psychological distress or physical pain may not be considered serious injury or torture but may nevertheless constitute cruel, inhuman or degrading treatment. Such acts would be covered by the immunity provided in the bill.

**1.41 The committee therefore recommends that the bill be amended to ensure that the proposed immunity afforded to ASIO officers or affiliates involved in special intelligence operations, does not extend to any acts of cruel, inhuman or degrading treatment.**

## **National Water Commission (Abolition) Bill 2014**

*Portfolio: Environment*

*Introduced: Senate, 25 September 2014*

### **Purpose**

1.42 The National Water Commission (Abolition) Bill 2014 (the bill) seeks to amend the *National Water Commission Act 2004* in order to abolish the National Water Commission with effect from 1 January 2015.

### **Committee view on compatibility**

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

## **Private Health Insurance Amendment Bill (No. 1) 2014**

*Portfolio: Health*

*Introduced: House of Representatives, 24 September 2014*

### **Purpose**

1.44 The Private Health Insurance Amendment Bill (No. 1) 2014 (the bill) seeks to amend the *Private Health Insurance Act 2007* (the PHI Act) to pause the income thresholds which determine the tiers for the Medicare levy surcharge (MLS) and the Australian Government Rebate on private health insurance at 2014-15 rates for three years.

### **Committee view on compatibility**

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

## **Rural Research and Development Legislation Amendment Bill 2014**

*Portfolio: Agriculture*

*Introduced: House of Representatives, 25 September 2014*

### **Purpose**

1.46 The Rural Research and Development Legislation Amendment Bill 2014 (the bill) seeks to amend the *Australian Grape and Wine Authority Act 2013*, the *Primary Industries Research and Development Act 1989*, the *Sugar Research and Development Services Act 2013*, the *Australian Meat and Live-stock Industry Act 1997*, the *Dairy Produce Act 1986*, and the *Forestry Marketing and Research and Development Services Act 2007*. It would:

- return the cost of membership fees to international commodity organisations and regional fisheries management organisations from the matching amounts paid to rural research and development corporations (RDCs); and
- remove the requirement for the Minister for Agriculture to organise an annual co-ordination meeting for the chairs of the statutory RDCs.

### **Committee view on compatibility**

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



## **Deferred bills and instruments**

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

**Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014**

**Migration Amendment (Character and General Visa Cancellation) Bill 2014**

**Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014**

**Racial Discrimination Amendment Bill 2014**

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

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

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

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

**Social Security (Administration) (Declared income management area - Ceduna and surrounding region) Determination 2014 [F2014L00777]**

