Parliamentary Joint Committee on Human Rights

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

Bills introduced 23 – 26 June 2014

Legislative Instruments received

7 – 20 June 2014

Ninth Report of the 44th Parliament

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Functions of the committee

The Committee has the following functions:

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

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Abbreviations

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

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 23 to 26 June 2014 and legislative instruments received during the period 7 to 20 June 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 23 to 26 June 2014

The committee considered 21 bills. Of these 21 bills, 17 do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to further defer its consideration of one additional bill which was introduced previously.

The committee has identified eight bills that it considers require further examination and for which it will seek further information. This includes four bills which the committee had deferred consideration of in previous reports.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 14 July 2014 include:

- Fair Work (Registered Organisations) Amendment Bill 2014;
- Family Assistance Legislation Amendment (Child Care Measures) (No. 2) Bill 2014;
- Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014.

Legislative instruments received between 7 and 20 June 2014

The committee considered 80 legislative instruments received between 7 and 20 June 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 80 instruments, 78 do not appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. The committee has decided to defer its consideration of one instrument.

The committee has decided to seek further information from the relevant minister in relation to two instruments, one of which the committee had deferred consideration of in a previous report. The committee also concluded its examination of two instruments previously deferred as they have been disallowed in full by the Senate.

Responses

The committee has considered 15 responses regarding matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to 10 bills and 2 instruments.

The committee has decided to seek further information from the relevant minister in relation to two bills and one instrument. The committee will write again to the relevant ministers in relation to these matters.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 14 July 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 23 and 26 June 2014, in addition to eight bills which have been previously deferred, and 80 instruments received between 7 June and 20 June 2014.

Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014

Sponsor: Senator Siewert
Introduced: Senate, 24 June 2014

Purpose

1.1 The Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (the bill) seeks to amend the *Aboriginal and Torres Strait Islander Act 2005* to clarify the terms and purpose of the Aboriginal and Torres Strait Islander Land Account (Land Account) and revise the structure, appointment process and duties of the Indigenous Land Corporation (ILC) Board. The bill also seeks to allow for parliamentary review of any proposed changes to the Land Account and the ILC.

1.2 The bill is accompanied by a statement of compatibility which concludes that the bill is 'compatible with human rights because it advances the cultural rights and right to non-discrimination of Aboriginal and Torres Strait Islander Peoples by improving mechanisms for protecting and strengthening the land account that is in part compensation for dispossessions of land'.[1]

1.3 The committee considers that the bill does not appear to give rise to human rights concerns.

1.4 The committee notes that, to the extent the bill strengthens Indigenous control over the Land Account and the ILC, the bill promotes the right to self-determination in Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

1 Explanatory memorandum (EM), p. 11

Business Services Wage Assessment Tool Payment Scheme Bill 2014

Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 5 June 2014

Purpose

1.5 The Business Services Wage Assessment Tool Payment Scheme Bill 2014 (the bill) was introduced with the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014. The bill responds to the Federal Court's decision in *Nojin v Commonwealth of Australia*, which found the application of the Business Services Wage Assessment Tool (BSWAT) to be discriminatory.[1] BSWAT measures not only work productivity but also competency, and the competency aspect of BSWAT was found to have a discriminatory effect on employees with an intellectual disability. The bill establishes a payment scheme for eligible current and former employees of Australian Disability Enterprises for work previously performed whilst earning wages calculated using BSWAT.

Committee view on compatibility

1.6 The principal rights engaged by this bill are the right to an effective remedy, the right to just and favourable conditions of work and the right to equality and non-discrimination, including the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

Right to an effective remedy

1.7 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.

1.8 States parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

1 *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

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

Whether payment amounts constitute an effective remedy

1.10 As noted above, the bill seeks to establish a payment system for supported employees (with an intellectual impairment) of Australian Disability Enterprises who previously had their wages assessed under BSWAT. This follows the Federal Court's decision in *Nojin v Commonwealth of Australia*, which found the application of the BSWAT to be discriminatory.[2]

1.11 The statement of compatibility notes that the bill engages and may limit the right to an effective remedy, particularly with regard to the fact that the scheme will not make payments to individuals who 'seek redress through the courts or other systems'. The statement of compatibility concludes that the bill is compatible with this right because, to the extent that it 'may be perceived to limit human rights, those limitations are reasonable, necessary and proportionate'.[3]

1.12 The committee notes that the scheme provides for the payment of an amount equal to 50 per cent of what a person would have been paid had their wages been assessed only on the productivity component of BSWAT.[4] The precise calculation will be set out in rules determined by the minister.[5] However, the committee notes that, while the statement of compatibility states that the scheme provides an 'effective remedy' for eligible workers,[6] it does not provide any substantive analysis of how the scheme payment rates may be regarded, for human rights purposes, as an effective remedy, understood as being fair and reasonable compensation for the breach of human rights suffered by affected individuals as a result of unlawful discrimination.

1.13 The committee notes that information regarding the factors taken into account in determining the amount of scheme payments is particularly relevant to the human rights assessment of whether the scheme provides an effective remedy. The continued use of BSWAT to assess the wages of individuals with an intellectual disability, discussed below, is also relevant to this assessment.

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2 *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

3 Statement of compatibility, p. 2.

4 The Federal Court found that the non-productive element of the BSWAT assessment of wages for workers with an intellectual disability constituted unlawful discrimination in contravention of section 15 of the *Disability Discrimination Act 1992*.

5 Proposed subsection 8(3).

6 Statement of compatibility, p. 1.

1.14 The committee therefore seeks the advice of the Minister for Social Services as to whether the proposed scheme payment amount is compatible with the right to an effective remedy.

Continued use of BSWAT to assess the wages of individuals with an intellectual disability

1.15 As noted above, the bill establishes a payment scheme for eligible current and former employees of Australian Disability Enterprises for work previously performed whilst earning wages calculated using BSWAT.[7]

1.16 The committee notes that the Australian Human Rights Commission (AHRC) has granted a 12-month exemption from the operation of certain provisions of the *Disability Discrimination Act 1992* to allow for the continued use of BSWAT. The exemption contains several conditions, including a requirement that the Commonwealth take all necessary steps to transition as quickly as possible from the BSWAT to the Supported Wage System, or an alternative tool approved by the Fair Work Commission.

1.17 In the committee's view, the extent to which the quantum of the proposed scheme payments may constitute an effective remedy is particularly difficult to assess in the absence of a government decision as to the appropriate tool for the assessment of the wages of persons with a disability.

1.18 Further, the committee considers it unlikely that the bill could be assessed as providing an effective remedy while affected individuals continue to be paid wages assessed by the use of BSWAT.

1.19 The committee therefore seeks the advice of the Minister for Social Services as to what steps are being taken in accordance with the AHRC exemption, and the likely timeframe for transition to the Supported Wage System or an alternative tool approved by the Fair Work Commission.

Effect of scheme payments on legal remedies

1.20 The bill provides that, if a person accepts a payment under the scheme, the effect is twofold in respect of access to legal remedies. First, the person will cease to be a member in any of a number of specified proceedings. Second, a statutory release and indemnity provision will immediately operate to relieve the Commonwealth, each Australian Disability Enterprise and all other people from further liability.[8] In relation to these measures, the statement of compatibility notes:

> There could be a perception that a human right to an effective remedy is being limited because…acceptance of a payment from the scheme releases the Commonwealth, Australian Disability Enterprises and all other persons

7 Statement of compatibility, p. 1.

8 Proposed section 10.

from liability in relation to unlawful discrimination associated with the use of a BSWAT assessment to determine the wages of that individual.[9]

1.21 The statement of compatibility explains that these measures are intended to serve the objective of preventing 'the Commonwealth utilising taxpayer funds to pay more than once for the same, or similar, claims in relation to the payment of wages assessed using the BSWAT'.[10]

1.22 The committee notes that, in addition to these measures, the statement of compatibility states that it is intended that 'the scheme will not pay compensation, but will provide a payment to eligible people',[11] and that any payment made under the scheme will not lead to any admission of liability on the part of the Commonwealth.[12]

1.23 In the committee's view, the release and indemnity provisions, and the positing of the scheme as not being 'compensatory in nature' may limit the effectiveness of the remedy provided under the bill, notwithstanding the characterisation of the scheme as 'proportionate' in the statement of compatibility.[13] Taken together, in light of the Federal Court finding that the application of the BSWAT constituted unlawful discrimination, the release and indemnity provisions; the expressing of offers as payments instead of compensation; and the refusal to make admissions of liability give rise to a concern that the scheme does not contain the requisite elements of an effective remedy to the unlawful discrimination found to have taken place.

1.24 The committee notes that the proposed release and indemnity provisions would appear to be able to operate so as to bar a person from accessing a legally effective remedy.

1.25 The committee therefore seeks the further advice of the Minister for Social Services as to whether the proposed release and indemnity provisions are compatible with the right to an effective remedy.

Lack of effective review mechanisms for persons excluded from the scheme

1.26 The payment scheme proposed by the bill would not provide payments for affected persons who have received an 'alternative amount'. This is defined as being where a person has accepted or been paid money in relation to or settlement of a claim made in relation to matters related to the discriminatory BSWAT assessments.

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9 Statement of compatibility, p. 2.

10 Statement of compatibility, p. 2.

11 Statement of compatibility, p. 2.

12 Proposed subsection 98.

13 Statement of compatibility, p. 3.

1.27 The committee notes that the statement of compatibility states that the scheme 'provides an effective remedy to…[affected] workers, while also providing effective mechanisms for internal and external appeal for the scheme itself'.[14] However, there appears to be no internal or external review provisions for people deemed to be ineligible for the scheme due to having an 'alternative amount'.[15]

1.28 The committee notes that this represents a limitation on the right to an effective remedy. However, the bill provides no assessment of the compatibility of this apparent limitation on the right.

1.29 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.30 The committee therefore seeks the advice of the Minister for Social Services as to whether the lack of effective review mechanisms for person who have received an 'alternative amount' is compatible with the right to an effective remedy, and particularly:

- **whether the bill in this respect is 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.**

Secretary-appointed external reviewer

1.31 The committee notes that the external review mechanisms provided in the bill do not enable a person to seek merits review through the Administrative Appeals Tribunal. Instead, proposed section 27 requires the Secretary to appoint an external reviewer.

1.32 The committee is concerned that this approach has a number of consequences that may not be compatible with the right to an effective remedy. For instance, the external reviewer may request the Secretary to exercise his or her powers to seek further information but 'only if the Secretary considers it appropriate to do so;'[16] and the Secretary may 'refuse to comply with the request and inform the

14 Statement of compatibility, p. 2.

15 This limits the review mechanisms available for such people who are affected by decisions made under section 6 (ineligibility for the scheme), section 14 (inability to register), section 16 (ineligible to make an application), section 17 (no determination to be made) and section 21 (not to receive an offer).

16 Proposed section 30; Explanatory memorandum, p. 23.

external reviewer',[17] in cases 'where the Secretary has already sought the information and the applicant or person has provided a reasonable explanation as to why the information cannot be provided'.[18]

1.33 However, the statement of compatibility does not provide an explanation for why this approach is preferable to a right of review through the Administrative Appeals Tribunal.

1.34 The committee therefore seeks the advice of the Minister for Social Services to whether the approach of a Secretary-appointed external reviewer as opposed to allowing access to the Administrative Appeals Tribunal is compatible with the right to an effective remedy, and particularly:

- **whether the bill in this respect is 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.**

Right to just and favourable conditions of work

1.35 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19]

1.36 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.

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

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

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17 Subclause 30(2).

18 Explanatory memorandum, p. 23.

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

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

1.38 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.

Whether payment amounts constitute adequate remuneration

1.39 As described above, the bill would establish a scheme that provides for the payment of an amount equal to 50 per cent of what an affected person would have been paid had their wages been assessed only on the productivity component of BSWAT.

1.40 The committee notes that, to the extent that the payments provided for by the scheme would be less than what an affected person would have been entitled to had their wages been assessed by a non-discriminatory method, the bill may represent a limitation on a person's right to receive fair and just compensation for their work. However, the statement of compatibility provides no assessment of this potential limitation on the right to work and rights at work.

1.41 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.42 The committee therefore seeks the advice of the Minister for Social Services as to whether the basis for the calculation of the payment amount using these principles will allow for adequate remuneration compatible with the right to just and favourable conditions of work, and particularly:

- **whether the bill in this respect is 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.**

Rights to equality and non-discrimination

1.43 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).[20]

1.44 These are fundamental human rights that 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.

1.45 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[21]

1.46 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.

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

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

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

Provision for use of nominees

1.50 The statement of compatibility notes that the 'scheme's target group is vulnerable because they have an intellectual disability', and lists a number of

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20 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

21 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.

mechanisms that are intended to increase the choice and control of affected individuals, including:

- allowing the provision of nominees;
- requiring nominees to ascertain the preferences of the applicant and to act in a manner giving effect to those wishes; and
- protecting the rights of the person with disability by requiring the nominee to declare any interest, pecuniary or otherwise, in the outcome.[22]

1.51 While the committee acknowledges that some people with an intellectual impairment may benefit from the appointment of a nominee, it considers that provision for use of nominees must be accompanied by adequate safeguards to ensure that the represented person's autonomy, will and preferences are respected and that the nominee acts to support, rather than substitute, the decision making of the represented person.[23]

1.52 In this respect, the committee is concerned that the bill may not, in a number of respects, ensure that nominees support, rather than substitute, the decision making of represented persons.

1.53 For example, the committee notes that the criteria the Secretary is to apply in considering the appointment of nominees are to be contained in as yet unpublished rules.[24] The rules may also prescribe and modify duties of a nominee, which *may* include duties requiring the nominee to support decision making by the participant personally, or to have regard to and give appropriate weight to the views of the participant or inform the secretary and participant of declaring any interest, pecuniary or otherwise, in the outcome.[25] With these matters remaining undefined and discretionary, there is considerable uncertainty as to precisely how the appointment of nominees, and their associated duties and obligations, will ensure that the effective choice and control of represented individuals is achieved.

1.54 The committee notes that the statement of compatibility provides no assessment of this potential limitation on the rights of person with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

1.55 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

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22 Statement of compatibility, p. 3

23 Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014); Article 12: Equal recognition before the law (CRPD/C/GC/1, adopted 11 April 2014) p. 6.

24 Subclause 51(5)(b).

25 Subclause 46(5).

1.56 The committee therefore seeks the advice of the Minister for Social Services as to whether the decision making models in place are compatible with the right to equality and non-discrimination, and particularly:

- **whether the bill in this respect is 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.**

Timeframes applying to scheme

1.57 The statement of compatibility for the bill notes that there are 'strict timeframes for the scheme'. [26] These include a requirement for registering by 1 May 2015, and lodging an application by 30 November 2015; timeframes will also apply to acceptance of an offer and applications for a review of a determination. There are no avenues for extension of the proposed deadlines where a review of a determination is being sought.

1.58 The objective of the strict timeframes is identified as being to promote the delivery of payments to eligible workers 'as quickly as possible'.

1.59 The committee notes also that there are no positive obligations on the secretary to ascertain whether or not a person understands the offer, with the effect that a person is taken to have declined an offer for payment simply by not taking any action by the end of the acceptance period.[27]

1.60 The committee notes that the application of these provisions in practice may amount to indirect discrimination, to the extent that they may have a disproportionately negative effect on people with an intellectual impairment. For example, such people may need more time and flexibility in order to access necessary support and advice to facilitate the exercise of their personal choice and control in responding to an offer. The strict timeframes, and lack of opportunity for extensions to seek a review, may therefore limit the right of such persons to enjoy legal capacity on an equal basis with others, and to be provided with access to the support necessary to exercise that legal capacity and to avail themselves of their rights. However, the statement of compatibility provides no assessment of this potential limitation of those rights.

1.61 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the

26 Statement of compatibility, p. 1.

27 Subclause 19(2). It should also be noted that a period of 14 days may be all that is available for a person to consider an offer if made late during the operation of the scheme.

rational connection between the measure and that objective, and the proportionality of the measure.

1.62 The committee therefore seeks the advice of the Minister for Social Services as to whether the strict scheme timeframes are compatible with the right to equality and non-discrimination, and particularly:

- **whether the bill in this respect is 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.**

Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2]

Portfolio: Treasury
Introduced: House of Representatives, 23 June 2014

Purpose

1.63 Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 [No. 2] seeks to amend the *Clean Energy (Income Tax Rates Amendments) Act 2011* to repeal the personal income tax cuts legislated to commence on 1 July 2015.

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

Background

1.65 This bill is a re-introduction of the Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 which the committee considered in its *First Report of the 44th Parliament*.[1]

1.66 The committee considered the Parliamentary Secretary to the Treasurer's response in its *Eighth Report of the 44th Parliament* and noted that the response had not provided a detailed and evidence-based explanation for the measures in accordance with the committee's usual expectations.[2]

1.67 The committee notes that the second reading of this bill was negatived by the Senate on 9 July 2014.

Committee view on compatibility

Right to an adequate standard of living

1.68 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.

1.69 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to 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.

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1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, pp 12-13.

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

Effect of repealing measures

1.70 The bill also 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.

1.71 As noted in its *First Report of the 44th Parliament*, 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 will have a significant impact on the right to an adequate standard of living.

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

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

Clean Energy Finance Corporation (Abolition) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 23 June 2014

1.74 The Clean Energy Finance Corporation (Abolition) Bill 2014 seeks to repeal the *Clean Energy Finance Corporation Act 2012* to abolish the Clean Energy Finance Corporation (CEFC). The bill also seeks to transfer the CEFC's existing contractual assets and liabilities to the Commonwealth to hold and manage.

1.75 The committee considered substantially similar bills in its *First Report of the 44th Parliament* and *Fifth Report of the 44th Parliament*.[1]

1.76 The committee considers that the bill does not appear to give rise to human rights concerns.

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, pp 11-12 and *Fifth Report of the 44th Parliament*, 25 March 2014, p. 28.

Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No. 2]

Portfolio: Environment
Introduced: House of Representatives, 23 June 2014

1.77 The Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [No. 2] is part of a package of bills that seeks to repeal the legislation that establishes carbon pricing by the end of the 2013-14 financial year. The bill repeals the following Acts:

- *Clean Energy Act 2011* (CE Act);
- *Clean Energy (Charges—Customs) Act 2011*;
- *Clean Energy (Charges—Excise) Act 2011*;
- *Clean Energy (Unit Issue Charge—Auctions) Act 2011*;
- *Clean Energy (Unit Issue Charge—Fixed Charge) Act 2011*; and
- *Clean Energy (Unit Shortfall Charge—General) Act 2011*.

1.78 The bill also:

- makes consequential amendments to other legislation referring to the CE Act and the carbon pricing mechanism;
- provides for the collection of all carbon tax liabilities for 2012-13 and 2013-14 financial years;
- introduces new powers for the Australian Competition and Consumer Commission (ACCC) to take action to ensure price reductions relating to the carbon tax repeal are passed on to consumers; and
- makes arrangements for the finalisation and cessation of industry assistance through the Jobs & Competitiveness Program, the Energy Security Fund and the Steel Transformation Plan.

1.79 This bill is a re-introduction of the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 which the committee considered in its *First Report of the 44th Parliament* and subsequently in its *Third Report of the 44th Parliament*.[1]

1.80 The bill is accompanied by a statement of compatibility which provides detailed discussion as to how the bill engages the right to privacy, property rights, the right to a fair trial and fair hearing, the right to work and the right to an adequate standard of living.[2] The statement of compatibility concludes that:

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1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, pp 3-8 and *Third Report of the 44th Parliament*, 4 March 2014, p. 101.

2 Explanatory memorandum (EM), pp 13-18.

> The Carbon Tax Repeal Bills are compatible with human rights because the only potential limitations on human rights that the Carbon Tax Repeal Bills impose relate to the right to privacy and criminal process rights and they are reasonable, necessary and proportionate in achieving the Bills legitimate policy objectives of repealing the carbon tax and making appropriate transitional provisions for that purpose.[3]

1.81 The committee considers that the bill does not appear to give rise to human rights concerns.

1.82 However, in its *First Report of the 44th Parliament* the committee noted the detailed analysis of the compatibility of new civil penalty provisions inserted into the *Competition and Consumer Act 2010* by Schedule 2 of the bill. The committee was pleased to note that certain minimum guarantees applicable to criminal proceedings are protected, but expressed concern that the application of a civil standard of proof in such proceedings to determine an individual's liability for such penalties may not meet the requirements of the right to be presumed innocent.

1.83 The statement of compatibility notes that in regards to the use of the civil standard of proof in civil penalty proceedings that the non-application of the criminal standard of proof:

> is compatible with Article 14(2) because the pecuniary penalty provisions have a long and well-litigated history, and it has not been shown that the failure to apply the criminal standard of proof has resulted in injustice. Indeed, the courts have on numerous occasions indicated that the gravity of the allegations being tested in the court will be taken into account, and that the graver the allegation, the greater the strictness of proof that will be required. In particular, more than just 'inexact proofs, indefinite testimony or indirection references' will be required (see, for example, Australian Competition and Consumer Commission v TF Woolam & Sons Pty Ltd (2011) 196 FCR 212 at [8]).[4]

1.84 While the committee notes these comments, it remains concerned that the application of the civil standard of proof in relation to civil penalties that are 'criminal' for the purposes of human rights law may not be compatible with the right to be presumed innocent in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

3 EM, p. 18.

4 EM, p. 17.

Climate Change Authority (Abolition) Bill 2013 [No. 2]

Portfolio: Environment
Introduced: House of Representatives, 23 June 2014

1.85 The Climate Change Authority (Abolition) Bill 2013 [No. 2] seeks to repeal the *Climate Change Authority Act 2011* and makes transitional and other arrangements for the abolition of the Climate Change Authority and the Land Sector Carbon and Biodiversity Board.

1.86 The committee considered an identical bill in its *First Report of the 44th Parliament*.[1]

1.87 The committee considers that the bill does not appear to give rise to human rights concerns.

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, pp 10-11.

Customs Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Excise Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Portfolio: Immigration and Border Protection and Treasury
Introduced: House of Representatives, 23 June 2014

1.88 The Customs Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] seeks to amend the *Customs Tariff Act 1995* to remove the equivalent carbon price imposed through excise equivalent customs duty on aviation fuel. The Excise Tariff Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] seeks to amend the *Excise Tariff Act 1921* to remove the carbon component rate from the rates of excise and excise equivalent customs duty imposed on aviation fuels.

1.89 The committee considered identical bills in its *First Report of the 44th Parliament*.[1]

1.90 The committee considers that the bills do not appear to give rise to human rights concerns.

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, pp 9-10.

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2014

Sponsor: Mr Bandt MP
Introduced: House of Representatives, 23 June 2014

1.91 The Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2014 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 Parliament.

1.92 The bill is accompanied by a statement of compatibility which concludes that the bill 'is compatible with human rights because it advances the protection of human rights.'[1]

1.93 The committee considers that the bill does not appear to give rise to human rights concerns.

1 Explanatory memorandum (EM), [p. 6.]

Fair Work (Registered Organisations) Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 19 June 2014

Purpose

1.94 The Fair Work (Registered Organisations) Amendment Bill 2014 (the 2014 bill) seeks to amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;
- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

1.95 The bill is accompanied by a statement of compatibility which outlines how the bill engages the right to freedom of association (including the right to form trade unions)[1], the right to fair trial (including the presumption of innocence)[2] and the right to privacy.[3] The statement concludes that 'the bill is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.'[4]

Background

1.96 This bill is a re-introduction of the Fair Work (Registered Organisations) Amendment Bill 2013 (the 2013 bill) which the committee considered in its *First Report of the 44th Parliament* and *Fifth Report of the 44th Parliament*.[5]

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1 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2 Article 14 of the ICCPR.

3 Article 17 of the ICCPR.

4 Statement of compatibility, p.14 (see explanatory memorandum).

5 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, p. 21 and *Fifth Report of the 44th Parliament*, 13 May 2014, p. 63.

1.97 The committee raised a number of issues in relation to the right to freedom of association and the right to fair trial and fair hearing rights in its *First Report of the 44th Parliament*.

1.98 The committee considered the Minister for Employment's response in its *Fifth Report of the 44th Parliament* and noted that the information provided had addressed most of the committee's concerns.

1.99 The committee expects that where it has raised concerns in relation to a measure in a bill, any subsequent re-introduction of the measure is accompanied by a statement of compatibility addressing the committee's previously identified concerns.

1.100 The committee also expects that where the minister has agreed to amend a bill in relation to a committee's concerns, the re-introduction of the bill would include these amendments.

1.101 The committee notes that the 2014 bill and explanatory memorandum (including the statement of compatibility) are virtually identical to the 2013 bill and its accompanying explanatory materials. The committee therefore reiterates its concerns below.

Committee view on compatibility

Right to freedom of association

1.102 The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association. Examples are political parties, professional or sporting clubs, non-governmental organisations and trade unions. The right to form and join trade unions is specifically protected in article 8 of the ICESCR. It is also protected in International Labour Organization (ILO) Convention No 87 (referred to in article 22(3) of the ICCPR and article 8(3) of ICESCR). Australia is a party to ILO Convention No 87.

Breadth of disclosure requirements

1.103 The bill would introduce a new provision, section 293B, which would require officers of registered organisations to disclose any remuneration and benefits paid to them. Proposed new section 293C will also require the officer to disclose any material personal interests that the officer or a relative has or acquires.

1.104 The committee notes that the Senate Education and Employment Legislation Committee, which conducted an inquiry into the bill, was 'persuaded by the evidence provided by submitters that the disclosure regime in relation to material personal interests proposed by the bill may create unnecessary administrative burdens for officers, some of whom are volunteers.'[6] The Senate Committee recommended

6 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, 2 December 2013, para 2.16.

restricting the requirement to disclose material personal interests to those officers whose duties relate to the financial management of the organisation; to narrow the disclosure obligations with regard to an officer's relatives to ensure consistency with the Corporations Act 2001; and to limit disclosures to payments made above a certain threshold.[7]

1.105 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether the breadth of the proposed disclosure regime in the 2013 bill was necessary and proportionate to the objective of achieving better governance of registered organisations.

1.106 In his response to the committee, the Minister for Employment stated that:

> The government takes seriously the [Senate Education and Employment Legislation] Committee's review process and respects the legitimate concerns that have been expressed regarding potentially excessive regulation. In response to these concerns, the Government will shortly circulate amendments to the Bill to:
>
> - amend the disclosure requirements for officers of registered organisations to more closely align them with the *Corporations Act 2001* so that the requirement to disclose material personal interests only applies to those officers whose duties relate to the financial management of the organisation
> - remove the more invasive disclosure requirements for officers of registered organisations to report family members', income and assets, thereby more closely aligning with *the Corporations Act 2001*
> - align the material personal interest disclosure requirements for officers of registered organisations with the *Corporations Act 2001* so that disclosures only need to be made to the governing body and not to the entire membership
> - limit disclosures of related party payments to payments made above a certain prescribed threshold and with certain other exceptions, based on the exceptions in the *Corporations Act 2001* for member approval of related party transactions
> - provide the Registered Organisations Commissioner with the discretion to waive the training requirements of officers of registered organisations if the Registered Organisations Commissioner is satisfied with their level of qualification (for example if a member is a Certified and Practicing Accountant).[8]

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7 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, 2 December 2013, paras 2.17-2.19.

8 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, pp 1-2, see Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, pp 66-67.

1.107 In its *Fifth Report of the 44th Parliament* the committee welcomed the proposed amendments to narrow the breadth of the disclosure requirements and noted that these addressed the committee's previous concerns.[9] The committee notes that these amendments have not been incorporated into the 2014 bill.

1.108 The committee therefore retains its concerns and recommends that the bill be amended to include the amendments previously proposed by the Minister for Employment.

Threshold for exercising RO Commissioner's powers

1.109 The bill would introduce a new provision, section 329AC, that provides the RO Commissioner with the power to do all things 'necessary or convenient' for the purposes of performing his or her functions. The RO Commissioner will be given broad functions under the bill, including extensive investigation and information gathering powers (modelled on powers in the *Australian Securities Investments Commission Act 2001*), and the ability to enforce the new rules and penalties.[10] The statement of compatibility notes that this power is a 'standard provision for a regulator'.[11]

1.110 The committee notes that human rights standards require limitations of rights to be 'necessary' in order to be justifiable. The threshold of 'convenient' would appear to be a lower standard than the usual international human rights law requirement of demonstrating that a limitation on a right is 'necessary'.

1.111 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether and how the standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary'.

1.112 The minister's response stated that the provision of a power to do something 'necessary or convenient' is commonplace in other Commonwealth legislation.[12] The committee noted its view that the fact that a provision is modelled on existing legislation is not in and of itself a sufficient justification for limitations on human rights.

1.113 The committee notes that the statement of compatibility to the 2014 bill does not contain further justification or information as to whether and how the

9 Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 64.

10 Proposed new section 329AB, inserted by item 88, Schedule 1.

11 Statement of compatibility, p. 14.

12 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 2. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, pp 64, 67.

standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary'.

1.114 The committee therefore reiterates its concern that the standard of 'convenient' contained in proposed new section 329AC is not fully consistent with the requirement under international human rights law that restrictions on rights be 'necessary'.

Right to a fair trial and fair hearing rights

1.115 The right to a fair trial and fair hearing is contained in 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.

1.116 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 to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Presumption of innocence

1.117 Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. Such offences must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim.

1.118 Proposed new section 337AC, creates an offence for concealing documents relevant to an investigation which imposes a reverse legal burden on the defendant and carries a maximum penalty of 5 years imprisonment. Subsection 337AC(2) states that it is a defence if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation…'.

1.119 The statement of compatibility does not identify or justify this provision. The committee notes that reverse legal burden offences that impose imprisonment as a penalty involve a significant limitation on the right to be presumed innocent and require a high threshold of justification.

1.120 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether the reverse burden offence in proposed new section 337AC was consistent with the right to be presumed innocent. The committee also sought clarification as to why the less restrictive alternative of an evidentiary burden would not be sufficient in these circumstances. The committee noted that this would still require the defendant to provide some evidence (for example a statement under oath) regarding intention, but would not require the defendant to prove lack of intent on the balance of probabilities.

1.121 In its *Fifth Report of the 44th Parliament* the committee noted the Minister for Employment's response stated that '[t]his prohibition is very important in terms of the integrity of the investigations framework under the Bill and is central to the Bill's objectives' and that recent investigations have shown the existing framework to be 'spectacularly ineffective in both deterring inappropriate behaviour and holding wrongdoers to account'. Further, that breaches of the law in this field 'should be treated just as seriously as such conduct by company directors'.[13]

1.122 The committee accepts the need for strong regulatory framework in this area. However, the minister's response did not address the committee's question as to whether the imposition of an evidential, rather than legal, burden was considered and why an evidential burden would not be sufficient.

1.123 The committee notes that the statement of compatibility to the 2014 bill does not provide any further information or justification as to why the imposition of a legal burden is necessary.

1.124 The committee therefore remains unable to conclude that the offence in proposed new section 337AC is compatible with the right to be presumed innocent.

Right against self-incrimination

1.125 Proposed new subsection 337AD states that it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record in accordance with a requirement made of the person because doing so might tend to incriminate a person or make them liable to a penalty.

1.126 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether proposed new subsection 337AD(3) of the 2013 bill provided for derivative use immunity, as well as use immunity and how the requirement for a person to have to 'claim' the right against self-incrimination in order to have it apply was consistent with article 14(3) of the ICCPR.

1.127 In his response to the committee, the minister clarified that the bill does not provide for derivative use immunity but does provide for use immunity. The minister

13 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 3. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 68.

outlined that the absence of derivative use immunity is reasonable and necessary for the effective prosecution of matters under the *Fair Work (Registered Organisations) Act 2009*. The minister also outlined that proposed new subsection 335(3) provides important safeguards which limit the risk that a person would fail to claim privilege from self-incrimination. [14]

1.128 The committee notes that the information previously provided by the minister has assisted the committee in concluding that this measure is compatible with human rights.

Civil penalty provisions

1.129 In addition to the introduction of new criminal offence provisions, the bill will also increase the maximum penalty for a range of civil penalties across the RO Act. The new penalties range from 60 penalty units for an individual ($17 000) or 300 penalty units for a body corporate ($51 000) for the least serious civil penalty provisions,[15] up to 1200 penalty units ($204 000) for an individual or 6000 for a body corporate ($1 020 000) for 'serious contraventions'.[16]

1.130 The committee is of the view that where a penalty is described as 'civil' under national or domestic law, it may nonetheless be classified as 'criminal' for the purposes of Australia's human rights obligations because of its purpose, character or severity. As a consequence, the specific criminal process guarantees set out in article 14 of the ICCPR may apply to such penalties and proceedings to enforce them.

1.131 The committee set out in its Practice Note 2 (interim) the expectation that statements of compatibility should provide an assessment as to whether civil penalty provisions in bills are likely to be 'criminal' for the purposes of article 14 of the ICCPR, and if so, whether sufficient provision has been made to guarantee their compliance with the relevant criminal process rights provided for under the ICCPR.

1.132 The statement of compatibility discusses these issues with regard to the domestic classification, the nature, and the severity of the penalties. The statement

14 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 4. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 69.

15 This penalty will apply to breaches of obligations to lodge certain documents with the Fair Work Commission and other administrative tasks such as removing non-financial members from the organisations register.

16 This penalty will apply to breaches of officer's civil financial management duties under sections 285 – 288, the new obligations introduced by the bill to disclose officer's material personal interests and remuneration, payments made by an organisation or branch, general duties in relation to orders and directions of the Fair Work Commission and Federal Court and restrictions on officers voting on certain matters.

of compatibility concludes that the penalties are, on balance, more likely to be considered 'civil' for the purposes of human rights law.[17]

1.133 In its *First Report of the 44th Parliament* the committee noted that the penalties will apply to individuals and, given the breadth of the disclosure regime, these may include volunteers in the organisation as well. The severity of the maximum penalty ($204 000 for an individual) may also, in and of itself, result in these provisions being considered as 'criminal' for the purposes of human rights law.

1.134 The committee sought clarification from the Minister for Employment as to whether the civil penalty provisions for 'serious contraventions', should be considered as 'criminal' for the purposes of article 14 of the ICCPR, given that they carry a substantial pecuniary sanction and could be applied to a broad range of individuals, including volunteers.

1.135 In his response to the committee, the minister reiterated the view expressed in the statement of compatibility to the 2013 bill, that the civil penalty provisions should not be considered criminal penalties for the purposes of international human rights law.[18]

1.136 The committee notes that as the minister's response proposed amendments to narrow the breadth of the disclosure requirements, this largely addressed the committee's concerns regarding the application of civil penalties to individuals.

1.137 The committee considers that unless amendments are made to narrow the disclosure requirements of the 2014 bill, the civil penalty provisions may be considered 'criminal' for the purposes of human rights law and require the rights guaranteed by article 14 of the ICCPR.

17 Statement of compatibility, p. 9 (see explanatory memorandum).

18 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 5. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 70.

Family Assistance Legislation Amendment (Child Care Measures) Bill (No. 2) 2014

Portfolio: Education
Introduced: House of Representatives, 25 June 2014

Purpose

1.138 The Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to maintain the child care benefit income thresholds at the amounts applicable as at 30 June 2014 for a further three years from 1 July 2014.

Background

1.139 The committee previously considered the following, substantially similar, measure in the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 in its *Eighth Report of the 44th Parliament*.

Committee view on compatibility

Right to social security

1.140 The right to social security is guaranteed 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.

1.141 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).

1.142 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.

1.143 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

1.144 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.

1.145 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to 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.

Pausing of indexation of income thresholds for the child care benefit

1.146 The bill would maintain the income thresholds for the separate child care benefit payment at the amounts applicable as at 30 June 2014 for a further three years.

1.147 The committee notes that, as a result, it can be expected that a number of families will lose their entitlement to the child care benefit payment (or at least have it reduced) if their incomes rise with inflation above a relevant threshold over the period. By operating to limit the availability of the benefit in this way, the bill may be seen as limiting the right to social security, and potentially the right to an adequate standard of living.

1.148 In concluding that the bill is compatible with human rights, the statement of compatibility states:

> The Government considers that the overall effect of maintaining the CCB [child care benefit] income thresholds until 30 June 2017 will, in relation to the families whose children attend approved child care, be limited by continued indexation of the CCB standard hourly rate, the minimum hourly amount and the multiple child loadings, which are not affected by this measure. For many of the families impacted by maintaining the CCB income thresholds, half of their additional out-of-pocket child care costs will be met by CCR [child care rebate].[1]

1 Explanatory memorandum (EM), p. 4

1.149 However, the committee notes that this justification for the measure mainly addresses its impact on the amount of the benefit rather than its impact on the entitlement to the benefit based on family income.

1.150 The statement of compatibility does not identify the number of families who will be affected by the pausing of indexation of the income thresholds for accessing child care benefits or the financial impact on those families.

1.151 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.

1.152 The committee notes that information regarding the number of families that may be affected by the pausing of indexation of the income thresholds, and the expected financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.153 The committee therefore seeks the Minister for Education's advice as the whether the pausing the indexation of the income thresholds for entitlement to the child care benefit is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Right to work

1.154 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

1.155 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

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

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.

1.156 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.

1.157 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.

Impact of measure on right to work for those with family responsibilities

1.158 Of further relevance to the right to work in this context, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States parties to implement measures to eliminate discrimination against women in the field of employment. These include the obligation:

> To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities.[3]

1.159 Accordingly, CEDAW recognises that the availability of child care is a critical component of the right to work.

1.160 As noted above, the bill proposes to limit the availability of the child care benefit by pausing indexation of income thresholds for eligibility. In the committee's view, the effect of the measure on the affordability and availability of child care may thus be seen as a limitation on the right to work. The committee notes that the statement of compatibility provides no assessment of the impact of the measures on the right to work.

1.161 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.

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3 Article 11(2)(c) of the CEDAW.

1.162 The committee therefore seeks the Minister for Education's advice as the whether the bill is compatible with the right to work, 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.**

Meteorology Amendment (Online Advertising) Bill 2014

Portfolio: Environment
Introduced: House of Representatives, 26 June 2014

Purpose

1.163 The Meteorology Amendment (Online Advertising) Bill 2014 (the bill) seeks to amend the *Meteorology Act 1955* to confirm the powers of the Director of Meteorology to include advertising in connection with the Bureau of Meteorology's services and require the Director to develop and publish guidelines relating to advertising.

1.164 The bill is accompanied by a statement of compatability which concludes that the bill is 'compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.[1]

1.165 The committee considers that the bill does not appear to give rise to human rights concerns.

1 Explanatory memorandum (EM), p. 4.

Migration Amendment (Protection and Other Measures) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 25 June 2014

Purpose

1.166 The Migration Amendment (Protection and Other Measures) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- confirm that it is an asylum seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim;
- expressly require the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation why those claims and evidence were not raised before a primary decision was made;
- create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so;
- clarify when an applicant for a protection visa, where a criterion for the grant of the visa is that they are a member of the same family unit of a person who engages Australia's protection obligations, is to make their application;
- define the risk threshold for assessing Australia's protection obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- simplify the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa;
- amend the processing and administrative duties of the Migration Review Tribunal (MRT) including:
    - a Principal Member being able to issue guidance decisions and practice directions;
    - tribunals being able to make an oral statement of reasons where there is an oral decision without the need for a written statement of reasons; and
    - tribunals being able to dismiss an application where an applicant fails to appear before the tribunal after being invited to do so, and to reinstate

the application where the applicant applies for reinstatement within a specified period of time; and

- make a technical amendment to put beyond doubt when a review of a decision that has been made in respect of an application under the Migration Act is 'finally determined'.[1]

Committee view on compatibility

Non-refoulement obligations

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

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

1.169 Human rights law requires provision of an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. Equally, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.[4]

1.170 Australia seeks to effect its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa, which include being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

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1 Explanatory memorandum (EM), pp. 1-2.

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

3 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations in addition to those under the Refugee Convention.

4 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights (PJCHR), *Second Report of the 44th Parliament*, 11 February 2014, p 45, at pp 49-51, paras 1.188-1.199 (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament*, 18 March 2014, p 51, at pp 55-57, paras 513.41-3.47 (comments on Minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

Responsibility of asylum seeker to provide evidence of claims

1.171 The bill would insert proposed section 5AAA into the Migration Act to provide that asylum seekers have responsibility to 'specify all particulars of his or her claim' and 'to provide sufficient evidence to establish the claim'. The statement of compatibility asserts that this amendment is:

> Consistent with requirements in other resettlement countries, and guidelines from the United Nations High Commissioner for Refugees, this provision places the responsibility for making claims for protection and providing sufficient evidence to establish the claim, on those who are seeking protection. The provision clarifies that it is not the responsibility of the decision-maker to make a case for protection on behalf of a person.

1.172 The committee acknowledges that it is a general legal principle of international law that the burden of proof rests with the asylum seeker. The committee assumes that the relevant section of the UNHCR 'guidelines' referred to in the statement of compatibility provides:

> It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.
>
> The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant. (emphasis added)[5]

5 UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, [196]-[197][available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 6 July 2014].

1.173 The committee considers that the new provision would risk shifting away from the shared duty articulated in the UNHCR *Handbook*. The proposed provision therefore raises concerns from the perspective of Australia's non-refoulement obligations. The effective and thorough assessment of the claims to protection against non-refoulement is a fundamental aspect of the obligation. The committee notes that the obligation of non-refoulement requires the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations (along with the general obligation to provide effective remedies for breaches of human rights under article 2 of the ICCPR).[6]

1.174 The committee notes that the new provision may have significant adverse consequences from a human rights perspective if an asylum seeker was unaware of the requirement to 'specify all particulars of his or her claim' or the asylum seeker was particularly vulnerable (for example, children or persons with disabilities). The committee notes that language barriers and experiences of trauma may compound problems in this regard.

1.175 The committee notes that the statement of compatibility sets out a range of matters which could be considered to be safeguards for vulnerable groups in the context of proposed section 5AAA. The statement of compatibility outlines that asylum seekers may make private arrangements to be represented by a registered migration agent. It explains that those asylum seekers who have arrived in Australia 'lawfully' (which the committee takes to mean with a valid visa) and who are 'disadvantaged and face financial hardship may be eligible for assistance with their primary application under the Immigration Advice and Application Assistance Scheme'.[7] The statement of compatibility points to the provision of what it describes as 'a small amount of additional support to illegal arrivals who are considered vulnerable, including unaccompanied minors', although it concedes that the Department of Immigration and Border Protection is still considering what this might entail.[8] The statement of compatibility further asserts that departmental policies and procedures will take into account whether an asylum seeker is from a vulnerable group and asylum seekers will be made aware of the requirement that they 'provide sufficient evidence to establish the claim'.[9]

1.176 The committee does not consider that the matters set out in the statement of compatibility such as potential migration agent assistance with the initial application, undecided 'additional support' for vulnerable asylum seekers or unspecified departmental policies taking 'into consideration' identified vulnerable

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6 ICCPR, articles 2 and 7 and CAT, article 3. See also, for example, Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

7 EM, Attachment A, p.4.

8 EM, Attachment A, p.4.

9 EM, Attachment A, p.4.

asylum seekers could provide sufficient safeguards in the context of proposed section 5AAA either for asylum seekers generally or those who may be particularly vulnerable. The committee is concerned that proposed section 5AAA risks abdicating the duties of government, as specified by the UNHCR, in the assessment of protection claims.

1.177 The committee notes that the statement of compatibility fails to make a specific and rigorous assessment of whether, due to the proposed inclusion of section 5AAA, there are sufficient procedural and substantive safeguards to ensure that a person is not removed in contravention of Australia's non-refoulement obligations.

1.178 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of the proposed section 5AAA with Australia's non-refoulement obligations under the ICCPR.

Altering the test for determining Australia's protection obligations

1.179 Schedule 2 of the bill seeks to alter the way in which Australia implements its non-refoulement obligations under the ICCPR and CAT. The explanatory memorandum for the bill notes that this amendment is proposed in response to a recent Federal Court case,[10] in which the court held that the risk threshold an applicant must meet to enliven Australia's protection obligations under the Migration Act is that there must be 'a real chance that [a person would] suffer significant harm…were he to be returned to [his country of origin]'. New section 6A provides:

> The Minister can only be satisfied that Australia has protection obligations in respect of the non-citizen if the Minister considers that it is more likely than not that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country.

1.180 In the second reading speech on the bill, the minister explained that the words 'more likely than not' will be taken to mean that there is 'a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to'.[11] Accordingly, Australia's protection obligations would be invoked only where there is a greater than 50 per cent chance that a person would be subject to death or torture.

1.181 The statement of compatibility explains:

> It is the Government's position that the risk threshold applicable to the non refoulement obligations under the CAT and ICCPR is higher than the

10 *Minister for Immigration and Citizenship v SZQRB*1 [2013] FCAFC 33.

11 Minister for Immigration and Citizenship, Second Reading Speech, Migration Amendment (Protection and Other Measures) Bill 2014, *Senate Hansard*, p. 9.

> 'real chance' test. While there is some difference of opinion in international fora and amongst the various national implementations of these obligations, applying the risk threshold of more likely than not is considered to be an acceptable position which is open to Australia under international law. The 'more likely than not' threshold reflects the Government's interpretation of Australia's obligations. As courts have applied a lower risk threshold that is inconsistent with this interpretation of Australia's obligations, it is necessary to give express legislative effect to this interpretation.[12]

1.182 In support of its assessment of the measure as compatible with Australia's non-refoulement obligations, the statement of compatibility states:

> While these amendments engage with Australia's *non refoulement* obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR, the amendments seek only to clarify Australia's interpretation of these obligations in light of judicial decisions which interpreted the applicable risk threshold in a different manner. The amendments will not operate to deny Australia's protection to any person who engages Australia's *non refoulement* obligations under international law.[13]

1.183 The committee notes that it commented on the issue of the appropriate standard for assessing complementary protection claims in its *Fourth Report of the 44th Parliament*.[14] The committee reiterates its assessment in that report regarding the international human rights standards for assessing non-refoulement obligations. The following additional comments are provided.

1.184 The committee considers that the assessment of the compatibility of this measure with Australia's non-refoulement obligations under the ICCPR and CAT is based on a misunderstanding of established interpretations of these obligations under international law. In particular, the committee notes that, in 1997, the UN Committee against Torture stated:

> Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.[15]

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12 Statement of compatibility, Attachment A, pp 8-9.

13 Statement of compatibility, Attachment A, p. 9.

14 PJCHR , *Fourth Report of the 44th Parliament*, 18 June 2014, p 51 at pp 55-57, paras 3.41-3.48 (Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

15 UN Committee against Torture (CAT), *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications),* A/53/44, annex IX, (21 November 1997).

1.185 The UN Human Rights Committee has considered the 'real risk' of harm test in relation to articles 6 and 7 of the ICCPR. In the case of *Pillai v Canada,* the Human Rights Committee stated:

> Article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General Comment No. 31, […], demonstrates this focus. So do the Committee's Views and Decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a 'necessary and foreseeable consequence' of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.[16]

1.186 Further, the United Nations High Commissioner for Refugees (UNHCR) stated in 2009, in relation to the proposed Australian complementary protection regime:

> UNHCR is of the view that there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection. The difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face, are all arguments in favour of adopting an approach that is no more demanding for people potentially in need of complementary protection than it is for refugees. It would be desirable to include the standard of proof in legislation to ensure consistency.[17]

1.187 In terms of the analysis in the statement of compatibility that the test for non-refoulement has been the subject of 'difference of opinion in international fora and amongst the various national implementations of these obligations',[18] the committee notes that this appears to refer to the approaches taken in Canada and the USA. As noted above, the UN Human Rights Committee disagreed with Canada's approach to interpreting the real risk test under the ICCPR.

1.188 In relation to the USA, the committee notes the USA issued an 'understanding' (being a statement as to how a State party intends to interpret its obligations) when it ratified the CAT, noting that it was adopting the 'more likely than not' standard in relation to its non-refoulement obligations in respect of torture. The United States government did this in order to align the standards adopted under its complementary protection legislation assessment procedures with the standard applicable under its law relating to assessment of claims under the Refugee

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16 *Pillai v Canada* (Communication No. 1763/2008), CCPR/C/101/D/1763/2008, (9 May 2011), http://www.worldcourts.com/hrc/eng/decisions/2011.03.25_Pillai_v_Canada.pdf

17 UNHCR*, Draft Complementary Protection Visa Model: Australia UNHCR Comments* (January 2009). http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09_000.pdf (accessed 8 July 2014)

18 Statement of compatibility, Attachment A, pp 8-9.

Convention. Australia issued no such understanding when it ratified the Convention against Torture.[19] Moreover, the Committee against Torture noted that the 'more likely than not' standard adopted by the USA involves a much stricter standard than that reflected in that committee's jurisprudence on the interpretation of the CAT.[20]

1.189 The committee notes that a number of countries have adopted approaches consistent with the international jurisprudence cited above. For example, in New Zealand, the Immigration and Protection Tribunal New Zealand has held:

> …as to the 'in danger of' threshold, it signals a degree of risk which is less than the balance of probabilities but more than mere speculation or conjecture…It is a threshold analogous to the real chance threshold long-established in refugee law.[21]

1.190 In the United Kingdom, when considering a case regarding non-refoulement and a potential violation of article 3 (torture) of the European Convention on Human Rights (ECHR), the UK Supreme Court stated:

> It is well established that a breach of Article 3 of the ECHR is proved where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or inhuman or degrading treatment (Vilvarajah v UK (1991) 14 EHRR 248 para 103)…It would add considerably to the burdens of hard-pressed immigration judges, who are often called upon to decide claims based both on the Refugee Convention and the ECHR at the same time, if they were required to apply slightly different standards of proof to the same facts when considering the two claims.[22]

1.191 In the Australian context, the committee also understands that when interpreting Australia's obligations to extradite individuals who are convicted or suspected of criminal offences under extradition treaties, the government does not apply a *more likely than not test* when considering the risk of the death penalty or torture.

1.192 Accordingly, as the committee has previously commented,[23] the committee considers that the international jurisprudence in relation to Australia's non-refoulement obligations does not support the proposed interpretation set out in Schedule 2 of the bill.

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19 See CAT/C/SR.427, para 9 (2000).

20 Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting, 10 May 2000, 24th Sess, CAT/C/SR.424 (9 February 2001), para 17.

21 *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012).

22 *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49, para 12-13.

23 See, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* 18 March 2014, 'Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013', pp 55-57 (paras 3.41-3.48).

1.193 The committee therefore considers the proposed amendments in Schedule 2 of the bill to be incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage – quality of law test

1.194 Proposed section 423A of the bill would provide that, where a new claim or evidence is raised at the review stage that was not placed before the original decision maker, the Refugee Review Tribunal (RRT) is to draw an unfavourable inference about the credibility of the claim or the evidence. The unfavourable inference is only to be drawn if the RRT is satisfied that the asylum seeker 'does not have a reasonable explanation'.

1.195 The statement of compatibility explains that the 'measure is intended to encourage all protection visa applicants to raise their claims and provide supporting evidence as soon as possible, in order to avoid unnecessary delays in deciding an application'.[24] The measure is assessed as compatible with Australia's non-refoulement obligations as follows:

> This measure meets Australia's *non refoulement* obligations under the CAT and ICCPR … A protection visa applicant has ample opportunity to present claims and supporting evidence to justify claims to international protection before a primary decision is made on their application. Claims and evidence may be provided when the application is lodged, during interview, on request from a decision-maker, or at the applicant's own initiative at any point before a primary decision has been made.[25]

1.196 However, the committee is concerned that there are insufficient procedural and substantive safeguards to ensure that this proposed provision does not result in a person being removed in contravention of non-refoulement obligations. For example, people who are fleeing persecution or have experienced physical or psychological trauma may not recount their full story initially (often due to recognised medical conditions such as post-traumatic stress disorder), or else may simply fail to understand what information might be important for their claim.

1.197 Further, the committee is concerned that the proposed provision appears to be inconsistent with the fundamental nature of independent merits review and, to that end, would seem to depart from the typical character of merits review tribunals in Australia. In particular, the committee notes that the function of the RRT as a merits review tribunal is to make the 'correct and preferable' decision in a supporting context where applicants are entitled to introduce new evidence to support their applications. However, proposed section 423A would limit the RRT to facts and claims provided in the original application, and require (rather than permit) the

24 EM, Attachment A, p. 4.

25 EM, p. 5.

drawing of an adverse inference as to credibility in the absence of a 'reasonable explanation' for not including those facts or claims in the original application.

1.198 As noted above, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.[26] The committee considers that the requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.

1.199 The committee therefore considers that proposed section 423A is incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

1.200 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 when the interference with their rights will be justified.

1.201 In the committee's view, what constitutes a 'reasonable explanation' for the purpose of the unfavourable inference not being drawn by the RRT is not well defined.

1.202 The committee therefore requests 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.

Power to refuse visa application for failure to establish identity, nationality or citizenship

1.203 The bill would amend the Migration Act to provide that an asylum seeker who fails or refuses to comply with a request to provide proof of identity, nationality or citizenship, without reasonable excuse, may have their protection claims refused (proposed section 91W). Proposed section 91WA would provide an additional refusal power where an asylum seeker provides a bogus document for the purpose of establishing identity, or has caused the disposal of their identity documents.[27]

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26 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, p 45, at pp 49-51, paras 1.188-1.199 (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament*, 18 March 2014, p 51, at pp 55-57, paras 513.41-3.47 (comments on Minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

27 For consideration of a similar measure, see Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament*, 18 June 2014, 'Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]', pp 49-51 (paras 1.188-1.199).

1.204 The statement of compatibility acknowledges that the measure engages Australia's non-refoulement obligations, and concludes that it is compatible with those obligations because they 'will not of themselves operate to deny Australia's protection to any person who engages Australia's non refoulement obligations under international law'.[28] It states:

> In circumstances where section 91W or section 91WA lead to an application being refused, an assessment of Australia's non refoulement obligations will still be undertaken. Where a person is found to engage protection obligations but did not comply with the amended section 91W or new section 91WA, their application for a protection visa would be refused. However, Australia's non-refoulement obligations would still apply despite the applicant being ineligible for a protection visa. In such cases it is open to the Minister of Immigration and Border Protection to exercise his or her non-compellable powers under the Migration Act 1958 to grant a visa.

1.205 However, while the committee acknowledges the importance of ensuring the integrity of the onshore protection status determination process (including the need to properly establish the identity of applicants), the committee is concerned that the measure may be inconsistent with the effective and thorough assessment of persons qualifying as entitled to protection against non-refoulement in accordance with the applicable international law standards. This is particularly the case with a person who may fail to establish their identity and is refused on that basis (as opposed to one who provides a bogus document).

1.206 In particular the committee notes that, due to their special situation asylum seekers who are fleeing persecution will frequently not possess personal or identity documents. An asylum seeker may not be in a position to obtain a passport or other identity documents in circumstances where they fear persecution. The committee notes that the Refugee Convention acknowledges that asylum seekers often arrive in prospective asylum countries without a valid passport or identity documents and provides a range of protections to asylum seekers in these circumstances.[29]

1.207 The committee notes that the statement of compatibility identifies the minister's discretionary and non-compellable powers under the Migration Act to grant a visa as enabling Australia to comply with its non-refoulement obligations, notwithstanding the proposed amendments.[30] However, as the committee has previously noted, the existence of ministerial discretion (and administrative review processes) does not sufficiently protect against the risk of refouling a person with valid protection claims in breach of Australia's non-refoulement obligations. The

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28 EM, Attachment A, p.6.

29 See 1951 Refugee Convention articles 25, 27, 28, 31.

30 EM, Attachment A, p.6.

committee considers that such discretionary and non-compellable powers (which are non-reviewable) in relation to visa protection claims are insufficient to satisfy the standards of 'independent, effective and impartial' review required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT, given the irreversible nature of the harm that might occur to persons from a breach of these obligations.

1.208 The committee therefore considers that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

Obligation to consider the best interests of the child

1.209 Under the Convention on the Rights of the Child (CRC), States parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[31]

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

1.211 Under article 10 of the CRC, Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state.

Responsibility of asylum seeker to provide evidence for claims

1.212 As noted above, the bill would insert a new section 5AAA to provide that asylum seekers have responsibility to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim'. The objective of the measure is described as 'encouraging individuals to specify the particulars of their claim as early as possible'.[32]

1.213 The statement of compatibility identifies the best interests of the child as engaged by the proposed measure. In support of its assessment of the measure as compatible with the obligation to consider the best interests of the child it states:

> …the Government is of the view that the aim of encouraging individuals to specify the particulars of their claim as early as possible is legitimate and should be applied to all persons seeking protection in Australia. As such

31 Article 3(1).

32 EM, Attachment A, p.4.

> section 5AAA is a reasonable and proportionate measure in achieving this aim and to the extent that this measure may engage the above Articles any limitation is reasonable, necessary and proportionate.[33].'

1.214 However, the committee notes that it is recognised in both international and domestic law that children have different capacities to adults. The committee is concerned that it may be particularly difficult for children, including unaccompanied minors, to provide evidence, as required by proposed section 5AAA, due to their age, vulnerabilities and capacity.

1.215 In this respect, the committee notes that the objective of the measure as described in the statement of compatibility does not provide a systematic analysis or explanation of how the measure will, of itself, encourage or support children to specify the particulars of their claims, taking into account the special vulnerabilities of children.

1.216 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'.[34] 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.

1.217 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 5AAA with the best interests of the child, and particularly:

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

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33 EM, Attachment A, p. 6.

34 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issue, at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx [accessed 15 July 2014].

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.218 As noted above, proposed section 423A of the bill would provide that, where a new claim or evidence is raised at the review stage that was not placed before the original decision maker, the Refugee Review Tribunal (RRT) is to draw an unfavourable inference about the credibility of the claim or the evidence. The unfavourable inference is only to be drawn if the RRT is satisfied that the asylum seeker 'does not have a reasonable explanation'.

1.219 The statement of compatibility explains that the 'measure is intended to encourage all protection visa applicants to raise their claims and provide supporting evidence as soon as possible, in order to avoid unnecessary delays in deciding an application'.[35]

1.220 The committee considers that the proposed measure potentially limits the obligation to consider the best interests of the child as a primary consideration. This is because it may negatively impact on the merits review of a child's application for protection. The committee is concerned that because children have special vulnerabilities as compared to adults, they may be more likely to fail to understand what information is important to their claim and may have limited capacity to present it. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

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

1.222 The committee notes that a systematic analysis or explanation of how the measure will, of itself, encourage children to raise their claims and provide supporting evidence as soon as possible, taking into account the special vulnerabilities of children, is particularly relevant to the human rights assessment (legitimate objective) of this measure.

1.223 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 423A with the obligations in relation to best interests of the child, and particularly:

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

35 EM, Attachment A, p. 4.

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

Power to refuse visa application for failure to establish identity, nationality or citizenship

1.224 As noted above, the bill would amend the Migration Act to provide that an asylum seeker who fails or refuses to comply with a request to provide proof of identity, nationality or citizenship, without reasonable excuse, may have their protection claims refused. Proposed section 91WA would provide an additional refusal power where an asylum seeker provides a 'bogus' document for the purpose of establishing identity or has caused the disposal of their identity documents.

1.225 The committee considers that the proposed measure potentially limits the obligation to consider the best interests of the child as a primary consideration. This is because the measure will effectively prevent Australia from assessing claims for refugee protection according to the tests as set out in international law. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

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

1.227 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 91W and section 91WA with the obligation in relation to the best interests of the child, and particularly:

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

Restrictions on applications for protection visa by member of same family unit

1.228 Schedule 1 of the bill would insert a new provision, section 91WB, which provides that a protection visa may be granted only on the basis of the applicant being a member of the same family unit as a protection visa holder, if the applicant applied for the protection visa before the primary protection visa holder was granted their protection visa. The purpose of this amendment appears to be to discourage parent's sending their child to Australia by boat unaccompanied.

1.229 The statement of compatibility identifies the measure as engaging and potentially limiting the rights of the child under article 10 of the CRC (and the rights to family life protected by article 17 and 23 of the ICCPR). In support of its assessment of the measure as compatible with human rights, it identifies the objective of the measure as being to encourage 'people to enter and reside in Australia using regular means, thereby preserving the integrity of the migration system and the national interest', and notes:

> Article 10 of the CRC requires that applications for family reunification made by minors or their parents are treated in a positive, humane and expeditious manner. However, Article 10 does not amount to a right to family reunification. The Australian Government will not provide a separate pathway (outside of the Humanitarian Programme) for family reunification that will exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited in existing law, these limitations are considered necessary, reasonable and proportionate to achieve a legitimate aim.[36]

1.230 The statement of compatibility also notes that children separated from their families continue to be able to apply for family reunification under the offshore Humanitarian Programme. However, the committee notes that Migration Amendment (2014 Measures No. 1) Regulation 2014 removed the concession for unaccompanied minors, which allowed their families to come to Australia under the special humanitarian programme (SHP) without having to meet the compelling reasons criterion.

1.231 The committee acknowledges that non-citizens do not have a stand-alone right to family reunification under international human rights law. The committee notes, however, that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia. The bill seeks to limit those rights. The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide a detailed and context-specific assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.232 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child as a primary consideration and, particularly, how the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**

36 EM, Attachment A, p. 8.

- **the measures are proportionate to that objective.**

Further barriers to permanent protection

1.233 Schedule 3 of the Bill inserts a barrier into the Migration Act preventing 'unauthorized maritime arrivals' on a temporary protection visa of some kind from making an application for a permanent visa unless the minister determines that it is in the public interest.

1.234 The committee notes that this means that people granted a temporary visa or bridging visa which contains no right to travel or sponsor family members is precluded from applying for any other category of visa unless the minster determines it is in the public interest for such a visa to be granted.

1.235 The committee notes that the engagement of the rights of the child in relation to this specific measure is not identified. As those on temporary protection visas and bridging visas are denied family reunification rights, this engages the rights of the child under article 10 of the CRC and article 17 and 23 of the ICCPR.

1.236 The committee acknowledges that non-citizens do not have a standalone right to family reunification under international human rights law. The committee notes, however, that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia. The bill seeks to limit those rights. The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.237 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly, how 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.**

Right to equality and non-discrimination

1.238 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).[37] 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.

1.239 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[38]

1.240 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.

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

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

Responsibility of asylum seeker to provide evidence for claims

1.243 As stated above, the bill would insert a new provision which provides that asylum seekers have responsibility to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim'.

1.244 The statement of compatibility identifies the rights to equality and non-discrimination as engaged by the proposed amendments.[39] The committee notes that the statement of compatibility sets out a range of matters which could be

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37 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights(ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

38 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.

39 EM, Attachment A, p. 6.

considered to be safeguards for persons from vulnerable groups in the context of the proposed section 5AAA. The statement of compatibility asserts that:

- asylum seekers may make private arrangements to be represented by a registered migration agent.
- asylum seekers who have arrived in Australia 'lawfully' (which the committee takes to mean with a valid visa) and are 'disadvantaged and face financial hardship may be eligible for assistance with their primary application under the Immigration Advice and Application Assistance Scheme'.[40]
- a small amount of additional support may be available for 'arrivals who are considered vulnerable'. Although the form of support is yet to be determined.[41]
- departmental policies and procedures will take into account whether an asylum seeker is from a vulnerable group.[42]

1.245 The committee notes that these measures, according to the information provided, are either undecided, unspecified or contingent. The committee therefore considers that the proposed section 5AAA may have a disproportionate or unintended negative impact on persons with a disability.[43] The committee notes that a person with particular disabilities may be less easily able to comply with the requirement 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim'.

1.246 The committee further considers the proposed section 5AAA may have a disproportionate or unintended negative impact on women. The committee notes that women may be more likely than their male counterparts to have claims based on persecution which has been suffered in the home or private sphere. Due to the nature of the harm women may have suffered, it may be potentially more difficult for women in these circumstances to obtain documentary evidence of the harm they have experienced, their activities and status in society.[44]

1.247 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of Section 5AAA with the rights to equality and non-discrimination.

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40 EM, Attachment A, p.4.

41 EM, Attachment A, p.4.

42 EM, Attachment A, p.4.

43 See Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament*, June 2014, pp 34 - 38, paras 1.136-1.163 (committee comments on Migration Legislation Amendment Bill (No. 2) 2014 and the rights of persons with disabilities)

44 D Singer, 'Falling at each hurdle: assessing the credibility of women's asylum claims in Europe' in J Millbank, C Dauvergne and E Erbel (eds) *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014), p.100.

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.248 As stated above the bill would provide that if a new claim or evidence is raised at the review stage that was not placed before the original decision maker then the Refugee Review Tribunal (RRT) is to draw an unfavourable inference about the credibility of the claim or the evidence. The unfavourable inference is only to be drawn if the RRT is satisfied that the asylum seeker 'does not have a reasonable explanation'. The statement of compatibility identifies the rights to equality and non-discrimination as engaged by the proposed amendments.[45]

1.249 However, the committee is concerned that proposed section 423A may have a disproportionate or unintended negative impact on persons with a disability. The committee notes that a person experiencing particular disabilities, in some circumstances, may be less able accurately provide evidence or repeat evidence.

1.250 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of section 423A with the rights to equality and non-discrimination.

Right to a fair trial and fair hearing rights

1.251 The right to a fair trial and fair hearing are contained in 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.

Responsibility of asylum seeker to provide evidence for claims

1.252 The committee notes that the right to a fair hearing in article 14(1) of the ICCPR may not generally apply to immigration decisions. However, the issue here relates to the bill's impact on existing determinations which have arisen from the exercise of existing statutory rights of review. As such, the committee considers that the retrospective application of these provisions constitutes a limitation on article 14(1) of the ICCPR and requires adequate justification.

RRT power to dismiss an application for failure to appear

1.253 Proposed section 362(1A) enables the RRT to dismiss an application where the asylum seeker fails to appear before the RRT after being invited to do so.

45 EM, Attachment A, p. 6.

Proposed s 362(1C) requires the RRT to, on application, reinstate if it considers it appropriate to do so.

1.254 The committee considers that the power under proposed section 362(1A) may constitute a limitation on the right to a fair hearing in article 14(1) of the ICCPR. The statement of compatibility provides no analysis of limitations on article 14(1) in the context of the proposed power to dismiss an application.

1.255 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed RTT to dismiss an application is compatible with on the right to a fair hearing in article 14 of the ICCPR, 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.**

Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2]

Portfolio: Treasury
Introduced: House of Representatives, 23 June 2014

Purpose

1.256 This bill proposes to repeal the mineral resources rent tax (MRRT) by repealing a number of acts (Schedule 1).[1] It also makes consequential amendments to other legislation,[2] required as a result of the repeal of the MRRT (Schedules 2- 9).

1.257 This bill also seeks to repeal the following MRRT-related measures: loss-carry back (Schedule 2); geothermal expenditure deduction (Schedule 5); low income superannuation contribution (Schedule 7); the income support bonus (Schedule 8); and schoolkids bonus (Schedule 9).

1.258 The bill will revise the following MRRT-related measures: capital allowances for small business entities (Schedules 3 and 4); and the superannuation guarantee charge percentage increase (Schedule 6).

Background

1.259 This bill is a reintroduction of the Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 which the committee considered in its *First Report of the 44th Parliament*.[3]

1.260 The committee considered the Parliamentary Secretary to the Treasurer's response in its *Eighth Report of the 44th Parliament* and noted that the response had not provided a detailed and evidence-based explanation for the measures in accordance with the committee's usual expectations.[4]

Committee view on compatibility

Right to social security

1.261 The right to social security is guaranteed 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

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1 *Minerals Resource Rent Tax Act 2012; Minerals Resource Rent Tax (Imposition—Customs) Act 2012*; *Minerals Resource Rent Tax (Imposition—Excise) Act 2012*; and *Minerals Resource Rent Tax (Imposition—General) Act 2012*.

2 Including the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

3 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, pp. 35-40.

4 Parliamentary Joint Committee on Human Rights, *Eight Report of the 44th Parliament*, 24 June 2014, pp 51-53.

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.

1.262 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).

1.263 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.

1.264 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

1.265 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.

1.266 The obligations of article 2(1) of the ICESCR also apply in relation to the right to an adequate standard of living, as described above in relation to the right to social security.

Deferral of proposed increase in compulsory superannuation contribution

1.267 Schedule 6 of the bill defers by two years the proposed gradual increase in the compulsory superannuation contribution by employers to 12 per cent.

1.268 The statement of compatibility concludes that Schedule 6 does not engage any human rights, noting that the measure to defer the proposed increase in the compulsory superannuation contribution:

> …does not affect an individual's eligibility for the social security safety net of the Age Pension (funded from Government revenue), which continues to be a fundamental part of Australia's retirement income system to ensure people unable to support themselves can have an adequate standard of living.[5]

1.269 The committee considers that the provision of superannuation engages both the right to an adequate standard of living[6] and the right to social security.[7] A similar view was consistently taken by the committee during the previous parliament.[8]

1.270 The proposed increase in the superannuation guarantee may be viewed as a measure to promote both of these rights. The deferral of the introduction of that measure may therefore be viewed as a limitation on these rights.

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

1.272 The committee therefore seeks the Treasurer's advice as to whether the deferral of the proposed increase to the compulsory superannuation contribution by two years is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Repeal of low-income superannuation contribution

1.273 Schedule 7 of the bill proposes to repeal the low income superannuation contribution (LISC) for contributions made for financial years starting on or after 1 July 2013. The statement of compatibility concludes that Schedule 7 does not engage any human rights, noting that the LISC:

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5 EM, p. 81.

6 Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

7 Article 9 of the ICESCR.

8 See, for example, Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013*, pp 78-80.

> …was funded with the expected revenue from the MRRT, which is being repealed. In order to ensure that the concessions in the superannuation system are sustainable for present and future generations, the LISC is also being repealed.[9]

1.274 As discussed above, the committee considers that the provision of superannuation engages both the right to an adequate standard of living,[10] and the right to social security.[11]

1.275 The reduction of the amount paid to low-income earners to compensate them for the tax paid on their superannuation contributions limits these rights.

1.276 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.

1.277 The committee therefore seeks the Treasurer's advice as to whether the repeal of the LISC is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Repeal of the low-income support bonus (Schedule 8)

1.278 Schedule 8 proposes to repeal the low-income support bonus (ISB).[12] The ISB was intended to provide payments to eligible recipients to help them plan expenditure and provide a buffer against unexpected costs.[13]

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9 EM, p. 82.

10 Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

11 Article 9 of the ICESCR.

12 By amendments made to the *Social Security Act 1991; Social Security (Administration) Act 1999; Farm Household Support Act 1992; Income Tax Assessment Act 1997.*

13 The eligible recipients are those receiving ABSTUDY Living Allowance, Austudy, Newstart Allowance, Parenting Payment, Sickness Allowance, Special Benefit, Youth Allowance, Transitional Farm Family Payment, and Exceptional Circumstances Relief Payment. ISB is also paid to eligible recipients under the Veterans' Children Education Scheme (Prepared under Part VII of the *Veteran's Entitlement Act 1986*), and the Military Rehabilitation and Compensation Act Education and Training Scheme (Determined under the *Military Rehabilitation and Compensation Act 2004*). People on any of these payments receiving more than the basic amount of Pension Supplement are not eligible for the ISB.

1.279 The statement of compatibility notes that the proposed removal of the ISB engages the rights to social security and to an adequate standard of living. It notes:

> [T]he right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage. Any removal of entitlements must be justified in line with Article 4 [of the ICESCR] in the context of the full use of the maximum available resources of the State party.[14]

1.280 The statement of compatibility further notes that this was a measure that was to be funded from the revenue to be raised by the MRRT and that with the removal of that tax, such measures are being removed. It maintains that the repeal of the ISB 'is a non-arbitrary measure that is reasonable, necessary and proportionate' in view of the modest sum involved, the range of existing social support programs, indexation and other factors to ensure that persons affected will continue to enjoy the right to social security and to an adequate standard of living.[15]

1.281 The removal of the ISB may be viewed either as a limitation or retrogressive measure. The committee accepts that the sums involved by the removal of the ISB are relatively modest. However, its removal may nevertheless have a detrimental effect on low-income and disadvantaged households, particularly in light of concerns regarding the adequacy of allowance payments in general.[16] The committee notes that the ISB was introduced in 2012 in recognition that:

> households relying on income support allowances as their main source of income may find it difficult to manage when unanticipated expenses, such as urgent repairs or unexpectedly large bills, arise. People in paid employment are more likely to be able to set aside some money for such circumstances, while allowance recipients may not be able to do so.[17]

1.282 The committee notes the statement of compatibility asserts that the package of existing payments and assistance available to individuals and families will be adequate to meet their needs, consistent with requirements under articles 9 and 11 of the ICESCR. The statement of compatibility, however, does not explain the evidence on which that assessment is made.

1.283 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.

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14 EM, p. 84.

15 EM, para 4.66.

16 See, for example, Parliamentary Joint Committee on Human Rights, *Fifth Report of 2013*; and Senate Education, Employment and Workplace Relations References Committee, *Report of the inquiry into the adequacy of the allowance payment system*, 29 November 2012.

17 Social Security and Other Legislation Amendment (Income Support Bonus) Bill 2012, EM, p. 15.

1.284 The committee therefore seeks the Treasurer's advice as to whether the measure to repeal the ISB is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Repeal of the Schoolkids bonus (Schedule 9)

1.285 Schedule 9 of the bill proposes to repeal the schoolkids bonus payment.[18] The schoolkids bonus is an indexed family assistance payment that is available to eligible families and people in certain other categories.[19]

1.286 The statement of compatibility notes that the repeal of the schoolkids bonus engages the rights to social security and to an adequate standard of living. It also notes that such rights may be limited in accordance with article 4 of the ICESCR.

1.287 The statement of compatibility argues that these rights are ensured through the system of family assistance and income and veterans' support payments which have the primary purpose of meeting the costs associated with raising a child. It notes that the schoolkids bonus 'is a supplementary payment designed to provide additional assistance for education expenses' and that the bill 'does not affect an individual's or child's right or access to family tax benefit or income support and veterans' payments.'[20]

1.288 The reduction in the payment of the schoolkids bonus may be viewed either as a limitation or retrogressive measure.

1.289 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

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18 By amendments made to the *A New Tax System (Family Assistance) Act 1999*; *A New Tax System (Family Assistance) (Administration) Act 1999*; *Income Tax Administration Act 1997*; and *Social Security (Administration) Act 1999*.

19 The eligible people are those receiving Family Tax Benefit Part A for a child in primary or secondary school. Young people in school receiving Youth Allowance or certain other income support or veterans' payments may also qualify for the bonus.

20 EM, p. 88.

1.290 The committee therefore seeks the Treasurer's advice as to whether the measure to repeal the schoolkids bonus payment is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Bill 2013 [No. 2]

Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2013 [No. 2]

Portfolio: Environment
Introduced: House of Representatives, 23 June 2014

1.291 The Clean Energy Legislation introduced an equivalent carbon price which applies to the import or manufacture of bulk synthetic greenhouse gases (SGGs) and import of all products containing these gases. These bills propose the repeal of those levies with effect from 1 July 2014.

1.292 The Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] seeks to amend the *Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995* to repeal provisions imposing an equivalent carbon price through levies imposed on the import and manufacture of synthetic greenhouse gas after 1 July 2014.

1.293 The Ozone Protection and Synthetic Greenhouse Gas (Import Levy) (Transitional Provisions) Bill 2013 [No. 2] seeks to provide for an exemption from the equivalent carbon price for the import of bulk synthetic greenhouse gases between 1 April and 30 June 2014 if certain conditions are met.

1.294 The Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2013 [No. 2] seeks to amend the *Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995* to repeal provisions imposing an equivalent carbon price through levies imposed on the import and manufacture of synthetic greenhouse gas after 1 July 2014.

1.295 The committee considered identical bills in its *First Report of the 44th Parliament*.[1]

1.296 The committee considers that these bills do not appear to give rise to human rights concerns.

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, p. 9.

Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 1), (No. 3) and (No. 5)) Bill 2014

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 2), (No. 4) and (No. 6)) Bill 2014

Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (Parliamentary Departments)) Bill 2014

Portfolio: Finance
Introduced: House of Representatives, 24 June 2013

1.297 The Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014 is part of a package of four bills and seeks to amend 246 Acts including to repeal the *Commonwealth Authorities and Companies Act 1997,* replace references to this Act and the *Financial Management and Accountability Act 1997* and address recommendations to reduce confusion regarding the duties for public officials and parliamentary service employees in the *Public Service Act 1999* and *Parliamentary Service Act 1999*.

1.298 The Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 1), (No. 3) and (No. 5)) Bill 2014 and the Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (No. 2), (No. 4) and (No. 6)) Bill 2014 seek to amend several Acts appropriating money out of the Consolidated Revenue Fund (CRF) for the ordinary annual services of the Government and related purposes to support the transition to the *Public Governance, Performance and Accountability Act 2013*.

1.299 The Public Governance, Performance and Accountability (Consequential Modifications of Appropriation Acts (Parliamentary Departments)) Bill 2014 seeks to amend several Acts appropriating money out of the CRF for certain expenditure relating to the Parliamentary Departments and other related purposes to support the transition to the *Public Governance, Performance and Accountability Act 2013*.

1.300 The committee notes that the bills have subsequently passed both House and received Royal Assent on 30 June 2014.

1.301 Each of the bills is accompanied by a statement of compatibility which concludes that the bills are compatible with human rights.

1.302 The committee considers that the bills do not appear to give rise to human rights concerns.

1.303 However, the committee notes that the statements of compatibility do not fully meet the committee's expectations as they cannot be read as self-contained documents and do not include information about the purpose and effect of the proposed bills. The committee therefore draws to the attention of the Minister for Finance the committee's usual expectations in relation to the content of statements of compatibility, as outlined in the committee's *Practice Note 1* (see Appendix 3).

Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014

Portfolio: Employment
Introduced: House of Representatives 4 June 2014

Purpose

1.304 The Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (the bill) seeks to amend the Social Security (Administration) Act 1999 to provide that:

- jobseekers who incur an eight-week non-payment penalty for refusing suitable work will no longer be able to have the penalty waived; and
- jobseekers who persistently fail to comply with participation obligations will only be able to have the penalty waived once while in receipt of an activity tested income support payment.

Committee view on compatibility

Right to social security

1.305 The right to social security is guaranteed 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.

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

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

1.307 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.

1.308 Specific purposes and circumstances recognised as engaging a person's right to social security include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

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

Right to an adequate standard of living

1.310 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.

1.311 The obligations of article 2(1) of the ICESCR also apply in relation to the right to an adequate standard of living, as described above in relation to the right to social security.

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.312 Currently, the *Social Security (Administration) Act* 1999 provides that jobseekers who receive an activity-tested income support payment 'participation payment' (that is, the Newstart allowance and, in some cases, youth allowance, parenting payment or special benefit) may have an eight-week non-payment penalty imposed if they refuse suitable employment, or for repeated failures to comply with their activity-test obligations.

1.313 The bill would remove the ability for the eight-week non-payment penalty to be waived for refusing suitable employment. In relation to jobseekers who persistently fail to comply with participation obligations, the penalty will only be able to be waived once for each period of continuous receipt of a participation payment.

1.314 The committee notes that the measures may limit these rights because their effect may be to reduce the ability of jobseekers subject to the eight-week penalty to enjoy an adequate standard of living. In this regard, the statement of compatibility notes that the measures potentially limit the rights to social security and to an adequate standard of living, and concludes:

> To the extent that the Bill may limit the right to social security and the right to an adequate standard of living, there is a reasonable justification...[1]

1.315 The statement of compatibility effectively identifies the 'reasonable justification' or objective of the measures as being to 'provide stronger deterrents to persistent non-compliance' of jobseekers to satisfy participation requirements.[2]

1.316 However, the committee notes that, while the statement of compatibility provides data regarding the number and amount of penalties applied, and the percentage of cases in which a waiver has been applied, the assessment does not establish that the removal or limitation of the waiver will, of itself, provide a deterrent against non-compliance with jobseekers' obligations.[3] In particular, the figures provided on the proportion of waivers granted are not accompanied by an analysis to show that these were inappropriate, excessive or misused. It is therefore unclear how limiting the availability of a waiver on the ground of a jobseeker's severe financial hardship, or because a jobseeker agrees to undertake more intensive activities, such as Work for the Dole, would achieve the stated objective of the measures.

1.317 Based on the information and analysis provided the committee does not consider that the statement of compatibility adequately demonstrates that the proposed amendments are needed for the purpose of meeting a pressing and substantial concern, that there is a rational connection between the measure and the identified objective and that the measure is a reasonable and proportionate one for the achievement of that objective.

1.318 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'.[4] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

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1 Explanatory memorandum (EM), p. 12.

2 EM, p. 12.

3 EM, p. 13.

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

1.319 Further, the committee considers that the characterisation of the bill as promoting the right to work by providing 'a stronger incentive to accept an offer of suitable work'[5], is not an accurate assessment of the limitation on human rights proposed by the measure. For example, the statement does not adequately the address the punitive aspects of the bill and how these might outweigh the asserted indirect promotion of the right to work. Reference to more remote impacts on other human rights, fails to effectively analyse the human rights implications required by human rights law.

1.320 The committee therefore seeks the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the right to social security, 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.**

Right to equality and non-discrimination

1.321 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).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.

1.322 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.[6]

1.323 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. Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the

5 EM, p. 11.

6 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.

specific elements that States parties are required to take into account to ensure the rights to equality for women.

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.324 The committee considers that the bill could potentially have a disproportionate or unintended negative impact on particular groups, and may therefore engage and limit the rights to equality and non-discrimination. For example, women are generally more likely to be welfare recipients and to have a range of caring responsibilities that intersect with the right to social security.

1.325 However, the statement of compatibility does not provide any assessment of the compatibility of the bill with the rights to equality and non-discrimination.

1.326 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provides an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.327 The committee notes that group-specific information, such as analysis or modelling based on gender-disaggregated data, is particularly relevant to the human rights assessment of this measure.

1.328 The committee therefore seeks the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the rights to equality and non-discrimination.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 18 June 2014

Purpose

1.329 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the bill) seeks to amend various Acts relating to social security, family assistance, veterans' entitlements, military rehabilitation and compensation and farm household support. The bill would:

- cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2014;
- rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014;
- implement the following changes to Australian Government payments:
    - pause indexation for three years of the income-free areas and assets-value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014;
    - index parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014;
    - pause indexation for three years of several family tax benefit free areas from 1 July 2014;
    - review disability support pension recipients under age 35 against revised impairment tables and apply the Program of Support requirements from 1 July 2014;
    - limit the six-week overseas portability period for student payments from 1 October 2014;
    - extend and simplify the ordinary waiting period for all working age payments from 1 October 2014; and
    - pause indexation for two years of the family tax benefit Part A and family tax benefit Part B standard payment rates from 1 July 2014.

1.330 The bill would also add the Western Australian Industrial Relations Commission decision of 29 August 2013 as a pay equity decision under the *Social and Community Services Pay Equity Special Account Act 2012*, to allow payment of Commonwealth supplementation to service providers affected by that decision.

Committee view on compatibility

Right to equality and non-discrimination

1.331 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.332 These are fundamental human rights that 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 protection of the law.

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

1.334 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.

Statement of compatibility does not address potential indirect discrimination against women.

1.335 Women are more likely than men to be recipients of a broad range of social security benefits and more likely to be reliant on some form of social security than men. Accordingly, a number of measures in the bill, which seek to reduce the amount of a social security payment, or restrict eligibility for a benefit may have a disproportionate effect on women.

1.336 The committee notes that the statement of compatibility fails to consider the impact of the bill 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.

1.337 The committee therefore requests the Minister for Social Services' advice on the compatibility of each schedule in 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.**

Right to social security

1.338 The right to social security is guaranteed 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.

1.339 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).

1.340 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.

1.341 Specific purposes and circumstances recognised as engaging a person's right to social security include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

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

Right to an adequate standard of living

1.343 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.

1.344 Article 2(1) of ICESCR also imposes on Australia the obligations listed at paragraph 1.6 above in relation to this right.

Abolition of seniors supplement

1.345 Schedule 1 of the bill would abolish the seniors supplement for holders of the Commonwealth Seniors Health Card. Veterans who hold a Commonwealth Seniors Health Card or Gold Card will also no longer receive the seniors supplement.

1.346 The seniors supplement is currently paid quarterly at the rate of $876.20 per annum for singles and $1320.80 for couples.[1] The payment is designed to assist with large annual bills such as motor vehicle registration.[2] The seniors supplement is payable to self-funded retirees not receiving the Age Pension or veteran's pension, and on incomes of less than $50 000 (singles) or $80 000 (couples).[3]

1.347 The statement of compatibility for the bill notes that the effect of the measure will be to reduce the income of self-funded retirees (on less than $50 000 (singles) or $80 000 (couples) per annum). It states:

> This Schedule removes assistance from those with higher means, and is consistent with a well-targeted income support system which is targeted at those in most financial need.[4]

1.348 The committee notes that a reduction in these payments may be seen as limiting the rights to social security and to an adequate standard of living, to the extent that reducing retirement incomes may affect retirees' capacity to enjoy an adequate standard of living. However, while the statement of compatibility for the bill describes the measure as 'consistent' with the targeting of the scheme, it provides no assessment of this potential limitation of human rights.

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

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1 Department of Human Services website, 'Seniors supplement', http://www.humanservices.gov.au/customer/services/centrelink/seniors-supplement [accessed 26 June 2014].

2 Department of Human Services website, 'Seniors supplement', http://www.humanservices.gov.au/customer/services/centrelink/seniors-supplement [accessed 26 June 2014].

3 Department of Human Services website, 'Seniors supplement', http://www.humanservices.gov.au/customer/services/centrelink/seniors-supplement [accessed 26 June 2014].

4 Statement of compatibility, p. 1.

1.350 The committee notes that information regarding the number of seniors affected by the measure, and the expected financial impact on these individuals, is particularly relevant to the human rights assessment of this measure.

1.351 The committee therefore seeks the Minister for Social Services' advice as to whether the removal of the seniors supplement is compatible with the right to social security, 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.**

Ceasing indexation of the (clean) energy supplement

1.352 Schedule 2 of the bill seeks to rename the clean energy supplement as the 'energy supplement' and permanently cease its indexation. The current value of the supplement is 1.7 per cent of the standard Age Pension rate.[5]

1.353 The statement of compatibility notes that the energy supplement was introduced to the primary social security, family assistance and veterans' entitlements payments as compensation for the cost-of-living impacts of the carbon tax.[6] The statement of compatibility concludes that the measure will have 'no human rights impacts' because:

> Recipients will be better off because there will no longer be price pressures from the carbon tax and people will continue to receive the energy supplement.
>
> There are no human rights impacts, as recipients will be better off after the carbon tax is repealed.[7]

1.354 The committee notes that the effect of ceasing indexation of the energy supplement will be to reduce over time (by the impact of inflation) the value of the supplement in real terms. This may represent a limitation on the rights to social security and to an adequate standard of living, to the extent that reducing the value of the affected social security payments over time may impact on the ability of recipients to enjoy an adequate standard of living.

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5 Department of Human Services website, 'Seniors supplement', http://www.humanservices.gov.au/customer/services/centrelink/seniors-supplement [accessed 26 June 2014].

6 EM, p. 14.

7 EM, p. 45.

1.355 However, while the statement of compatibility asserts that the measure will provide a relative benefit at a certain point in time (being the assumed point at which the carbon tax is abolished), it provides no assessment of this potential limitation on human rights.

1.356 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.

1.357 The committee notes that information regarding the number of families who would be affected by ceasing the indexation of the energy supplement, and the financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.358 The committee therefore seeks the Minister for Social Services' advice as to whether ceasing indexation of the energy supplement is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Pausing indexation of income and asset thresholds for a range of benefits

1.359 Schedule 3 of the bill would pause indexation, for three years from 1 July 2014, of:

- the income-free areas and assets-value limits for all working-age allowances (other than student payments);
- the income test-free area and assets-value limit for parenting payment single; and
- several family tax benefit-free areas.

1.360 In concluding that the bill is compatible with human rights, the statement of compatibility states:

> The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in targeting payments according to need. Payments will not be reduced unless

customers' circumstances change, such as their income or assets increasing in value.[8]

1.361 However, the committee notes that this assessment appears not to take into account the impact of inflation, which may have the effect that families whose incomes merely keep up with inflation (and thus do not increase in value in real terms) may still have their benefits reduced. This is because it can be expected that a number of families will lose and/or have reduced their entitlement to family tax benefits and other working-age allowances if, due to inflation, their incomes rise above a relevant threshold over the period. To the extent that this reduction or loss of entitlements may impact on the ability of recipients to enjoy the rights to social security and an adequate standard of living, the measure may be seen as potentially limiting those rights.

1.362 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.

1.363 The committee notes that information regarding the number of families who would be affected by ceasing the indexation of these benefits, and the financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.364 The committee therefore seeks the Minister for Social Services' advice as to whether the these measures in Schedule 3 of the bill are compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Pausing indexation of the parenting payment single

1.365 Schedule 3 of the bill would also change the indexation of the parenting payment single from benchmarking against Male Total Average Weekly Earnings (MTAWE) to the Consumer Price Index (CPI).

1.366 The statement of compatibility states that the measure is compatible with human rights as:

8 EM, p. 6.

> Parenting Payment Single will continue to be indexed to movement in the Consumer Price Index twice a year, and its purchasing power will be maintained.[9]

1.367 However, this assessment does not address potential differences in the rate of growth between CPI and MTAWE indexation (and thus their relative efficiency in maintaining the purchasing power of the benefit). The committee notes that indexation by CPI rather than MTAWE may result in slower growth of parenting payment single (given that MTAWE generally increases at a higher rate), thus reducing the purchasing power of the payment over time. To the extent that this reduction may affect the ability of recipients to enjoy the rights to social security and an adequate standard of living, the measure may be seen as potentially limiting those rights.

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

1.369 The committee notes that information regarding the number of families that may be affected by the measure, and the expected financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.370 The committee therefore seeks the Minister for Social Services' advice as to whether changing the indexation of the parenting payment single from benchmarking against Male Total Average Weekly Earnings to the Consumer Price Index is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Restrictions on eligibility for immediate social welfare payments

1.371 Schedule 6 to the bill would amend the *Social Security Act 1991* to extend the application of the one-week waiting period, which currently applies to new claimants of Newstart allowance and sickness allowance, to new claimants of youth allowance (other), parenting payment and widow allowance.

9 EM, p. 48.

1.372 Schedule 6 would also introduce an additional criterion to be satisfied for claimants seeking to have the one-week waiting period waived. Currently, this period may be waived if the Secretary of the Department of Human Services is satisfied that claimants are in 'severe financial hardship'.[10] Schedule 6 would require that the person also be 'experiencing a personal financial crisis' (and provide supporting evidence). The definition of 'experiencing a personal financial crisis' will be set out in rules.

1.373 The statement of compatibility explains that the objective of the measure is:

> …to better promote self-support, and discourage a culture of automatic entitlement to income support, by ensuring that the waiting period is applied consistently and effectively across similar working age payments.[11]

1.374 The statement of compatibility concludes:

> To the extent that the changes in this Schedule may limit the right to social security, those limitations are reasonable and proportionate to the policy objective of ensuring a sustainable and well-targeted payment system.[12]

1.375 The committee notes that the objective of the measure is not clearly identified, being variously described as to 'discourage a culture of automatic entitlement' and to ensure 'a sustainable and well-targeted payment system'. Further, the committee notes that these objectives are overly generalised and not sufficiently supported by evidence, as required to conduct a human rights assessment.

1.376 The committee notes the Attorney-General's Department's guidance on the preparation of statements of compatibility that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[13] 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.

1.377 In relation to the effect of the measure, the committee notes that the extension of the one-week waiting period to a broad range of benefits, and the

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10 Under section 19C of the *Social Security Act 1991*, a claimant is in 'severe financial hardship' where the value of their liquid assets is less than their fortnightly rate of payment (if single) or less than double their fortnightly payment (if partnered).

11 Statement of compatibility, p.9.

12 Statement of compatibility, p. 11.

13 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].

introduction of an additional criteria for a waiver of the waiting period, represent potential limitations on the rights to social security and to an adequate standard of living. This is because the measures may reduce a person's financial capacity to provide an adequate standard of living for themselves and their families. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

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

1.379 The committee notes that information regarding the number of people affected by the measure and the expected financial impact on those individuals (including their ability to access crisis support) is particularly relevant to the human rights assessment of this measure.

1.380 The committee therefore seeks the Minister for Social Services' advice as to whether changing the eligibility for immediate social welfare payments is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Restrictions on eligibility for immediate social welfare payments – quality of law test

1.381 The committee notes that human rights standards require that limitations on 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 laws which interfere with human rights must be sufficiently certain and accessible for people to understand when the interference with their rights will be justified.

1.382 In the committee's view, the requirement for welfare recipients to prove they are 'experiencing a personal financial crisis' is not well defined. The Secretary of the Department of Human Services is given broad power to shape the requirements through legislative rules.

1.383 The existing requirement to show 'severe financial hardship' is defined objectively on the basis of the person's liquid assets and is set out in the Act. The proposed additional requirement to also prove a 'personal financial crisis' may introduce discretionary and subjective requirements that are difficult for claimants

to meet. In these circumstances, the committee considers that the measure may not meet the quality of law test standards.

1.384 The committee therefore requests the Minister for Social Security's advice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

Pausing indexation of Family Tax Benefits

1.385 Schedule 7 of the bill would pause for two years the indexation of a number of family tax benefit payments from 1 July 2014. The payments are the family tax benefit Part A, the standard rates for family tax benefit Part B, and an approved care organisation's standard rate. These payments are currently indexed against CPI.

1.386 The statement of compatibility states that the measure is compatible with human rights as:

> To the extent that maintaining the family tax benefit standard payment rates limits the right to social security, this is reasonable and proportionate. The standard rates are not being reduced, and families will continue to receive assistance at current rates for another two years. Certain elements of family tax benefit, namely rent assistance, newborn supplement, large family supplement and multiple birth allowance, will continue to be indexed.[14]

1.387 The committee notes that the effect of ceasing the indexation of these payments for two years will be to reduce over time (by the impact of inflation) their value in real terms. This potentially represents a limitation on the right to social security and potentially the right to an adequate standard of living.

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

1.389 The committee notes that information regarding the number of families that may be affected by the measure and the expected financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.390 The committee therefore seeks the Minister for Social Services' advice as to whether pausing the indexation of family tax benefit payments is compatible with the right to social security and the right to an adequate standard of living, and particularly:

14 EM, p. 56.

- **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.**

Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 18 June 2014

Purpose

1.391 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the bill) seeks to amend various Acts relating to social security, family assistance, veterans' entitlements and farm household support to make the following changes to certain Australian Government payments:

- pause indexation for three years of the income free areas and assets value limits for student payments, including the student income bank limits from 1 January 2015;
- pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017;
- provide that all pensions are indexed to the Consumer Price Index only by removing from 20 September 2017:
  - benchmarking to Male Total Average Weekly Earnings; and
  - indexation to the Pensioner and Beneficiary Living Cost Index.

1.392 The bill would also:

- reset the social security and veterans' entitlements income test deeming thresholds to $30 000 for single income support recipients, $50 000 combined for pensioner couples, and $25 000 for a member of a couple (other than a pensioner couple) from 20 September 2017;
- generally limit the overseas portability period for disability support pension to 28 days in a 12-month period from 1 January 2015;
- exclude from the social security and veterans' entitlements income test any payments made under the new Young Carer Bursary Programme from 1 January 2015;
- include untaxed superannuation income in the assessment for the Commonwealth Seniors Health Card (with products purchased before 1 January 2015 by existing cardholders exempt from the new arrangements), and extend from six to 19 weeks the portability period for cardholders;
- remove relocation scholarship assistance for students relocating within and between major cities from 1 January 2015;
- cease the pensioner education supplement from 1 January 2015;

- cease the education entry payment from 1 January 2015;
- extend youth allowance (other) to 22 to 24 year olds in lieu of the Newstart allowance and sickness allowance From 1 January 2015;
- require young people with full capacity to learn, earn or Work for the Dole from 1 January 2015;
- implement the following family payment reforms from 1 July 2015:
    - limit the family tax benefit Part A large family supplement to families with four or more children;
    - remove the family tax benefit Part A per-child add-on to the higher income free area for each additional child;
    - revise the family tax benefit end-of-year supplements to their original values and cease indexation;
    - reduce the primary earner income limit of family tax benefit Part B from $150 000 a year to $100 000 a year;
    - limit family tax benefit Part B to families with children under six years of age, with two-year transitional arrangements for current recipients with children above the new age limit; and
    - introduce a new allowance for single parents on the maximum rate of family tax benefit Part A for each child aged six to 12 years inclusive, and not receiving family tax benefit Part B.
- increase the qualifying age for the age pension and the non-veteran pension age to 70 (increasing by six months every two years from 1 July 2025).

Committee view on compatibility

Right to social security

1.393 The right to social security is guaranteed 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.

1.394 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).

1.395 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.

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

1.397 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.

Changes to indexation of pensions

1.398 Schedule 1 of the bill would remove indexation of pensions by reference to Male Total Average Weekly Earnings and the Pensioner and Beneficiary Living Costs Index (PBLCI), with the result that all pensions will be indexed against the Consumer Price Index (CPI) from September 2017.

1.399 The statement of compatibility explains that the objective of the measure is to achieve 'consistency of indexation arrangements across the social security system', and noting that payments will be indexed twice a year, and that their 'purchasing power will be maintained'. It concludes that the measure is compatible with human rights because it 'does not limit access to social security'.[1]

1.400 However, this assessment does not address potential differences in the rate of growth between CPI and MTAWE/PBCLI indexation (and thus their relative efficiency in maintaining the purchasing power of the benefit). The committee notes that indexation by CPI rather than MTAWE/PBCLI may result in slower growth of payments (given that MTAWE generally increases at a higher rate), thus reducing the purchasing power of those payments over time. To the extent that this reduction may impact on the ability of recipients to enjoy the rights to social security and an

1 Statement of compatibility, p. 1 (see explanatory memorandum).

adequate standard of living, the measure may be seen as potentially limiting those rights.

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

1.402 The committee notes that information regarding the number of persons that may be affected by the measure, and the expected financial impact on those persons, is particularly relevant to the human rights assessment of this measure.

1.403 The committee therefore seeks the Minister for Social Services' advice as to whether the changes to indexation of pensions are compatible with the right to social security, 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.**

Pausing indexation of income and asset test thresholds for a range of benefits

1.404 Schedule 1 of the bill would pause indexation of income and asset test thresholds for a number of Australian government payments for three years from 1 January 2015. This includes: the income free areas and assets value limits for student payments, including the student income bank limit; the parental income free area; and the family actual means free area.

1.405 Schedule 1 would also, for three years from 1 July 2017, pause indexation of the income test and assets test free areas for social security pension payments (other than parenting payment single) and equivalent Veterans' Affairs pension payments, as well as the deeming thresholds for all income support payments.

1.406 In concluding that the bill is compatible with human rights, the statement of compatibility explains:

> The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in targeting payments according to need. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.[2]

2 Explanatory memorandum (EM), p. 6.

1.407 However, the committee notes that this assessment appears not to take into account the impact of inflation, which may have the effect that persons whose incomes merely keep up with inflation (and thus do not increase in value in real terms) may still have their benefits reduced. This is because it can be expected that a number of people will lose and/or have reduced their entitlement to benefits if, due to inflation, their incomes, or the value of their assets, rise above a relevant threshold over the period. To the extent that this loss of or reduction in entitlements may impact on the ability of recipients to enjoy the rights to social security and an adequate standard of living, the measure may be seen as potentially limiting those rights.

1.408 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.

1.409 The committee notes that information regarding the number of individuals who would be affected by pausing the indexation of these benefits, and the financial impact on those persons, is particularly relevant to the human rights assessment of this measure.

1.410 The committee therefore seeks the Minister for Social Services' advice as to whether the these measures in Schedule 1 of the bill are compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Removal of eligibility for Newstart allowance for 22-24 year olds

1.411 Schedule 8 of the bill would provide that 22-24 year olds are no longer eligible for Newstart allowance (or Sickness Allowance), and are instead eligible for youth allowance. Existing recipients of Newstart allowance (or sickness allowance) would continue to receive those payments until such time as they are no longer eligible.

1.412 The statement of compatibility for the bill notes that the measure engages the right to social security, and states that it 'provides incentives to young unemployed Australians to acquire the required skills to obtain gainful employment'. It concludes that the measure is compatible with human rights because it 'generally advances human rights including the opportunity for education and gainful

employment'; and that any limitations on human rights are 'reasonable and for legitimate reasons'.[3]

1.413 The committee notes that, for single people living away from home, the rate of youth allowance is approximately $95 a fortnight less than the Newstart allowance.[4] The effect of the measure would therefore appear to be to reduce the quantum of social security payments available to 22-24 year olds. To the extent that this reduced payment may impact on the ability of recipients to enjoy the rights to social security and an adequate standard of living, the measure may be seen as potentially limiting those rights. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

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

1.415 The committee notes that information regarding the number of young people affected by the measure, and the expected financial impact on those people, is particularly relevant to the human rights assessment of this measure.

1.416 The committee therefore seeks the Minister for Social Services' advice as to whether the removal of eligibility of 22-24 year olds for the Newstart allowance is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Twenty-six week waiting period for social security payments for under-30 year olds

1.417 Schedule 9 of the bill would introduce a requirement, from 1 January 2015, that individuals under the age of 30 be subject to a 26-week waiting period before social security benefits become payable. The measure would apply to applicants

3 Statement of compatibility, pp 16-17.

4 Department of Human Services website, 'Payment rates for Newstart Allowance', http://www.humanservices.gov.au/customer/enablers/centrelink/newstart-allowance/payment-rates-for-newstart-allowance (accessed 8 July 2014); and 'Youth Allowance', http://www.humanservices.gov.au/customer/services/centrelink/youth-allowance [accessed 8 July 2014].

seeking Newstart allowance, youth allowance (other) and special benefit. The 26-week waiting period may be reduced if a person has previously been employed, and there are a range of exemptions for parents and individuals with a disability.

1.418 After the initial 26-week waiting period, jobseekers may be eligible to receive income support for 26 weeks. After that 26-week payment period, a person will be subject to a further 26-week non-payment period, unless an exemption applies. This cycle will continue, with income support generally payable for 26 weeks in every year until a person finds a job, undertakes full-time study or turns 30 years of age.

1.419 The statement of compatibility for the bill states that the measure is intended to provide 'incentives for young unemployed Australians to either acquire employment or the required skills to obtain gainful employment'.[5] While the statement of compatibility does not explicitly identify the measure as potentially limiting human rights, it concludes that, to the extent that the measure 'may limit the right to social security and the right to an adequate standard of living, the impact is reasonable and for legitimate reasons'.[6]

1.420 The committee notes that the effect of the measure would be that individuals would be ineligible for income support for periods of six months at a time. On its face, the measure appears to remove those individuals' capacity to provide their own adequate food and shelter, and therefore to be incompatible with the rights to social security and to an adequate standard of living. However, while the statement of compatibility identifies a number of exemptions 'to allow flexibility in exempting certain vulnerable persons from the measure', and states that young people 'often have access to family support to enjoy an adequate standard of living,'[7] it provides no assessment of this potential limitation on human rights.

1.421 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.

1.422 The committee notes that information regarding the likely impact of the measure on individuals and their families, and how individuals subject to the measure will retain access to adequate shelter and food, is particularly relevant to the human rights assessment of the measure. Further, noting that the stated objective of the measure is to improve the employment rate of young people, the committee would expect the assessment to include a sufficiently evidence-based

5 Statement of compatibility, p. 20.

6 Statement of compatibility, p. 20.

7 Statement of compatibility, p. 20.

analysis to demonstrate how the measure will achieve its objective of increasing youth employment.

1.423 The committee therefore seeks the Minister for Social Services' advice as the whether the 26 week waiting period for social security benefits for those under 30 is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Change to eligibility criteria for the large family supplement

1.424 Schedule 10 of the bill seeks to change the eligibility criteria for the family tax benefit large family supplement so that it will apply to families with four or more children, instead of those with three or more children as currently.

1.425 In concluding that the measure is compatible with human rights, the statement of compatibility for the bill states:

> Limiting the family tax benefit Part A large family supplement better targets this supplement to families with four or more children. To the extent that this limits the right to social security, this change is reasonable and proportionate. Very large families will have extra support.[8]

1.426 However, while the statement of compatibility identifies the measure as limiting the right to social security, it provides no information in support of its assessment of the measure as compatible with human rights.

1.427 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.

1.428 The committee notes that information regarding the number of families likely to be affected by the measure, and the expected impact of the withdrawal of the supplement on those families, is particularly relevant to the human rights assessment of the measure.

8 Statement of compatibility, p. 22.

1.429 The committee therefore seeks the advice of the Minister for Social Services as to whether the change to the eligibility criteria for the family tax benefit large family supplement is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Reduced access to family tax benefit Part B

1.430 Schedule 10 of the bill also seeks to reduce access to family tax benefit Part B to only those families with the youngest child under 6 years of age. Currently, Part B is available to families with a child under 16 years of age or with a full-time secondary student up to 18 years of age. A transitional two-year period will apply for families currently receiving Part B.

1.431 In addition, the bill would introduce a single parent supplement for single parents eligible for the maximum Part A payment, and with children aged 6 to 12. This supplement is intended to 'offset partially the loss of assistance' to single parent families as a result of the reduced access to Part B.[9]

1.432 In concluding that the measure is compatible with human rights, the statement of compatibility for the bill states:

> Limiting the age of eligibility for family tax benefit Part B to families with a youngest child aged under six acknowledges that care requirements for children are higher when children are very young. To the extent that this limits the right to social security, it is reasonable and proportionate. This change encourages parents to participate in the workforce.[10]

1.433 The committee notes that the effect of the measure would be to reduce access to family tax benefit Part B for families with a child under 16 years of age or with a full-time secondary student up to 18 years of age. To the extent that those families' loss of access to the benefit may impact on their ability to enjoy an adequate standard of living, the measure may be regarded as limiting the rights to social security and to an adequate standard of living. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

1.434 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

9 EM, p. 49.

10 Statement of compatibility, p. 23.

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.

1.435 The committee notes that information regarding the number of families impacted by the measure, and the expected financial impact of the measure on those families, is particularly relevant to the human rights assessment of the measure.

1.436 The committee therefore seeks the advice of the Minister for Social Services as to whether the proposed reduction in access to family tax benefit Part B is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Increase to age pension entitlement age

1.437 Schedule 11 of the bill would increase the age pension qualification age from 67 to 70 years by increments of six months every two years from 1 July 2025.

1.438 In concluding that the measure is compatible with human rights, the statement of compatibility for the bill states:

> This Schedule changes the qualification arrangements for the age pension. However, other social security income support payments will remain available for claimants in the affected age groups who cannot fully support themselves before qualifying for the age pension. The Schedule is compatible with human rights because it does not limit or preclude people from gaining or maintaining access to social security.[11]

1.439 The committee notes that the effect of the measure is to effectively reduce access to the age pension by increasing the qualification age. To the extent that the reduced access to the benefit may impact on a person's ability to enjoy an adequate standard of living, the measure may be regarded as limiting the rights to social security and to an adequate standard of living. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

1.440 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

11 Statement of compatibility, p. 24.

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

1.441 The committee notes that information regarding: the number of persons affected by the measure; the expected financial impacts of the measure; and the eligibility criteria and relative value of other income support schemes available to affected persons is particularly relevant to the human rights assessment of this measure.

1.442 The committee therefore seeks the advice of the Minister for Social Services as to whether the increase in age eligibility for the age pension is compatible with the right to social security and the right to 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 reasonable and proportionate measure for the achievement of that objective.**

Right to equality and non-discrimination

1.443 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).[12] 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 protection of the law.

1.444 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[13]

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12 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

13 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.

1.445 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.

1.446 Differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds and is a proportionate measure in pursuit of a legitimate objective.

Residency requirements for the disability support pension

1.447 Schedule 2 of the bill would change the residency requirements for the disability support pension so that, from 1 January 2015, recipients may only travel overseas for 28 days in a 12-month period. If recipients travel for longer periods they will lose their benefit and have to reapply on return to Australia. Currently, recipients of the disability support pension may travel for up to six weeks at a time, and there are a number of exceptions that permit absences longer than six weeks.

1.448 To the extent that the bill proposes to impose conditions on eligibility to continue to receive benefits on persons with disability apply that are more restrictive than those which apply to other social welfare recipients, such as age pension recipients, the measure involves differential treatment on the basis of the status of disability. Under article 26 of the ICCPR and articles 9 (social security) and 12 (adequate standard of living) of the ICESCR such differential treatment will constitute a violation of the guarantees of equal protection of the law and non-discrimination in the enjoyment of the rights to social security and to an adequate standard of living, unless the measure can be shown to be based on objective and reasonable grounds in pursuit of a legitimate objective. However, the statement of compatibility does not identify the measure as engaging and potentially limiting the right to equality and non-discrimination.

1.449 The committee therefore requests the Minister for Social Services' advice on the compatibility of the proposed changes to residency requirements for disability support pension recipients with the right to equality and non-discrimination and in particular, whether these measures are:

- **based on objective and reasonable grounds; and**
- **is a proportionate measure in pursuit of a legitimate objective.**

Age criteria for Newstart allowance and exclusion periods

1.450 The committee notes that the following two measures discussed above seek to effect changes to current entitlements that would operate with reference to a person's age:

- Schedule 8 would provide that 22-24 year olds are no longer eligible for Newstart allowance (or Sickness Allowance), and are instead eligible for youth allowance; and

- Schedule 9 would introduce a requirement, from 1 January 2015, that individuals under the age of 30 be subject to a 26-week waiting period before social security benefits become payable. The measure would apply to applicants seeking Newstart allowance, youth allowance (other) and special benefit.

1.451 The committee notes that a measure that impacts differentially on individuals based on their age is likely, on its face, to be incompatible with the right to equality and non-discrimination. However, the statement of compatibility does not identify the measures as engaging and potentially limiting the right to equality and non-discrimination.

1.452 The committee notes that, to establish that the apparent discrimination against people on the basis of their age is not arbitrary, a human rights assessment of the measures would require an assessment of how the proposed age cut offs are necessary, reasonable and proportionate to achieve a legitimate objective. Such an assessment should, for example, provide a detailed and evidence based explanation of why the six-month exclusion period should apply to 29 year olds and not 30 year olds.

1.453 The committee therefore requests the advice of the Minister for Social Services as to the compatibility of the proposed measures in schedules 8 and 9 with the right to equality and non-discrimination and in particular, whether these measures are:

- **based on objective and reasonable grounds; and**
- **is a proportionate measure in pursuit of a legitimate objective.**

Reduced access to family tax benefit Part B

1.454 As noted above, Schedule 10 of the bill seeks to reduce access to family tax benefit Part B to only those families with the youngest child under 6 years of age. Currently, Part B is available to families with a child under 16 years of age or with a full-time secondary student up to 18 years of age.

1.455 In addition, the bill would introduce a single parent supplement for single parents eligible for the maximum Part A payment, and with children aged 6 to 12. This supplement is intended to 'offset partially the loss of assistance' to single parent families as a result of the reduced access to Part B.[14]

1.456 The committee notes that the measure may have a disproportionate and therefore discriminatory effect on women, given that women are generally more likely to be single parents than men.

14 EM, p. 49.

1.457 Further, the EM for the bill explains that the new supplement only 'partially' offsets the cuts to family tax benefit Part B,[15] which suggests that single parent families with children aged over six are likely to be particularly affected by this measure. Again, single parent households are more likely to headed by women, which may result in the measure having a disproportionate and therefore discriminatory effect on women.

1.458 The committee therefore requests the advice of the Minister for Social Services on the compatibility of the measure in Schedule 10 with the right to equality and non-discrimination and, in particular, whether these measures are:

- **based on objective and reasonable grounds; and**
- **is a proportionate measure in pursuit of a legitimate objective.**

Right to education

1.459 The right to education is guaranteed by articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 28 of the Convention on the Rights of the Child (CRC). The right to an education is a fundamental human right and plays a vital role in promoting human rights and democracy.

1.460 The right to education recognises that accessing education is central to individuals being able to fully exercise a number of other rights. It is a right to an education directed at the development of a person's humanity and dignity, enabling people to effectively participate in a free society. The right to fundamental education is not limited to children; all people, including adults, have the right to life-long learning.

1.461 The right to education requires that the state provide free primary school education and work progressively to providing free secondary and higher education (including vocational training). The right requires:

- that functioning educational facilities are made available, including adequate buildings, sufficient quantities of trained teachers (receiving competitive salaries), teaching materials, and access to information technology;
- that education is accessible to everyone without discrimination, including being located in safe physical reach or via distance learning, and is affordable to all (with measures taken to enhance educational access for people from disadvantaged groups); and

15 EM, p. 27.

- that education is relevant, culturally appropriate, of good quality and flexible and tailored to the needs of individual students (including education that is suitable for students of all ages and for those with a disability).[16]

1.462 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to education. 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.

1.463 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.

Removal of the pensioner education supplement

1.464 Schedule 6 of the bill would remove the pensioner education supplement (PES), which is currently payable to pensioners to assist with the costs of their studies. The supplement is currently $62.40 a fortnight for full-time students.

1.465 The statement of compatibility identifies the measure as engaging and limiting the right to education, but concludes that it is compatible with this right as follows:

> The removal of PES, to a small extent, impacts on an individual's ability to participate in education, particularly if they have a low income. However, its impact on individuals is minor ($31.20 or $62.40 per fortnight depending on study load), and it does not affect a person's entitlement to other ongoing payments designed to support individuals to engage in education, such as austudy payment and youth allowance (student).[17]

1.466 However, in the committee's view, the characterisation of the measure as having a 'low' impact on affected individuals does not give sufficient weight to the relative significance of the lost supplement to persons on low incomes, as is the case with pensioners. Further, while the statement of compatibility sets out the range of

16 *Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999).*

17 Statement of compatibility, p. 11.

other support programs and additional measures being introduced to assist tertiary students, it provides no analysis of the accessibility and value of those schemes to those specifically impacted by the removal of the PES.

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

1.468 The committee notes that information regarding the number of persons likely to be affected by the measure, and the expected impact on pensioners' access to education (for example, the expected impact on enrolments), is particularly relevant to the human rights assessment of this measure.

1.469 The committee therefore seeks the advice of the Minister for Social Services as to whether removing the PES is compatible with the right to education, and particularly:

- **whether the proposed change is 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.**

Removal of the education entry payment

1.470 Schedule 7 of the bill would remove the education entry payment (EEP), which is currently payable to recipients of a range of social welfare benefits to assist with the up-front costs of education and training at enrolment or commencement of study.[18] EEP is currently $208 per annum.

1.471 The statement of compatibility identifies the measure as engaging and limiting the right to education, but concludes that it is compatible with this right as follows:

> The removal of [EEP], to a small extent, impacts on an individual's ability to participate in education, particularly if they have a low income. However, its impact on individuals is minor ($208 per annum), and it does not affect a person's entitlement to other ongoing payments designed to support

18 EEP is currently payable to recipients of Newstart allowance, partner allowance, widow allowance, widow B pension, wife pension, parenting payment, disability support pension, carer payment, special benefit partner service pension, invalidity service pension and income support supplement.

individuals to engage in education, such as austudy payment and youth allowance (student).[19]

1.472 However, in the committee's view, the characterisation of the measure as having a 'low' impact on affected individuals does not give sufficient weight to the relative significance of the lost payment to persons on low incomes, as is the case with those on the affected benefits. Further, while the statement of compatibility sets out the range of other support programs and additional measures being introduced to assist tertiary students, it provides no analysis of the accessibility and value of those schemes to those specifically impacted by the removal of the payment.

1.473 In addition, no analysis is provided as to the expected impact on the education enrolments rates of social welfare recipients following the implementation of this measure is provided.

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

1.475 The committee notes that information regarding the number of persons likely to be affected by the measure, and the expected impact on affected payment recipients' access to education (for example, the expected impact on enrolments), is particularly relevant to the human rights assessment of this measure.

1.476 The committee therefore seeks the advice of the Minister for Social Services as to whether removing the EES is compatible with the right to education, 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.**

19 Statement of compatibility, p. 13.

Trade Support Loans Bill 2014

Trade Support Loans (Consequential Amendments) Bill 2014

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

Purpose

1.477 The Trade Support Loans Bill 2014 and Trade Support Loans (Consequential Amendments) Bill 2014 (the bill) seeks to establish 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.

Committee view on compatibility

Right to education

1.478 The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which States parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms.

1.479 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.

1.480 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.

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

1.481 As outlined above, the proposed legislation introduces a voluntary loan scheme for concessional, income-contingent loans of up to $20 000 over four years

to certain apprentices. The statement of compatibility for the bill notes that the bill engages and promotes the right to education. It states:

> [The bill] will promote an individual's right to education by providing access to financial assistance, under the loans, during an apprenticeship. The loans are designed to help apprentices with the everyday living expenses associated with training (technical and vocational education). This will improve the accessibility of technical and vocational education, as individuals need not miss out on enrolment due to the prospect of financial difficulties in undertaking an apprenticeship. The Bills will therefore expand the accessibility of technical and vocational education.[1]

1.482 However, the committee notes that the trade support loan scheme is intended to supersede the 'Tools for Your Trade Program' (which was to cease from 1 July 2014) as a form of financial support for apprentices.[2]

1.483 Where a bill seeks to repeal or replace existing arrangements, the committee's usual expectation is that the statement of compatibility provide an assessment of whether the repeal or replacement of those arrangements may limit or remove human rights protections, and whether remaining or proposed arrangements in place of the repealed or replaced measures may offer equivalent or greater protection of human rights.[3]

1.484 The committee notes that the statement of compatibility does not provide a human rights assessment of the proposed scheme with reference to any programs or measures, such as the 'Tools for Trade Program', which it is intended to replace.

1.485 The committee therefore seeks the advice of the Minister for Industry as to the compatibility of the bill with the right to education.

Rights to equality and non-discrimination

1.486 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).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.

1.487 For human rights purposes, 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated

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1 Explanatory memorandum (EM), p. 6.

2 Australian Apprenticeships (Australian Government) website, 'Tools for Trade Payment', http://www.australianapprenticeships.gov.au/program/tools-your-trade-payment (accessed 10 July 2014).

3 See, for example, Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, 'Omnibus Repeal Day (Autumn 2014) Bill 2014', p. 9.

less favourably than others, based on one of the prohibited grounds for discrimination.[4]

1.488 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. Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) further describes the content of these rights, describing the specific elements that States parties are required to take into account to ensure the rights to equality for women.

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

1.489 The bill provides that, to qualify for a concessional, income-contingent loan, a person must be undertaking a qualifying apprenticeship in an occupation or qualification on the Trade Support Loans (TSL) priority list (the list),[5] which must be established and maintained by the minister.

1.490 The committee notes that the requirement for the minister to specify particular occupations or qualifications on the list may, in practice, operate to indirectly discriminate against certain groups. For example, if occupations or qualifications specified on the list are predominantly those in which apprentices are traditionally male, this may be regarded as indirectly discriminating against women, who would have less access to the scheme.

1.491 The committee notes that, while the statement of compatibility identifies the rights to equality and non-discrimination as being engaged, it does not provide an assessment of the compatibility of the proposed list with the rights to equality and non-discrimination.[6]

1.492 The committee therefore seeks the Minister for Industry's advice as to whether the qualification requirement for the loan through the TSL Priority List is compatible with the rights to equality and non-discrimination.

Right to privacy

1.493 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.

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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.

5 Trade Support Loans Bill 2014, proposed section 8.

6 See EM, p. 6.

1.494 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.

Powers to obtain certain information

1.495 The bill would provide a number of powers to the Secretary of the Department of Industry to obtain certain information in connection with a trade support loan.[7]

1.496 The statement of compatibility for the bill notes that this aspect of the scheme engages the right to privacy. In concluding that the secretary's powers to obtain information are compatible with human rights, it states:

> Given the importance placed on confidentiality and that loans are claimed on a voluntary basis, the requirements do not restrict any persons right to privacy.[8]

1.497 However, the committee notes that, while the statement of compatibility notes generally that the information collected will be protected by the *Privacy Act 1988*, it contains no assessment of whether the limitation is compatible with the right to privacy.

1.498 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.

1.499 The committee notes that information regarding the associated offences provided for in the bill (discussed below) is particularly relevant to an assessment of the bill's compatibility with the right to privacy.

1.500 The committee therefore seeks the Minister for Industry's advice 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.**

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7 See Trade Support Loans Bill 2014, proposed sections 59-61.

8 EM, p. 6.

Right to a fair trial and fair hearing rights

1.501 The right to a fair trial and fair hearing are contained in 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.

1.502 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 and minimum guarantees in criminal proceedings, which include the right to not to incriminate oneself (article 14(3)(g)). The ICCPR also provides a guarantee against retrospective criminal laws and the right not to incriminate oneself (article 14(3)).

Creation of new offences with respect to obtaining information

1.503 The bill proposes the creation of new offences under proposed sections 63 and 73. Proposed section 63 provides that it is an offence if a person refuses or fails to comply with a requirement to give information or produce a document. The penalty for this offence is 12 months' imprisonment. Proposed section 73 creates the offence of failing to inform the secretary of a change of circumstances which may affect the qualification for a Trade Support Loan. The penalty for this offence is six months' imprisonment. These provisions provide for a 'reasonable excuse' defence in relation to which the defendant bears an evidential burden of proof. In order to rely on the defence, the defendant is required to adduce or point to evidence 'that suggests a reasonable possibility that the [reasonable excuse] exists or does not exist'.[9]

1.504 The committee considers that the proposed provisions may engage the right to be presumed innocent, to the extent that they may be potentially regarded as creating a reverse burden of proof in the context of the particular offences. The committee notes that the statement of compatibility for the bill makes no reference to these provisions.

1.505 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provides an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.506 The committee notes that the nature of the offence, the requirement for the defendant to establish the 'excuse' and the severity of the proposed penalties may be particularly relevant to an analysis of whether the proposed measures are compatible with the right to be presumed innocent.

9 Criminal Code, section 13.3.

1.507 The committee therefore seeks 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.**

True-up Shortfall Levy (Excise) (Carbon Tax Repeal) Bill 2013 [No. 2]

True-up Shortfall Levy (General) (Carbon Tax Repeal) Bill 2013 [No. 2]

Portfolio: Environment
Introduced: House of Representatives, 23 June 2014

1.508 The True-up Shortfall Levy (Excise) (Carbon Tax Repeal) Bill 2013 [No. 2] seek to impose a levy on persons who were over-allocated free carbon units under the Jobs and Competitiveness Program in the 2013-14 financial year and would have had their allocation in the 2014-15 financial year reduced if the carbon tax had remained in force, so far as that levy is a duty of excise.

1.509 The True-up Shortfall Levy (General) (Carbon Tax Repeal) Bill 2013 [No. 2] seeks to impose a levy on persons who were over-allocated free carbon units under the Jobs and Competitiveness Program in the 2013-14 financial year and would have had their allocation in the 2014-15 financial year reduced if the carbon tax had remained in force, so far as that levy is neither a duty of customs nor a duty of excise.

1.510 The committee considered identical bills in its *First Report of the 44th Parliament*.[1]

1.511 The committee considers that the bills do not appear to give rise to human rights concerns.

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, p. 9.

G20 (Safety and Security) Complementary Bill 2014

Portfolio: Justice
Introduced: House of Representatives, 20 March 2014

Purpose

1.512 The G20 (Safety and Security) Complementary Bill 2014 (the bill) creates a new standalone Commonwealth Act intended to clarify the interaction between provisions in the G20 (Safety and Security) Act 2013 (Qld) and existing Commonwealth legislation at the Brisbane Airport during the 2014 G20 Summit, which is to be held in Brisbane in November 2014.

1.513 The new Act will provide for specified Commonwealth aviation laws (including regulations or other subordinate legislation made under Commonwealth aviation legislation) to operate concurrently with the G20 (Safety and Security) Act 2013 (Qld). The operation of the specified Commonwealth aviation laws will be rolled back with respect to certain areas of the Brisbane Airport (a Commonwealth place) to avoid inconsistency with the Queensland G20 legislation. To the extent that they are not inconsistent with the Queensland G20 legislation, Commonwealth aviation laws will continue to apply to those areas.

Background

1.514 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

Committee view on compatibility

Multiple rights

Human rights assessment of state laws applied by Commonwealth laws

1.515 The committee requested the Minister for Justice's advice on the compatibility of the measures in the Queensland Act with human rights, insofar as they will apply as Commonwealth laws.

Minister's response

> The [G20 (Safety and Security) Act 2013 (the Queensland Act)] was enacted by the Queensland Parliament to provide powers, offences and other arrangements it considers necessary to ensure the safety and security of the G20 Summit to be held in Queensland this year. These arrangements are consistent with arrangements for previous special events in Australia, such as the Asia Pacific Economic Cooperation forum in 2007 and the Commonwealth Heads of Government Meeting in 2011.
>
> The powers conferred by the Queensland Act are exercisable for a limited period and apply only at those locations specified in the Queensland Act. This includes part of the Brisbane Airport which is a Commonwealth place.
>
> The Bill does not apply the Queensland legislation, including its powers, in circumstances where that legislation otherwise would not - the

> Queensland Act already applies the relevant provisions to the declared security area at the Brisbane Airport. The Bill will confirm that the provisions in the Queensland Act and those in existing Commonwealth aviation legislation apply concurrently at that Commonwealth place. In addition, to avoid confusion about the source of any powers being exercised at a particular time, the Bill clarifies that, in the event there is any overlap between those sets of provisions, the provisions in the Queensland Act prevail.
>
> In other words, the Bill does not extend the application of the Queensland provisions to any additional locations. It merely avoids ambiguity by addressing any potential overlap in the two sets of laws for an effective period of five days in November.
>
> On this basis, the Bill will not substantially engage and limit human rights.

Committee response

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

1.517 However, the committee reiterates that the Queensland Act contains a number of provisions which augment existing Queensland law, and which potentially engage and limit a range of human rights.

1.518 The committee notes that the response does not address the committee's original request as to the compatibility of the measures in the Queensland Act with human rights, insofar as they will apply as Commonwealth laws.

1.519 The committee, therefore, intends to write to the Minister for Justice seeking a detailed assessment of the compatibility of the measures in the Queensland Act with human rights, insofar as they will apply as Commonwealth laws.

Application of State laws to Commonwealth places under the Commonwealth Places Act

1.520 To facilitate the committee's assessment of the *Commonwealth Places (Application of Laws) Act 1970*, the committee requested that the Minister for Justice provide a statement of compatibility for that Act, particularly with respect to the question of the compatibility of measures that have or may be applied as Commonwealth law by its operation.

Minister's response

> The Commonwealth Places Act ensures that State laws can apply to Commonwealth places within each jurisdiction to facilitate consistent and seamless application of each State's laws across the jurisdiction. Because it is necessary for the Commonwealth Places Act to apply to a large number of State laws, it has been framed in open and general terms so that State laws apply automatically to Commonwealth places without first needing to be identified and specifically prescribed.

The Commonwealth Places Act applies State laws to Commonwealth places within that State. The Act is facilitative, rather than enacting specific powers and obligations in its own right. Accordingly, the Commonwealth Places Act would have the same impact on Australia's human rights obligations as the relevant State laws being applied.

Committee response

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

1.522 The committee appreciates the objective being pursued by the Commonwealth Places Act. However, the committee remains of the view that it would be appropriate for a statement of compatibility to be prepared for the Commonwealth Places Act, particularly as it is framed in such open and general terms and allows State laws to automatically apply to Commonwealth places.

1.523 The committee therefore requests that the Minister for Justice provide a statement of compatibility for the *Commonwealth Places (Application of Laws) Act 1970*.

1.524 The committee notes that identification of particular state laws that impact on the assessment, as well as the number and area of Commonwealth places, would be particularly relevant to the human rights assessment.

Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014

Portfolio: Veterans' Affairs
Introduced: House of Representatives, 27 March 2014

Purpose

1.525 The Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014 (the bill) seeks to enable the expansion of mental health services for veterans and members of the Defence Force and their families, and make changes to the operation of the Veterans' Review Board.

1.526 The bill will amend the *Veterans' Entitlements Act 1986* to:

- expand non-liability health care to include certain mental health conditions and alcohol and substance use disorders (Schedule 1);
- expand eligibility for the Veterans and Veterans Families Counselling Service from 1 July 2014 (Schedule 2);
- provide that the seniors supplement is paid automatically following short periods of overseas travel (Schedule 3); and
- make a technical amendment (Schedule 5).

1.527 The bill will amend the *Military Rehabilitation and Compensation Act 2004* to:

- expand the circumstances in which an eligible young person is taken to be wholly dependent on a Defence Force member (Schedule 6); and
- enable the Chief Executive Officer of Comcare to be nominated for appointment to the Military Rehabilitation and Compensation Commission (Schedule 7).

1.528 The bill will also amend both the Veterans' Entitlements Act 1986 and the Military Rehabilitation and Compensation Act 2004 (the Acts) in relation to the operation of the Veterans' Review Board (the Board), including changes to dispute resolution processes, case management powers, and administrative business procedures of the Board (Schedule 4).

Background

1.529 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

1.530 The bill was subsequently passed by both Houses and received Royal Assent on 30 June 2014.

Committee view on compatibility

Right to freedom of opinion and expression

Contempt of board offences

1.531 The committee therefore requests the advice of the Minister for Veterans' Affairs as to the compatibility of new section 170 with the right to freedom of opinion and expression, and particularly:

- whether the measure is rationally connected to its stated objective; and
- whether the measure is proportionate to achieving that objective.

Right to freedom of assembly

Contempt of Board offences

1.532 The committee therefore requests the advice of the Minister for Veterans' Affairs as to the compatibility of new subsections 170(3) and 170(4) with the right to freedom of assembly, and particularly:

- whether the measures are rationally connected to their apparent objective; and
- whether the measures are proportionate to achieving that objective.

Minister's response

> As background, it is noted that the amendments to the contempt provisions of the Veterans Review Board (the Board) were in response to the Report of the Strategic Review of Small and Medium Agencies in the Attorney General's portfolio (the Skehill Review) recommendations proposing consistency between the statutory frameworks of Tribunals. To achieve this consistency, the contempt provisions of the *Administrative Appeals Tribunal Act 1975* have been replicated in the *Veterans Entitlements Act 1986*.
>
> The objective of the new provisions is for the Board to be able to conduct its business without disruption in a fair and equitable manner. It is noted that the Report states this objective as 'the protection of the Board and its hearings'. The proposed limitations are likely to be effective in achieving this objective because the existence of these provisions will act as a deterrent to inappropriate behaviour that would disrupt the Board and its hearings. Therefore, the proposed limitations are rationally connected to the objective.
>
> As to the question of proportionality, it is noted that on occasion the Board operates from non-secure, non-government premises, and protections are required to ensure the safety and proper function of the Board and its members. However, the Board would not use these provisions lightly. It would require an extreme event to warrant consideration of applying the contempt provisions and the decision to

prosecute would be undertaken by the Commonwealth Director of Public Prosecutions on referral from the police.

Further, in relation to the concerns raised about the nature of the penalties for the proposed offences, it should be noted that section 48 of the *Crimes Act 1914* provides for the imposition of a pecuniary penalty instead of, or in addition to, a penalty of imprisonment.

Committee response

1.533 The committee thanks the Minister for Veterans' Affairs for his response. The committee notes that the minister's response does not address the specific issues raised by the committee in relation to the potential overreach of the contempt provisions.[1] The committee therefore continues to have concerns about the human rights compatibility of proposed new subsections 170 (3) and (4), and therefore seeks the minister's advice as the proportionality of the contempt provisions (including, for example, what safeguards are in place to ensure the provisions are in practice applied cautiously).

1 Parliamentary Joint Committee on Human Rights, *Sixth Report of the 44th Parliament,* 14 May 2014, pp 35-37.

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]

Portfolio: Immigration
Authorising Legislation: Migration Act 1958
Last day to disallow: 17 July 2014 (Senate)

Purpose

1.534 The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622] (the regulation) amends Part 1 and Schedules 1 and 2 to the *Migration Regulations 1994* to provide for the repeal of the following classes of visa from 2 June 2014:

- the Aged Dependent Relative visa classes and subclasses (for a person who is single, meets the aged requirements and both is, and has for a reasonable period been, financially dependent on their Australian relative);
- the Remaining Relative visa classes and subclasses (for a person whose only near relatives are those usually resident in Australia);
- the Carer visa classes and subclasses. (for a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a long-term or permanent medical condition); and
- the Parent and Aged Parent visa classes and subclasses (for a person who is the parent of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, and where the parent does not pay a significant financial contribution towards their own future health, welfare and other costs in Australia).

1.535 The affected visa classes and subclasses are:

- Parent (Migrant) (Class AX), Subclass 103;
- Aged Parent (Residence) (Class BP), Subclass 804;
- Other Family (Migrant) (Class BO), Subclass 114, 115 and 116; and
- Other Family (Residence) (Class BU), Subclass 835, 836 and 838.

Committee view on compatibility

Right to protection of the family

1.536 The right to respect for the family is guaranteed by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection.

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

Repeal of visas classes for relatives

1.538 As noted above, the regulation amends the *Migration Regulations 1994* to repeal:

- Parent (Migrant) (Class AX), Subclass 103;
- Aged Parent (Residence) (Class BP), Subclass 804;
- Other Family (Migrant) (Class BO), Subclass 114, 115 and 116; and
- Other Family (Residence) (Class BU), Subclass 835, 836 and 838.

1.539 The statement of compatibility for the regulation identifies it as engaging and potentially limiting the rights to equality and non-discrimination and the right to health, and concludes that 'the changes' (and presumably any limitations on those rights) are considered reasonable, necessary and proportionate' to achieving the objective of ensuring that 'skilled people comprise at least two-thirds' of Australia's migration program.

1.540 The statement of compatibility also notes that Australia's international human rights obligations apply subject to its jurisdiction, and concludes on this basis that the repeal of the specified visas, insofar as these apply to offshore applicants, does not invoke Australia's jurisdiction in relation to those applicants.[1]

1.541 However, while the committee accepts that non-citizens do not have a stand-alone right to family reunification under international human rights law, it notes that the repealed visa classes operated to affect the interests not only the visa applicant but also their relatives in Australia. To this extent, the visa classes in question may be seen as having provided avenues to protect, where appropriate and reasonable, the family unity of persons usually resident in Australia with family members from overseas. To the extent that the repeal of those visa classes may limit the right to the protection of the family, the regulation may therefore be seen as a limitation on that right.

1.542 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1 Explanatory Memorandum (EM), Attachment B, p. 1.

1.543 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:

- **whether the measure is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is proportionate to that objective.**

Right to health and a healthy environment

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

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

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

1.546 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 certain classes of carer visas

1.547 As described above, the regulation repeals a number of visa classes available to carers. These visas enabled a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a long-term or permanent medical condition.

1.548 The statement of compatibility identifies the right to health as engaged by the repeal of the affected classes of carer visas. However, it concludes that 'the changes are considered reasonable, necessary and proportionate' on the basis that:

> The repealing of Remaining Relative Visa and Aged Dependent Relative Visas demonstrate that [sic] the government's policy to focus the family stream of the Migration Programme on the entry of close family members, that is, partners, children and those parents who are able to contribute to the cost of their migration and settlement in Australia.[2]

1.549 The statement of compatibility suggests that the repealed carer visa 'was 'only intended to be used when other forms of care (i.e. hospital, nursing and community services) cannot reasonably be accessed in Australia',[3] and notes:

> The National Disability Insurance Scheme [the NDIS] and expanding network of disability support services meet those four elements [which require that health care must be available, accessible, acceptable and of a sufficient quality]. Other forms of care (such as hospital access, nursing and community services) which the Carer visa was intended to be used to fill gaps in can now be reasonably accessed throughout Australia. Additionally, more flexible Visitor visa arrangements are available for the relatives of permanent residents to provide short-term care.

1.550 However, the committee notes that the assessment contained in the statement of compatibility provides no analysis to support the conclusion that repeal of the carer's visa in reliance on the NDIS and other existing forms of care does not represent a limitation on the right to health. For example, it is unclear whether persons with particular difficulties in accessing health care services (such as people who face cultural or language barriers) may have reduced access to care and health services as a result of the repeal of the carer visa.

1.551 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.552 In addition, in relation to the stated objective of the bill, the committee notes that the statement of compatibility provides only a general and unsupported statement of the policy intention or objective of the measure, being to focus the family stream of the migration program on close family members able to contribute to the cost of their migration.

1.553 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

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2 EM, Attachment B, p. 4.

3 EM, Attachment B, pp 3-4.

states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.554 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of the repeal of certain carer visa classes with the right to health, and particularly, and particularly:

- **whether the measure is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is proportionate to that objective.**

Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 26 June 2014 (Senate)

Purpose

1.555 The Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] (the regulation) amends the Migration Regulations 1994 and the Australian Citizenship Regulations 2007 in relation to visa evidence charges, members of the family unit for student visas, skills assessment validity, foreign currencies and places, substitution of AusAID references, Australian citizenship fees and other measures, and infringement notices.

Committee view on compatibility

Right to privacy

1.556 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.

1.557 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 disclosure of information.

Releasing information concerning a person's change of name

1.558 Schedule 6 of the regulation amends the Citizenship Regulations 2007 in relation to information that may be included in a notice of evidence of Australian citizenship (notice), which is a document that may be provided by the minister as evidence of a person's Australian citizenship. The amendment provides that the minister may list on the back of a citizenship notice additional information about the applicant, including their legal name at the time they acquired Australian citizenship and any other name or date of birth in relation to which a notice has previously been given.

1.559 The committee notes that this measure appears to limit the right to privacy, particularly in relation to respect for personal information through the storing, use and sharing of such information. In particular, the measure appears to reduce a person's control over the dissemination of information about his or her personal life and, as recognised in the statement of compatibility, potentially expose people to risk. In this respect the statement of compatibility notes that the amendment will enable, but not require, the specified information to be listed, because there 'will be

instances where it is not appropriate to include the details of a notice previously given to the person, such as when doing so may endanger the person or a person connected with them'.[1]

1.560 The committee notes that the statement of compatibility does not provide an assessment of the human rights compatibility of these potential limitations on the right to privacy.

1.561 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.562 The committee notes that information regarding the safeguards in place for the storing, use and sharing of such information in relation to this measure is particularly relevant to the assessment of its compatibility with human rights.

1.563 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's previous changes of name is compatible with the right to privacy.

Rights to equality and non-discrimination

1.564 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).[2]

1.565 These are fundamental human rights that 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.

1.566 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[3]

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1 Explanatory statement, p. 8.

2 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

3 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.

1.567 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.

Impact of release for persons who have undergone sex or gender reassignment procedures

1.568 The committee notes that the power to disclose a person's previous name may operate to have a disproportionate effect on, and therefore indirectly discriminate, against persons who have undergone sex or gender reassignment procedures, to the extent that that disclosure could potentially reveal or indicate that history. Indirect discrimination arising in this way would amount to discrimination against individuals on the prohibited grounds of 'other status'.

1.569 In particular, the committee notes that the Australian Government Guidelines on the Recognition of Sex and Gender instruct departments and agencies to 'ensure an individual's history of changes of sex, gender or name…is recorded and accessed only when the person's history is relevant to a decision being made'.[4]

1.570 However, the statement of compatibility does not provide an assessment of this potential limitation on human rights and, with reference to the guidelines cited above, does not beyond a reference to avoiding fraud explain in what circumstances that information may be relevant for disclosure.

1.571 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.572 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's change of name is compatible with the right to equality and non-discrimination.

4 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013), http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF, p. 7 [accessed 9 July 2014].

Military Rehabilitation and Compensation Act Education and Training Scheme (Income Support Bonus) Repeal Determination 2014 [F2014L00256]

Portfolio: Veterans' Affairs
Authorising legislation: Military Rehabilitation and Compensation Act 2004
Last day to disallow: The instrument was disallowed in full on 25 March 2014.

Purpose

1.573 The purpose of the instrument is to revoke the education benefit known as the 'Income Support Bonus' (the bonus). The bonus is a tax-free, twice-yearly, non means tested payment of $105.80 (or $211.60 per annum) as at 20 September 2013. The bonus is payable to certain eligible young people dependent on members or former members of the Defence Force in order to assist them with their education.

Background

1.574 The Military Rehabilitation and Compensation Act Education and Training Scheme (Income Support Bonus) Repeal Determination 2014 came into force on 13 March 2014. The regulation ceased to have effect when it was disallowed in full by the Senate on 25 March 2014.

Committee view on compatibility

Right to social security

1.575 The right to social security is guaranteed 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.

1.576 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).

1.577 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.

1.578 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

1.579 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.

1.580 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to 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.

Revocation of Income Support Bonus

1.581 The human rights statement identifies that the revocation of the income support bonus limits the right to social security and the right to an adequate standard of living in that eligible DVA students will no longer receive the bonus. It goes on to note that Article 4 of the ICESCR requires that any removals in entitlements must be justified in the context of the full use of the maximum available resources of the State party. In this case, the statement claims that:

> The bonus was introduced in light of the expected revenue flowing from the MRRT. This revenue flow has not eventuated. The Government considers that it is not in the interests of the general welfare to continue such bonus payments in the absence of the resources necessary to do so.[1]

1.582 The statement of compatibility also lists a number of reasons provided to justify the revocation of the payment as reasonable, necessary and proportionate to achieve a legitimate objective. The statement also highlights that a range of other payments or assistance is available to recipients of income support.

1.583 However, the committee is concerned that the statement does not adequately identify a legitimate objective to achieve in revoking the payment aside

1 Explanatory statement, p. 2

from suggesting it is 'not in the interests of the general welfare to continue such bonus payments in the absence of the resources necessary to do so'[2].

1.584 It also does not particularly comment in any detail on the impact this revocation may have on the specific target group of eligible DVA students who are dependent on members or former members of the Defence Force. The statement refers to the fact that 'the payment was generally not considered by social welfare and advocacy groups to be the best way to provide support to vulnerable income support recipients' but does not explain the basis for this conclusion any further or how it relates to the situation of eligible DVA students.

1.585 On the basis of the information provided, the committee is unable to conclude that the measure is compatible with the right to social security and the right to an adequate standard of living.

1.586 However, the committee notes that the instrument has been disallowed and therefore has concluded its examination of the matter.

2 Explanatory statement, p. 2

Veterans' Children Education Scheme (Income Support Bonus) Repeal Instrument 2014 [F2014L00257]

Portfolio: Veterans' Affairs
Authorising legislation: Veterans' Entitlements Act 1986
Last day to disallow: The instrument was disallowed in full on 25 March 2014.

Purpose

1.587 The purpose of the instrument is to revoke the education benefit known as the 'Income Support Bonus'. The bonus is a tax-free, twice-yearly, non means tested payment of $105.80 (or $211.60 per annum) as at 20 September 2013. The bonus is payable to certain eligible children of vertarns in order to assist them with their education.

Background

1.588 The Veterans' Children Education Scheme (Income Support Bonus) Repeal Instrument 2014 came into force on 13 March 2014. The regulation ceased to have effect when it was disallowed in full by the Senate on 25 March 2014.

Committee view on compatibility

Right to social security

1.589 The right to social security is guaranteed 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.

1.590 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).

1.591 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.

1.592 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

1.593 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.

1.594 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to 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.

Revocation of Income Support Bonus

1.595 The human rights statement identifies that the revocation of the income support bonus limits the right to social security and the right to an adequate standard of living in that eligible Department of Veterans' Affairs (DVA) students will no longer receive the bonus. It goes on to note that Article 4 of the ICESCR requires that any removals in entitlements must be justified in the context of the full use of the maximum available resources of the State party. In this case, the statement claims that:

> The bonus was introduced in light of the expected revenue flowing from the MRRT. This revenue flow has not eventuated. The Government considers that it is not in the interests of the general welfare to continue such bonus payments in the absence of the resources necessary to do so.[1]

1.596 The human rights statement also lists a number of reasons provided to justify the revocation of the payment as reasonable, necessary and proportionate to achieve a legitimate objective. The statement also highlights that a range of other payments or assistance is available to recipients of income support.

1.597 However, the committee is concerned that the statement does not adequately identify a legitimate objective to achieve in revoking the payment aside

1 Explanatory statement, p. 2

from suggesting it is 'not in the interests of the general welfare to continue such bonus payments in the absence of the resources necessary to do so'[2].

1.598 It also does not particularly comment in any detail on the impact this revocation may have on the specific target group of eligible DVA students who are dependent on members or former members of the Defence Force. The statement refers to the fact that 'the payment was generally not considered by social welfare and advocacy groups to be the best way to provide support to vulnerable income support recipients'[3] but does not explain the basis for this conclusion any further or how it relates to the situation of eligible DVA students.

1.599 On the basis of the information provided, the committee is unable to conclude that the measure is compatible with the right to social security and the right to an adequate standard of living.

1.600 However, the committee notes that the instrument has been disallowed and therefore has concluded its examination of the matter.

2 Explanatory statement, p. 2

3 Explanatory statement, p. 3

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

1.601 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

1.602 The committee reported on the instrument in its *First Report of the 44th Parliament*.

Committee view on compatibility

Right to a fair hearing

Immunity from suit and other legal process

1.603 The committee sought clarification as to whether the immunities granted to the ICRC under the regulation were compatible with the right to a fair hearing.

Minister's response

1. This paper has been prepared by the Department of Foreign Affairs and Trade in response to the request for further information from the Chair of the Parliamentary Joint Committee on Human Rights in his letter to the Minister for Foreign Affairs and Trade of 10 December 2013 regarding the International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013 (Cth) (Regulation).
2. The Committee, in its *First Report of the 44th Parliament*, questioned the compatibility of this Regulation with human rights, in particular the right to a fair hearing (and any possible right of access to court) in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). It noted its intention to write to the Minister to seek clarification on this point. The Committee also drew to the Minister's attention the comments of its predecessor committee on the possible

inconsistency of Australia's laws on privileges and immunities with Australia's obligations under the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). It requested the Minister to undertake a review of those laws in relation to this aspect of their operation. This paper will address each issue in turn.

Compatibility with human rights

3. There is no incompatibility between this Regulation and the human rights and freedoms recognised in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In particular, there is no legal basis on which to assert that the conferral of privileges and immunities on an international organisation would breach any rights conferred by Article 14 of the ICCPR, which provides for an accused's right to a fair trial before an impartial court or tribunal.

4. The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and tribunals". Article 14(1) goes on to outline specific provisions regarding a fair hearing, while Article 14(3) sets out the minimum guarantees of the accused in criminal proceedings. In his leading commentary on the ICCPR, Nowak elaborates further on the content of the rights conferred in Article 14(1), identifying that the principle of "equality of arms" between plaintiff and respondent (or between prosecutor and defendant) is an important component of a fair trial. This is the principle that each party to a proceeding should have an equal opportunity to present his case. Nonetheless, Nowak notes that the right to equality before courts and tribunals does not affect diplomatic privilege or parliamentary immunity.[1]

5. The Regulation also provides some restrictions on the privileges and immunities conferred on the ICRC. The purpose of conferring privileges and immunities on an organisation such as the ICRC is to assist it to fulfil its mandate. Protecting the confidential nature of the ICRC's work, including through immunity from legal processes, helps it to maintain the access it needs to perform its functions and the security of its personnel. The Regulation makes clear that the privileges and immunities conferred are for the benefit of the ICRC, therefore, and not the personal benefit of individuals (subsection 15(1)).

6. The Regulation also provides that the privileges and immunities conferred on the ICRC and its Delegates in Division 1 of the Regulation (Privileges and Immunities of the ICRC) and Division 2 (Privileges and Immunities of delegates of ICRC) do not apply if, in the ICRC's view: their application would impede the course of justice, as long as the

1 Novak, M. UN Covenant on Civil and Political Rights - CCPR Commentary (2nd Ed.), Kehl, 2005, pp 308-309.

purposes for which the privileges or immunities were conferred are not prejudiced (subsections 15(3) and 15(4). Given the ICRC's mandate to promote and ensure compliance with international humanitarian law, we expect that the ICRC would be favourably disposed to any requests from the Australian Government to waive immunity in appropriate circumstances.

Committee response

1.604 The committee thanks the Minister for Foreign Affairs for her response and has concluded its examination of this matter.

1.605 The committee accepts that the right to a fair hearing in article 14 of the ICCPR may be subject to reasonable limitations. The committee notes that immunities enjoyed under international law by heads of state, diplomats and consular representatives and officials of recognised international organisations may involve a restriction on the right to a fair hearing. However, these immunities have generally been held to be consistent with the right to a fair trial. The committee notes that international law in relation to immunities and exceptions to immunities is evolving.[2]

Obligation to extradite or prosecute person suspected of certain international crimes

Immunities from prosecution

1.606 The committee noted the apparent inconsistency of Australia's laws on granting privileges and immunities with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and requested the Minister to undertake a review of those laws in relation to this aspect of their operation.

Minister's response

Consistency of Australia's laws on privileges and immunities with Australia's obligations under CAT

7. The question of the application of immunities to serious international crimes, including torture, remains unsettled under international law. There has been limited jurisprudence on this point and such jurisprudence as there has been is not determinative. For this reason, it would be premature to propose further legislative amendments addressing this issue. As such, a review of the legislation is not warranted at this time.

2 See, for example, M C Bassiouni, *Introduction to international criminal law*, Martinus Nijhoff Publishers, 2012 pp76-77. See, also, for example, Rome Statute of the International Criminal Court, article 5(1), *Prosecutor v Kambanda*, ICTR T Ch1, (4 September 1998); *Prosecutor v Blaskic* (ICTY) IT-95-14 AR 108 (1997).

Committee response

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

1.608 However, the committee notes that the legal basis for the obligation to prosecute or extradite an individual suspected of torture is well settled under the express provisions of Article 6(1) and (2) of the CAT, as elucidated in the jurisprudence of the Committee against Torture.[3] The committee refers to its earlier analysis of this issue.[4]

1.609 The committee therefore seeks further information in relation to the compatibility of Australia's laws on granting privileges and immunities with its obligations under the CAT to prosecute or extradite an individual suspected of torture.

3 See the Committee against Torture's views expressed in its discussions with the UK government (CAT/C/SR.354, paras 39-40, 46) and in its concluding observations on the United Kingdom's third periodic report (CAT/C/SR.360, para 11 and CAT A/54/44, para 77(f) (1999)). A similar view is reflected in the Committee against Torture's decision in the case of Guengueng v Senegal, Comm. No 181/2001, A/61/44, at 160 (2006) (failure by Senegal to prosecute the former head of state of Chad involved violation of the Torture Convention). See also, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No3)* [2000] 1 AC 147.

4 See, Parliamentary Joint Committee on Human Rights, *Fourth Report* of 2013, 20 March 2013, pp 42-47; *Sixth Report of 2013*, 15 May 2013, pp 228-232 and *First Report of 44th Parliament*, 10 December 2013, pp 97-99.

The committee has deferred its consideration of the following bill

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Chapter 2 - Concluded matters

This chapter list matters previously raised by the committee and considered at its meeting on 14 July 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 5 March 2014

Purpose

2.1 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (the bill) seeks to amend the *Proceeds of Crime Act 2002* (the POC Act) to implement recommendations made by the Parliamentary Joint Committee on Law Enforcement (the PJC-LE) in its final report on its inquiry into Commonwealth unexplained wealth legislation and arrangements.

2.2 Schedule 1 of the bill amends the POC Act to implement the PJC-LE's recommendations to:

- include a statement in the objects clause about undermining the profitability of criminal enterprise;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- streamline affidavit requirements for preliminary unexplained wealth orders;
- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court in appropriate circumstances;
- amend legal expense and legal aid provisions for unexplained wealth cases with those for other POC Act proceedings so as to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order, as can occur with other types of proceeds of crime order;
- remove a court's discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and
- require the AFP Commissioner to provide a report to the PJC-LE annually on unexplained wealth matters and litigation, and to empower the PJC-LE to seek further information from federal agencies in relation to such a report.

2.3 Schedule 1 would also amend the POC Act in ways that do not relate to specific recommendations of the PJC-LE, which include:

- clarifying that unexplained wealth orders may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding;
- ensuring that provisions in the POC Act that determine when restraining orders cease to have effect take account of the following matters: the new provisions allowing charges to be created and registered over restrained property to secure the payment of unexplained wealth amounts; and the fact that unexplained wealth restraining orders may sometimes be made after an unexplained wealth order (not only before);
- further streamlining the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place (or has been revoked under section 44 of the POC Act);
- removing redundant affidavit requirements in support of applications for preliminary unexplained wealth orders;
- ensuring that a copy of the affidavit relied upon when a preliminary unexplained wealth order was made must be provided to the person who is subject to the order in light of changes to the affidavit requirements for preliminary unexplained wealth orders outlined above; and
- amending the POC Act to extend the purposes under section 266A for which information obtained under the coercive powers of the POC Act can be shared with a State, Territory or foreign authority to include a proceeds of crime purpose.

2.4 Schedule 2 of the Bill seeks to correct minor drafting errors in the POC Act that were identified during the drafting of the Bill.

Background

2.5 The committee reported on the bill in its *Fourth Report of the 44th Parliament*.

2.6 The committee noted that a number of the measures in this bill were re-introduced as a result of the lapsing of the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (the 2012 bill) at the end of the 43rd Parliament.

2.7 The committee reiterated its concerns that the unexplained wealth scheme in the POC Act sought to be amended by the bill may involve the determination of a criminal charge, and that the operation of the presumption of unlawful conduct involves a significant limitation on the right to a fair hearing. The committee also re-iterated its expectation that statements of compatibility include sufficient justification for proposed limitations on rights, particularly where the committee has previously raised concerns with a measure.

Committee view on compatibility

Right to a fair hearing

Presumption of innocence

2.8 The committee sought clarification from the Minister for Justice as to why it is necessary to ensure a court is not prevented from making an unexplained wealth order in the absence of the person who is the subject of the order, including evidence or examples of where preventing the court from doing so has frustrated the objectives of the scheme.

Minister's response

> The Committee has sought my clarification in relation to amendments in the Bill designed to ensure a court is not prevented from making an unexplained wealth order where a person who is subject to the order fails to appear at an unexplained wealth proceeding. The Committee notes that a possible consequence of this measure is that a person may be the subject of an unexplained wealth order without being notified of it. The Committee further notes that it has concerns regarding the compatibility of this measure with the right to a fair hearing, given that the scheme operates on the basis of a presumption of unlawful conduct which a person must rebut in order to avoid the making of an unexplained wealth order against them.
>
> These amendments are designed to clarify the existing provisions in the *Proceeds of Crime Act 2002* (the POC Act) to ensure that a person cannot frustrate unexplained wealth proceedings by simply failing to appear before the court. They will operate in conjunction with existing provisions in the POC Act which protect the rights of a person who is subject to an application for an unexplained wealth order by imposing notification requirements on the proceeds of crime authority that has applied for an order against that person.
>
> Under the current provisions in the POC Act, the process for seeking an unexplained wealth order commences with a proceeds of crime authority (either the Australian Federal Police or the Commonwealth Director of Public Prosecutions) making an application for an unexplained wealth restraining order (followed by a preliminary unexplained wealth order), or a preliminary unexplained wealth order. As the Committee has noted in its Report, these preliminary orders may be sought ex parte in some circumstances to ensure that a person does not disperse his or her assets during the time between the preliminary order being sought, and the time a final unexplained wealth order is made.
>
> Section 179N of the POC Act sets out the notice requirements if a proceeds of crime authority has made an application for an unexplained wealth order. Subsection 179N (2) currently provides that if a court makes a preliminary unexplained wealth order, the proceeds of crime authority that has applied for the order must, within seven days:

- give written notice of the order to the person who would be subject to the final unexplained wealth order if it were made, and
- provide to the person a copy of the application for the unexplained wealth order, and affidavits used to support that order.

Subsection 179N (3) provides that the proceeds of crime authority must also ensure that the person is provided with a copy of other affidavits used to support the application for the preliminary order. The provision of this information must occur within a reasonable time before the hearing in relation to whether the unexplained wealth order is to be made.

The Bill makes two amendments to extend the period in which notice can be provided. New subsection 179N (2A) will allow a court to make an order extending the time limit for serving notice by up to 28 days where the court is satisfied that it is appropriate to do so, if a proceeds of crime authority applies before the end of the original period for serving the notice. New subsection 179N (2B) will provide that the court may extend the notice period more than once. Extending the time limit for giving notice aims to cover situations where, for example, a suspect is attempting to avoid service of the notice or is temporarily absent from the jurisdiction. A court will have the discretion as to whether to extend the time limit for serving notice, meaning that independent consideration will be given as to whether an extension is appropriate.

The Committee has requested examples of where the absence of a person who has failed to appear as required by a preliminary unexplained wealth order has frustrated the objective of the unexplained wealth scheme. The 2012 report of the Parliamentary Joint Committee on Law Enforcement from its inquiry into Commonwealth unexplained wealth legislation and arrangements noted that the unexplained wealth provisions of the POC Act are not working as intended. To date, no unexplained wealth applications have been made by proceeds of crime authorities. The aim of the Bill is to generally strengthen Commonwealth unexplained wealth laws to ensure the Commonwealth's unexplained wealth scheme is as effective as possible.[1]

Committee response

2.9 The committee thanks the Minister for Justice for his response and has concluded its examination of this bill.

1 See Appendix 2, Letter from The Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith, 29 April 2014, pp 1-3.

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

Portfolio: Defence
Introduced: Senate, 27 March 2014

Purpose

2.10 The Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014 (the bill) seeks to establish a framework intended to provide all non-Defence users within the Woomera Prohibited Area (WPA) and industry more generally with a level of certainty over Defence activity in the area; and to allow users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill is said to give effect to the recommendations in the Final Report of the Hawke Review of 3 May 2011, which included a recommendation that the WPA 'be opened up for resources exploration and mining to the maximum extent possible within the confines of its primary use for defence of Australia purposes.'[1]

Background

2.11 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

Committee view on compatibility

Right to privacy

Search and request powers exercisable without consent

2.12 The committee requested the Minster for Defence's further advice as to the necessity for non-consensual powers to search and request information from a person at defence access control points, and particularly:

- whether the proposed limitation on the right to privacy is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is proportionate to that objective.

Minister's response

> The Woomera Prohibited Area (WPA) has been the site of weapons testing since the 1950s and contains unexploded ordnance and the debris from weapons testing. The WPA is an extremely large remote land area and it is difficult for the Department of Defence to monitor the movements and activities of people on the WPA.

1 Explanatory memorandum (EM), p. 2.

> The non-consensual search powers under Part VIA of the *Defence Act 1903* will only apply generally where a person does not have authorisation to be on Defence premises, where they constitute a threat to safety or have committed or may commit a criminal offence in relation to the Defence premises. These powers may also apply at Defence access control points.
>
> These powers are required to ensure that people and vehicles leaving the WPA through Defence access control points are not removing war materiel or equipment. If a person attempting to enter the WPA through an access point refuses a consensual search, it is within the power of a Defence security official to refuse to allow that person to enter the WPA. In circumstances where the person is intending to leave the WPA and refuses a consensual search, a special Defence security official requires the proposed powers to conduct a non-consensual search to ensure that no materiel, including unexploded ordnance, debris from weapons testing or war materiel is removed from the WPA.
>
> In light of the sensitive nature of testing activities and the potential hazards associated with materiel that may be present in the WPA, a mechanism to control access and ensure people's safety is compatible with this limitation on the right to privacy.[2]

Committee response

2.13 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

Right to security of persons and freedom from arbitrary detention

Arrest and detention powers

2.14 The committee requested the Minister for Defence's advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the AFP, or member of a state or territory police force, with the right to be brought promptly before a court.

2.15 The committee also sought the Minister for Defence's advice as to what protections may apply more generally to the right to security of the person and freedom from arbitrary detention, such as restrictions on the time a person may be detained without being brought before a relevant AFP or state or territory police force member, and provision for a person to access legal advice while detained.

Minister's response

> The committee has requested advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the Australian Federal Police or member of a state or territory police force, with the right to be brought

2 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, pp 1-2.

promptly before a court. In addition, advice has been requested on what protection may apply to the right to security of the person and freedom from arbitrary detention.

Defence advises the arrest and detention powers in this Bill already apply to 'Defence Premises' through Pt VIA of the *Defence Act 1903*, this Bill will only extend the application of these existing powers to the WPA.

The vast and remote nature of the WPA combined with safety concerns associated with testing may give rise to a situation where it may take time for a detained person to be brought before a member of the police force which in any event will be done as soon as practicable. This is compatible with the right to be brought promptly before a court in that a detained person will be brought before a member of a police force as soon as circumstances allow this to occur.[3]

Committee response

2.16 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

Right to enjoy and benefit from culture and the right to self determination

Impact of increased economic activity on Indigenous people

2.17 The committee requested further information from the Minister for Defence as to the compatibility of the bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by this bill might limit Indigenous groups' enjoyment of these rights.

Minister's response

The committee sought advice on the compatibility of the Bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by the Bill might limit Indigenous groups' enjoyment of these rights.

Indigenous groups will retain current access rights and will not require permission under this Bill. I note that section 72TB of the Bill specifically excludes existing users of the WPA from the application of the Bill. This includes Indigenous groups with an interest in the land. Additionally, permit holders under the Bill will be required to respect the rights of the local Indigenous groups and comply with all relevant laws and pertaining to native title and the protection of these sites. Defence engages in ongoing consultation and discussion with all stakeholders, including

3 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, p. 2.

Indigenous groups, to ensure there is minimal disruption caused by Defence testing.

With respect to economic activity, the Bill only creates a permission system to access a prohibited area. Any economic activity that takes place in the WPA, specifically mining activity, is regulated by the South Australian Government under its *Mining Act 1971*.[4]

Committee response

2.18 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

Right to a fair trial and fair hearing rights

Validation of declaration and past acts in relation to the Woomera Prohibited Area

2.19 The committee requested the Minister for Defence's advice on the compatibility of the retrospective validation proposed by new section 121A with human rights, and particularly whether the measure will engage or limit the right to a fair trial and fair hearing, and the prohibition on retrospective criminal laws.

Minister's response

The inclusion in the Bill of the proposed s 121A is designed to ensure there can be no doubt about the validity of the 1989 declaration of the WPA. The purpose of s 121A is to address technical arguments that could be raised in relation to the 1989 declaration and some acts taken pursuant to it. The only perceived basis for this is that the Defence Force Regulations 1952 did not fully provide for just terms compensation for any acquisitions of property consequent on that declaration or those acts for the purposes of s 51 (xxxi) of the Constitution (although Defence is not aware of any particular cases in which this may have occurred). Section 121A rectifies any constitutional deficiencies by providing just terms compensation in accordance with s 51 (xxxi).

There are no *pending* or *completed* proceedings that would be affected by the proposed s 121A. Nor is Defence aware of any circumstances that would give rise to new proceedings in relation to the period covered by the proposed s 121A.

Even if there were such proceedings s 121A would merely prevent a person from attempting to indirectly escape liability by arguing that he or she could not have been in the WPA because the declaration of that area as a prohibited area was invalid as it effected an acquisition of property other than on just terms. Further, any such liability would not be imposed on a person who could not have reasonably known of the liability at the time the conduct constituting the offence was committed.

4 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, p. 2.

> In any case, Defence is not aware of any information that suggests any person is likely to be prosecuted for an offence against reg 35 for conduct occurring before this Bill. There are no current investigations or prosecutions. Accordingly, to the best of Defence's knowledge, the proposed s 121A will not operate in practice so as to cause, indirectly, any retrospective imposition of criminal liability.[5]

Committee response

2.20 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

5 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, p. 3.

Export Market Development Grants Amendment Bill 2014

Portfolio: Trade and Investment
Introduced: House of Representatives, 6 March 2014

Purpose

2.21 The Export Market Development Grants Amendment Bill 2014 sought to amend the *Export Market Development Grants Act 1997* to:

- align the Export Market Development Grants (EMDG) scheme rules with a revised level of scheme funding;
- increase the number of grants able to be received by an applicant from seven to eight;
- reduce the minimum expenses threshold required to be incurred by an applicant from $20 000 to $15 000;
- reduce the current $5000 deduction from the applicant's provisional grant amount to $2500;
- prevent the payment of grants to applicants engaging an EMDG consultant assessed to be a not fit and proper person; and
- enable a grant to be paid more quickly where a grant is determined before the 1 July following the balance distribution date.

Background

2.22 The committee reported on the bill in its *Fourth Report of the 44th Parliament*.

2.23 The bill was subsequently passed by both Houses and received Royal Asset on 9 April 2014.

Committee view on compatibility

Right to privacy and reputation

Protection of the professional and business reputation of a person

2.24 The committee intends to write to the Minister for Trade and Investment to seek further information on the compatibility of the bill with the right to privacy and reputation, particularly the justification for the fit and proper person measure, including:

- whether it is to be imposed in pursuit of a legitimate objective;
- whether it is both necessary and proportionate to achieving that objective, including all relevant procedural and other safeguards; and
- details of any less intrusive policy measures that may have been available or were considered in the development of this measure.

Minister's response

Objective of the provision

The EMDG scheme is the only significant financial assistance program for Australian small exporters. The total amount payable under the scheme is capped. Any grant that is paid on the basis of false information reduces the amount available to other applicants. Also, the amounts spent on monitoring and investigating claims reduces the overall amount available. It is not feasible for Austrade to fully verify every application (approximately 3000 applications each year). It is important that the EMDG scheme be able to operate on the basis that applications are honest.

EMDG consultants advise applicants on claims under the EMDG scheme. These consultants usually work on a success fee basis, essentially a 1O per cent commission on grants obtained for their clients, which can be a very substantial amount. Approximately 50 per cent to 60 per cent of claims are prepared by consultants.

The Government, applicants and EMDG consultants all share an interest in the EMDG scheme maintaining broad public support. This public support depends upon public confidence in the probity of the scheme. EMDG consultants are a significant part of the scheme. They are publically linked to the scheme, undertake significant promotion of the scheme, manage the majority of applications to the scheme, and earn fees from the scheme, usually on a commission basis. The probity and good public image of EMDG consultants therefore has a significant impact on public perception of the EMDG scheme and the Government's management of it. It is therefore appropriate that just as applicants are required to be fit and proper to receive a grant, so should consultants meet a similar standard. If the scheme were to be withdrawn due to negative public perception it would cause disruption and damage to thousands of businesses.

Connection between the limitation and its objective

The "fit and proper person" test for applicants, that has been in place since 2004, provides an incentive for them to act honestly. The new provisions appropriately extend this requirement to consultants who prepare applications, often for applicants who themselves have little or no knowledge or experience of the scheme requirements. Because consultants' fees are a percentage of the grant received, there is an incentive for consultants to maximise the amount claimed. The current Bill is intended to provide a further incentive to consultants not to make false claims, and an incidental incentive to applicants not to use consultants with a poor record for financial probity.

EMDG consultants are not subject to the disciplinary rules of any professional or industrial body. The only control the government has over the conduct of consultants in the preparation of claims is through the mechanism of preventing them from preparing and lodging further claims,

as proposed in the Bill. If a criminal offence (such as fraud or attempted fraud) can be proved in a particular case, a criminal prosecution can be brought, and in that case they will be automatically disqualified under s78 of the EMDG Act from preparing applications for a period of at least 5 years. However, this will occur after the claim has been lodged, possibly after a grant has been paid and certainly after damage to the public reputation of the export grants scheme and the government's management of the scheme.

The proposed provisions will therefore protect taxpayers' funds from fraudulent or excessive claims, ensure the proper operation of the scheme and, importantly, maintain public confidence in the scheme.

Limitation proportionate to its objective

I recognise that the making of a finding that a consultant is a not fit and proper person is significant and therefore it is appropriate that such a finding should be subject to administrative law. Consultants will therefore have access to merits review by the Administrative Appeals Tribunal (AAT) of an adverse decision under s79A. In addition, consultants would be entitled to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* as well as under the common law. Judicial review would consider the lawfulness of a decision under s79A of the EMDG Act, in particular, in relation to whether the decision complied with the rules of administrative law. It is also important to note that s79A operates in relation to each individual application lodged by the consultant.

If, in relation to one application, Austrade's CEO forms the opinion that the consultant who prepared it is not a fit and proper person, the application in question is taken not to have been made. However, it does not automatically affect other applications. If the same consultant later prepares a new application, that new application will be taken not to have been made only if the CEO again forms the opinion that the consultant is not a fit and proper person. In doing so, the CEO will have to take into account any relevant submissions by the consultant and any change in the circumstances, such as a successful appeal against a conviction and the lapse of time since any adverse event.

Consultants will be permitted to continue to lodge claims on behalf of their clients whilst being investigated, and only when a not fit and proper determination has been made and communicated to the consultant will they be precluded from lodging further applications. There will therefore be no disadvantage to consultants when a not fit and proper decision is delayed, as they will be permitted to continue to lodge grant applications on behalf of their clients until an adverse decision is determined.

It is important to note that a decision by the CEO that a consultant is not a fit and proper person does not operate indefinitely into the future. An excluded consultant may apply in writing to the CEO of Austrade for the CEO to revoke a not fit and proper determination and the CEO must revoke such a determination if the excluded consultant has made this

application and the CEO is satisfied that the circumstances that resulted in the determination no longer exist, and the CEO is not aware of any other reason for the determination to remain in force.

I consider that, in light of these various safeguards, s79A and the related provisions proposed in the Bill are a reasonable and appropriate measure to give effect to the aim pursued. Moreover, I do not consider that they breach, or limit, a consultant's right to be protected from unlawful attacks on their reputation.[1]

Committee response

2.25 The committee thanks the Minister for Trade and Investment for his response and has concluded its examination of this bill.

1 See Appendix 2, Letter from The Hon Andrew Robb MP, Minister for Trade and Investment, to Senator Dean Smith, 1 May 2014, pp 1-3.

Major Sporting Events (Indicia and Images) Protection Bill 2014

Portfolio: Sport
Introduced: House of Representatives, 26 March 2014

Purpose

2.26 The Major Sporting Events (Indicia and Images) Protection Bill 2014 (the bill) seeks to prevent the unauthorised commercial use of certain indicia and images associated with the Asian Football Confederation Asian Cup 2015, the International Cricket Council Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games, consistent with written undertakings provided as a condition of being awarded the right to host these events.

2.27 The bill seeks to achieve this by establishing a registration process to restrict the use of protected indicia and images for each event to official users only.

Background

2.28 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

2.29 The bill was subsequently passed by both Houses and received Royal Assent on 27 May 2014.

Committee view on compatibility

Right to freedom of opinion and expression

Exemptions for the use of certain indicia and images by third parties

2.30 The committee sought the Minister for Sport's advice as to the proportionality of the proposed restriction on the right to freedom of expression, particularly in relation to the exemptions provided for the purposes of criticism, review or the provision of information (in the terms drafted in the bill).

Minister's response

> Criticism, review and provision of information
>
> The legislation provides for the use the protected indicia or images for news reporting and criticism and review. It does this by balancing a commercial use test at section 12 with an exemption at section 14.
>
> At section 12 three elements need to be established to satisfy the commercial use test:
>
> 1. protected indicia or images are applied to the user's goods or services (section 12(1)(a));
>
> 2. the application is for the primary purpose of advertising or promotion or enhancing the demand for the goods or services (section12(1)(b)); and

3. the application would suggest to a reasonable person that the user is or was a sponsor or provider of support for the event (section 12(1)(c).

Section 14 modifies section 12(1)(c) so that where the purpose of the use of the protected indicia or images is, for example, only and genuinely to report the news or critically or satirically review the events, then such use would not suggest that a sponsorship arrangement exists between the writer/reviewer/broadcaster and the event (which is otherwise prohibited by section 12(1)(c) above).

For a breach to occur, it would need to be considered that the images and indicia were applied by the user for the primary purpose of advertising or promoting or enhancing demand for the user's goods or services. That is, the primary purpose would not be for the purposes of genuine criticism, review or the provision of information (which is a requirement of the exemption at section 14). Further, the reasonable person test at 12(1)(c) would still need to be satisfied and all three elements of the commercial use test successfully proven through action brought by someone claiming their rights had been breached. In such a circumstance the use of the indicia or images in question would, appropriately, be considered a breach of the legislation and would not be consistent with the use envisaged by section 14.

Therefore the proposed restriction is considered appropriate in the context of the purposes of this legislation.[1]

Committee response

2.31 The committee thanks the Minister for Sport for his response and has concluded its examination of this bill.

Power to order a corrective advertisement

2.32 The committee requested the Minister for Sport's advice as to the compatibility of proposed section 47 with the right to freedom of expression.

Minister's response

The Bill provides that the court may make an order requiring a person to publish at their own expense a corrective advertisement, if the court is satisfied that the person has used a protected indicia or image without authorisation. Remedies are available to the authorising bodies under the legislation as a means of protecting their commercial interests. Without sponsorship the cost of staging major international sporting events would rely heavily on government support.

The objective of the corrective advertisement mechanism is to reverse the harm done by the false impression that may be created by the

1 See Appendix 2, Letter from The Hon Peter Dutton MP, Minister for Sport, to Senator Dean Smith, 2 June 2014, pp 1-2.

unauthorised use of the event indicia and images. Although this may involve a restriction on the unauthorised user's freedom of expression, this is considered justifiable; both to alert the community to the unauthorised use and to preserve the protection of the authorised user's rights that the Bill is intended to afford. This is proportionate to the harm created by the unauthorised use because the use of advertising is an equivalent means of correcting the false impression created by the unauthorised use. The power to order corrective advertising also serves to deter future contraventions and encourages compliance.

Accordingly the limitation of a person's right to freedom of expression, including the right not to be compelled to engage in particular forms of expression is reasonable, necessary and proportionate to the objective of promoting the right of the Australian public to access and benefit from the staging of major sporting events.[2]

Committee response

2.33 The committee thanks the Minister for Sport for his response and has concluded its examination of this bill.

2 See Appendix 2, Letter from The Hon Peter Dutton MP, Minister for Sport, to Senator Dean Smith, 2 June 2014, p. 2.

Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

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

Purpose

2.34 The Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (the bill) seeks to repeal the *Migration Amendment (Offshore Resources Activity) Act 2013* (ORA Act).

2.35 The purpose of the ORA Act, which would take effect from 30 June 2014,[1] is to provide that foreign workers must hold a relevant visa when they participate in, or support, offshore resource activities taken to be in the migration zone.

2.36 The proposed repeal of the ORA Act will therefore have the effect of maintaining existing arrangements in relation to visa requirements for offshore resource activities.[2]

Background

2.37 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

Committee view on compatibility

Right to work and rights at work

Effect of repealing measures

2.38 The committee requested the advice of the Minister for Immigration and Border Protection as to the compatibility of the bill with the right to work and rights at work.

Minister's response

> The right to work
>
> Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:
>
> > *The States Parties to the present Covenant recognize the right to work, which includes the rightof everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
>
> The Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (the Bill) does not operate to deprive people of the right to work. In particular, it does not seek to preclude non-citizens from working in

1 *Migration Amendment (Offshore Resources Activity) Act 2013*, s 2(1).

2 Explanatory memorandum (EM), pp 1-2.

Australia's offshore resources industry, or to limit the conditions under which they may work in the industry by way of a prescribed visa.

For their part, Australian citizens already have the right to work in the offshore resources industry, and the Bill does not limit their capacity to do so.

Rights at work

Article 7 of ICESCR provides for recognition of the "right of everyone to the enjoyment of just and favourable conditions of work". Such conditions include fair wages and equal remuneration, safe and healthy working conditions, equal opportunity in respect of promotion and rest and leisure.

The Bill does not operate as an impediment to the recognition of the right to just and favourable conditions of work. The *Migration Amendment (Offshore Resources Activity) Act 2013* (the ORA Act) establishes a legislative framework for a visa to be prescribed for noncitizens who are participating in, or supporting, an offshore resources activity.

The ORA Act itself is silent on what visa (other than a permanent visa) a non-citizen must hold to participate in, or to support, an offshore resources activity as this was to be determined at a later date following a period of consultation with the industry.

The appropriate visa, including relevant visa conditions, is to be prescribed in the *Migration Regulations 1994*. In any event, though visas may prescribe (by way of sponsorship obligations) certain terms and conditions that must be provided to the sponsored person, conditions of employment more broadly are regulated under Australian workplace laws and agreements, and not under migration laws. Neither the ORA Act nor the Bill affects the geographical application of Australia's workplace laws.

The ORA Act did not address the conditions of work that would apply to a non-citizen holding a prescribed visa for the purposes of working in Australia's offshore resources industry. As the Bill seeks to repeal the provisions introduced by the ORA Act, it also does not engage conditions of work for the purposes of article 7 of the ICESCR.[3]

Committee response

2.39 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this bill.

3 See Appendix 2, Letter from The Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith, 16 June 2014, pp 2-3.

Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 19 March 2014

Purpose

2.40 The Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 seeks to make a number of amendments to the *Safety, Rehabilitation and Compensation Act 1988* (the Act). The explanatory memorandum for the bill states that the amendments are intended to reduce the cost of the regulatory burden on the economy by implementing recommendations of the 2012 Review of the *Safety, Rehabilitation and Compensation Act 1988* (the Review).[1] The bill will amend the Act to:

- remove the requirement for the minister to declare a corporation to be eligible to be granted a licence for self-insurance, while retaining the ability for the minister to give directions to the Safety, Rehabilitation and Compensation Commission (the Commission);
- enable corporations currently required to meet workers' compensation obligations under two or more workers' compensation laws of a State or Territory to apply to the Commission to join the Comcare scheme (the 'national employer' test);
- allow a Commonwealth authority that ceases to be a Commonwealth authority to apply directly to the Commission for approval to be a self-insurer in the Comcare scheme and be granted a group licence if the former Commonwealth authority meets the national employer test;
- enable the Commission to grant group licences to related corporations;
- make consequential changes to extend the coverage provisions of the Work Health and Safety Act 2011 to those corporations that obtain a licence to self-insure under the Act; and
- exclude access to workers' compensation where injuries occur during recess breaks away from an employer's premises; or a person engages in serious and wilful misconduct, even if the injury results in death or serious and permanent impairment.

1 See Department of Employment website, 'Safety, Rehabilitation and Compensation Act Review', https://employment.gov.au/safety-rehabilitation-and-compensation-act-review-0 [accessed 9 July 2014.]

Background

2.41 The committee reported on the bill in its *Fifth Report of the 44th Parliament*.

Committee view on compatibility

Right to social security and rights at work

Changes to the licensing system

2.42 The committee sought clarification from the Minister for Employment as to whether the proposed changes to the licensing system may limit the right to social security and the right to enjoy just and favourable conditions of work and, if so:

- 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 proportionate to that objective.

Minister's response

> The Committee noted that, if passed, the Bill will have the effect of expanding and changing the eligibility criteria for licencing under the *Safety, Rehabilitation and Compensation Act 1988*, which will bring more employers, and therefore employees, under the (Commonwealth) Comcare scheme. It also noted that the 'minor variations' between the Comcare scheme and the state and territory workers' compensation schemes might reduce the amount of compensation being received by an injured worker who has moved from a state or territory scheme to the Comcare scheme. The Committee noted that such variations may represent a limitation on the right to social security and the right to enjoy just and favourable conditions of work.
>
> The Coalition Government submits that the minor variations in compensation amounts between the Comcare scheme and the state and territory schemes merely reflect different approaches and priorities by the different jurisdictions in implementing a workers' compensation scheme, and therefore should not be considered a limitation on human rights. Regardless of which jurisdiction they fall under, employees have access to a very comprehensive no-fault compensation and rehabilitation scheme for injuries arising out of, or in the course of, their employment. With respect, the Australian Work Health and Safety and workers compensation schemes are widely recognised as the best in the world. Improvements to the Comcare scheme will improve its operation and any suggestion that people will be left worse off, compared to both national and international standards are unsustainable.
>
> For instance, the Government notes that in many respects the Com care scheme provides equal, if not higher, compensation to injured workers than many of the state or territory workers' compensation schemes. For example, under the Comcare scheme, weekly incapacity benefits (the

income replacement component of compensation) are paid at 100 per cent of an injured worker's normal weekly earnings for up to 45 weeks. For longer term incapacity the amount is reduced to between 70 and 75 per cent of normal weekly earnings and ceases at 65 years of age. State and territory schemes mostly pay 100 per cent of normal weekly earnings for the first 13 weeks, after which payments reduce in varying increments and at varying time intervals from the date of injury. Those reductions result in payments ranging from 65 per cent to 95 per cent of normal weekly earnings. Comcare's longer initial payment period means that it continues to be at least as generous as the other schemes in the longer term.

Another example relates to compensation for medical expenses. Under the Comcare scheme compensation is available as long as treatment is reasonably required, which is also the case in the Australian Capital Territory, the Northern Territory and South Australia. In the other schemes (as at 30 September 2012) limits are imposed on compensation for medical expenses:

- in New South Wales, the limit is $50 000 (or a greater amount if prescribed or directed by the Workers' Compensation Commission)
- in Victoria, medical payments cease 52 weeks after the cessation of weekly incapacity benefits
- in Western Australia, medical payments arc limited to $59 510 (or in exceptional medical circumstances with a severe injury to a maximum of $250 000); and in Queensland there is a five year limit on the payment of medical expenses.

Each scheme also pays for attendant care services, home help and other costs such as home modifications. All states either set fees, limit duration of payments, limit the amounts that can be paid or do a combination of these. Comcare has no limits on these costs, except that payment amounts are as Comcare determines are appropriate to the medical treatment of the compensable injury or illness.

Lump sum payments to compensate for permanent impairment also vary considerably across the schemes. As at 30 September 2012, lump sums for permanent impairment varied from a maximum of $198 365 in Western Australia to a maximum of $543 920 in Victoria. Comcare's permanent impairment maximum lump sum amount is $231 831. Lump sum death entitlement payments to surviving dependants also vary across schemes: as at 30 September 2012 they ranged from a maximum of$271 935 in Western Australia to a maximum of$538 715 in Queensland, with the Comcarc scheme amount being $475 962. All schemes also separately pay funeral expenses, with the exception of Tasmania.

Based on components such as income replacement amounts, the periods for which they are paid and the reimbursement for medical and hospital costs, Comcare is one of the more generous schemes. On other scheme elements, while comparisons become more difficult because of the

different emphases placed on each element of each scheme, Comcare is in the middle or upper range of benefits paid.

To the extent that these variations could be considered potential limitations on the right to social security and the right to enjoy just and favourable conditions of work, they are nonetheless proportionate to the legitimate objective they are aimed at achieving. The objective aimed at is the reduction of the regulatory burden on multi-state employers by enabling them to access a single workers' compensation jurisdiction. Reducing the regulatory burden on multi-state employers will enhance other human rights, through enabling employers to reallocate resources to growing their enterprises (which promotes the right to work), and to developing practical work health and safety programs (which promotes the right to safe and healthy working conditions).

The regulatory burden caused by multi-state employers falling under several different workers' compensation schemes is caused, in part, by the numerous minor variations between the different state and territory schemes. This regulatory burden can only be reduced by allowing these employers to move to a single workers' compensation scheme. The changes are part of reforms which will reduce the regulatory impact on the economy by $32.8 million each year for the next 10 years.[2]

Committee response

2.43 The committee thanks the Minister for Employment for his response and has concluded its examination of this bill.

2 See Appendix 2, Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 1 May 2014, pp 1-2.

Save Our Sharks Bill 2014

Sponsor: Senator Siewert
Introduced: House of Representatives, 25 March 2014

Purpose

2.44 The Save Our Sharks Bill 2014 (the bill) seeks to void the 10 January 2014 exemption granted under section 158 of the Environment Protection and Biodiversity Conservation Act 1999, allowing the deployment of baited drum to catch sharks in Western Australia. The bill would also ensure that no similar declaration or exemption will have any effect.

Background

2.45 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

Committee view on compatibility

Right to life

Impact of voiding exemption

2.46 The committee requested Senator Siewert's advice as to the compatibility of the bill with the right to life.

Right to work and rights at work

Economic impact of measure

2.47 The committee requested Senator Siewert's advice as to the compatibility of the bill with the right to work and rights at work.

Senator's response

> The Australian Greens, in introducing this bill, believe that its key function of preventing future shark culling does not unreasonably limit the right to life.
>
> The practical effect of the bill, should it become law, would be that no state or territory government would be able to introduce a great white shark culling program without environmental assessment.
>
> The projections which suggest that preventing future shark culls would result in any loss of life are flawed and the effectiveness of the shark cull on reducing the likelihood of shark-related death is greatly contested.
>
> This bill is aimed at achieving the legitimate objective of protecting our marine life, and even if a limitation on the right to life was presumed to exist by not mitigating shark attacks, there are a number of other methods including beach nets and watchtowers available to the Government which have not yet been fully explored.

Nor do the Australian Greens, in introducing this bill, believe that its key function of preventing future shark culling unreasonably limits the right to work.

There are no projections which suggest that preventing future shark culls would result in any job losses, or any impact on the local economy, to the extent that people's right to work would be affected. Rather, it has been argued that the cull in WA this summer has had a negative impact on tourism operators as it has deterred international visitors.

I note, as the Committee's report notes, that the right to work is not absolute and may be subject to permissible limitations where they are aimed at a legitimate objective, and are reasonable, necessary and proportionate to that objective. With this in mind, even if a limitation on the right to work were presumed to exist, this would be aimed at achieving the legitimate objective of protecting our marine life, by ensuring that the population numbers of apex predators that are vital to the health and wellbeing of entire marine ecosystem are not reduced to endangered levels. The critical species are not just great white sharks, but also tiger sharks – the WA Government's public environmental review predicts about 900 tiger sharks, 25 great white sharks and only a few bull sharks will be caught over the next three years. If these animals are removed from the ecosystem, there will be a much more significant impact on not just the work of tourism operators but also of commercial fishers who rely on health oceans for abundant fish stocks.

In conclusion, because the bill does not limit the right to life, and only limits the rights to work in tourism to the extent to which it protects our marine health which is vital to promoting the broader rights of work across all marine based industries including fisheries, the Australian Greens are of the view that this bill is compatible with Australia's human rights obligations.[1]

Committee response

2.48 The committee thanks Senator Siewert for her response and has concluded its examination of this bill.

1 See Appendix 2, Letter from Senator Rachel Siewert, to Senator Dean Smith, 12 June 2014, pp 1-2.

Social Security Legislation Amendment (Increased Employment Participation) Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Purpose

2.49 The Social Security Legislation Amendment (Increased Employment Participation) Bill 2014 sought to amend the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, and the *Income Tax Assessment Act 1997* to enable the implementation of the Job Commitment Bonus and the 'Relocation Assistance to Take Up a Job' programme.

2.50 The Job Commitment Bonus payment will provide job seekers aged 18-30 who have been receiving Newstart Allowance or Youth Allowance (other than as an apprentice or full time student) for 12 months or more with:

- a $2 500 payment, if they undertake gainful work and remain off income support for a continuous period of 12 months; and
- a further $4 000 to eligible job seekers if they remain in a job and do not receive an income support payment for a continuous period of 24 months, for a total payment of $6 500.

2.51 If job seekers later return to receipt of an income support payment and then qualify again for the Job Commitment Bonus, they will be able to receive a further Job Commitment Bonus (that is, a further $2 500, or $2 500 plus an additional $4000, depending on whether the further period of work is 12 or 24 months).

2.52 The 'Relocation Assistance to Take Up a Job' programme is intended to replace a current scheme that provided relocation assistance to job-seekers, called 'Move 2 Work'. The replacement scheme will come into effect on 1 July 2014 and will provide financial assistance to long term unemployed job seekers with participation requirements who have been receiving Newstart Allowance, Youth Allowance or Parenting Payment for at least the preceding 12 months, to relocate for the purposes of commencing ongoing employment.

2.53 Those who relocate to a regional area (whether from a metropolitan area or another regional area) will receive up to $6 000. Those who move to a metropolitan area from a regional area will receive up to $3 000. Relocations between capital cities (metropolitan areas) will be limited to cases where the relocation is to a capital city with a lower unemployment rate. Families with dependent children will be provided with up to an additional $3 000.

2.54 The bill also seeks to introduce a non-payment period of 26 weeks for which the relevant income support payment is not payable if the person ends their employment because of their own voluntary act or misconduct within a period of 6

months of the relocation assistance being paid. This requirement will apply to participants in the new 'Relocation Assistance to Take Up a Job' programme. The current non-payment period of 12 weeks will continue to apply to participants in the present 'Move 2 Work' programme.

Background

2.55 The committee reported on the bill in its *Third Report of the 44th Parliament*.

2.56 The bill was subsequently passed by the Parliament and received Royal Assent on 18 June 2014.

Committee view on compatibility

Right to equality and non-discrimination

Exclusion on protected Special Category Visa holders

2.57 The committee sought clarification from the minister as to why it is considered necessary to exclude protected Special Category Visa (SCV) holders from accessing the Job Commitment Bonus, and the basis for considering that their inclusion may jeopardise the goals of the measure.

Assistant Minister's response

> The Australian Government considers it necessary to exclude protected Special Category Visa holders from eligibility and this exclusion is consistent with the 2001 Social Security Agreement between Australia and New Zealand.
>
> The Job Commitment Bonus is an incentive for Australians 18- 30 years of age who have been recipients of certain income support payments for 12 months or more, to find and remain in gainful work for 12 months or more while remaining off income support.
>
> The *Social Security Legislation Amendment (Increased Employment Participation) Act 2014* provides that a person must be an Australian resident throughout the period of work on which they rely to claim the Job Commitment Bonus.
>
> For the purpose of the Job Commitment Bonus, the term 'Australian resident' is defined as a person who resides in Australia and who is an Australian citizen or who is the holder of a permanent visa. The term does not include a person who resides in Australia and is the holder of a protected Special Category Visa. Protected Special Category Visa holders are able to apply to become an 'Australian resident'.
>
> Broadly, protected Special Category Visa holders are New Zealand citizens who arrived in Australia on a New Zealand passport and were in Australia on 26 February 2001, or were in Australia for 12 months in the two years immediately before this date and later returned to Australia, or who are in certain other similar categories. New Zealand citizens are able to work in Australia due to the 1973 Trans-Tasman Travel Arrangement.

The designation of protected Special Category Visa holders came as a result of the bilateral Social Security Agreement between Australia and New Zealand announced on 26 February 2001. The agreement only sets out arrangements for the payment of Age Pension, Disability Support Pension and Carer Payment to New Zealand citizens in Australia. Importantly, the agreement recognised the right of each country to determine access to social security benefits not covered by the agreement and to set related residence and citizenship rules within legislative and policy frameworks. The *Social Security legislation Amendment (Increased Employment Participation) Act 2014* is not intended to alter access to income support related payments that were negotiated in the 2001 agreement.

The Job Commitment Bonus is not aimed at providing support to people so that they can meet the basic costs of living- that is the purpose of income support. Protected Special Category Visa holders can normally claim income support as long as they satisfy the usual qualification criteria and serve any relevant waiting periods. Protected Special Category Visa holders' ineligibility for the Job Commitment Bonus does not impact on their access to income support.

Getting more Australians into paid employment has both economic and social benefits for individuals, their families and the community and therefore it is reasonable to provide an incentive for certain young Australians to find and remain in gainful work. However, it is necessary to set parameters on the eligibility for the Job Commitment Bonus (for example, the age requirements and the requirements for persons to have been on certain income support payments for 12 months and to remain in gainful work for at least 12 months).[1]

Committee response

2.58 The committee thanks the Assistant Minister for Employment for his response and has concluded its examination of this matter.

Right to social security

Increase of non-payment period from 12 to 26 weeks

2.59 The committee sought the following information from the minister:

- The levels of assistance provided under the current 'Move 2 Work' programme, including how the present 12-week non-payment period correlates with the applicable relocation assistance provided to eligible individuals.

1 See Appendix 2, Letter from The Hon Luke Hartsuyker MP, Assistant Minister for Employment, to Senator Dean Smith, 27 June 2014, pp 2-3.

- Whether for some individuals the proposed 26-week non-payment period may amount to more than the relocation assistance received.

Assistant Minister's response

> […] The *Social Security Legislation Amendment (Increased Employment Participation) Act 2014* maintains the previous 12 week non-payment period rather than the originally proposed 26 weeks non-payment period.
>
> Under the current Move 2 Work programme eligible job seekers may be reimbursed up to $6500 if relocating with dependants and $4500 if relocating with no dependants. Under the new Relocation Assistance to Take Up a Job programme, those who relocate to a regional area, whether from a capital city or another regional area, will receive up to $6000. Those who move to a capital city from a regional area will receive up to $3000. Families with dependent children will be provided with up to an additional $3000. A maximum of $9000 of assistance is available.
>
> The maximum financial impact of a 12 weeks non-payment period is $4197.60 for an individual receiving Parenting Payment (Parenting Payment has higher payment rates than Newstart Allowance or Youth Allowance).
>
> The 12 week non-payment period is considered to be a penalty for job seekers who choose not to remain in a job for which they have relocated and received generous relocation assistance. While in some cases the amount of relocation assistance received by a person could be less than the financial impact of the 12 week non-payment period, it is important to note that the non-payment period will continue to be able to be ended at any time, based on existing provisions in the social security law, for certain cohorts of job seekers (including those with children) who are in severe financial hardship.
>
> The maximum non-payment period is therefore consistent with the right to social security and the right to an adequate standard of living, as explained in the statement of compatibility with human rights for the Social Security Legislation Amendment (Increased Employment Participation) Bill 2014.
>
> As also noted in the Social Security Legislation Amendment (Increased Employment Participation) Bill 2014 statement of compatibility with human rights, it is necessary to discourage job seekers from not only making ill-considered decisions to relocate, but from relocating purely to take illegitimate advantage of financial assistance from the Commonwealth without a genuine intention of remaining in the job for which they purportedly relocated. This will help ensure that finite

resources are used for the benefit of genuine job seekers, to assist those genuine job seekers to realise their right to work.[2]

Committee response

2.60 The committee thanks the Assistant Minister for Employment for his response and has concluded its examination of this matter.

2 See Appendix 2, Letter from The Hon Luke Hartsuyker MP, Assistant Minister for Employment, to Senator Dean Smith, 27 June 2014, p. 3.

Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 26 February 2014

Purpose

2.61 Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill 2014 sought to amend various taxation and superannuation laws.

2.62 Schedule 1 to the bill introduced penalties to deter and penalise persons who promote the illegal early release of superannuation benefits.

2.63 Schedule 2 to the bill introduced administrative directions and penalties for contraventions relating to self-managed superannuation funds (SMSFs) including rectification directions; education directions; and administrative penalties.

2.64 Schedule 3 to the bill sought to amend the *Income Tax Assessment Act 1936* to phase-out the net medical expenses tax offset by the end of the 2018-19 income year. During the income years 2013-14 to 2018-19 the tax offset will be subject to transitional arrangements.

2.65 Schedule 4 to the bill sought to amend the *Income Tax Assessment Act 1997* to update the list of specifically-listed deductible gift recipients.

Background

2.66 The committee reported on the bill in its *Third Report of the 44th Parliament*.

2.67 The bill was subsequently passed by the Parliament and received Royal Assent on 18 March 2014.

Committee view on compatibility

Right to fair trial and fair hearing rights

Civil penalty provisions

2.68 The committee sought clarification from the Treasurer as to why a maximum penalty of $340 000 for an individual is considered to be appropriate in these circumstances, and if not, whether sufficient provision has been made to guarantee compliance with the relevant criminal process rights provided for under the International Covenant on Civil and Political Rights (ICCPR), in particular the right to be presumed innocent, the right not to incriminate oneself and the prohibition against double jeopardy.

Parliamentary Secretary's response

> All members who contribute to superannuation receive the same substantial tax concessions, which are provided to encourage individuals to save for their retirement. Whilst the structure of funds within the

industry differs, there is no maximum amount that an individual may accumulate within their superannuation account and therefore the amount of benefit they may receive from these generous tax concessions.

Specifically, in relation to the measure in Schedule 1 to the Bill, the maximum penalty of $340,000 is considered appropriate to provide sufficient deterrence to promoters involved in schemes aimed at facilitating the illegal early release of several million dollars and targeting many members.

As noted in the statement of compatibility, a court will determine the appropriate amount of any monetary penalty, taking into account the facts and circumstances of the case, which will include the size of the superannuation fund, the value of the assets involved and the severity of the contravention. Further information is provided in the statement of compatibility.[1]

Committee response

2.69 The committee thanks the Parliamentary Secretary to the Treasurer for his response and has concluded its examination of this matter.

Right to health

Phase-out of the net medical expenses tax offset

2.70 The committee sought an explanation from the Treasurer as to whether any limitations on the right to health that may result from the phasing out of the NMETO are reasonable and proportionate to the achievement of the government's fiscal priorities.

Parliamentary Secretary's response

The NMETO has a number of shortcomings. First, it does not provide financial assistance when the medical expense is incurred, therefore it does not necessarily make the treatment more affordable for individuals on low incomes. Secondly, only taxpayers who have a tax liability receive a benefit from the offset, therefore individuals on low incomes with no tax liability do not benefit from the offset, which undermines the principle of equity.

The phase-out and eventual repeal of this offset is aimed at the objective of allowing for more effective, alternative mechanisms and further funding of Government priorities, including health care. The Government has determined that directing funding to health care through the indirect

1 See Appendix 2, Letter from The Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 28 April 2014, p. 1.

> method of the NMETO and the tax system is not the most effective way of supporting the objective of funding Australia's health care system.[2]

Committee response

2.71 The committee thanks the Parliamentary Secretary to the Treasurer for his response and has concluded its examination of this matter.

Rights of persons with disabilities

Phase-out of the net medical expenses tax offset

2.72 The committee sought clarification from the Treasurer as to whether the repeal of the NMETO is consistent with the rights of persons with disabilities, including whether the National Disability Insurance Scheme and other relevant supports will adequately compensate for any gap left by its abolition.

Parliamentary Secretary's response

> The NDIS is expected to cover all related expenses previously covered by the NMETO for those eligible for a funded plan from the NDIS and is consistent with the rights of persons with disabilities.[3]

Committee response

2.73 The committee thanks the Parliamentary Secretary to the Treasurer for his response and has concluded its examination of this matter.

2 See Appendix 2, Letter from The Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 28 April 2014, p. 2.

3 See Appendix 2, Letter from The Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 28 April 2014, p. 2.

Textile, Clothing and Footwear Investment and Innovation Programs Amendment Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 29 May 2014

Purpose

2.74 The Textile, Clothing, and Footwear Investment and Innovation Programs Amendment Bill 2014 (the bill) will amend the *Textile, Clothing and Footwear Investment and Innovation Programs Act 1999* to provide for the closure of the Clothing and Household Textile Building Innovative Capability Scheme (BIC Scheme) and the Textiles, Clothing and Footwear Small Business Program (TCF Small Business Program) on 30 June 2014.

Background

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

Committee view on compatibility

Right to work and rights at work

Economic impact of measure

2.76 The committee sought the Minister for Industry's advice as to the compatibility of the bill with the right to work and rights at work.

Minister's response

> I note the Committee has raised concerns about the compatibility of the Bill with the right to work and rights at work as guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee is concerned that early closure of the Textile, Clothing and Footwear Small Business Program (TCF-SBP) and the Clothing and Household Textiles Building Innovative Capability (BIC) scheme may reduce the employment opportunities of those working in the industry.
>
> The TCF-SBP and the BIC scheme are just two of a number of programmes that were created to help Australia's TCF manufacturing industry to transition to a lower import tariff regime. These programmes are part of a range of industry support initiatives through which the Australian Government has paid over $1.2 billion to the TCF manufacturing industry since 2001-02. Tariffs on TCF items, which in 1990 ranged from 15-55 per cent, have gradually been reduced. By 1 January 2015, all TCF tariffs will be 5 per cent.
>
> The Government's aim is to create an economy-wide environment conducive to private sector investment and jobs growth, including investment in innovation.

> The Government remains committed to ensuring Australia's manufacturing industries are internationally competitive and that they move in step with the global transition to the niche, value adding and export-focused industries of the future. The $50 million Manufacturing Transition Grants Programme will support firms to transition and build capability in higher value activities in new or growing sectors. The Government also recently announced the details of a $155 million Growth Fund to ensure that workers affected by the closure of the car manufacturing industry transition to new jobs, businesses find new markets and invest in capital equipment and regions invest in infrastructure projects.
>
> Additionally, the R&D Tax Incentive is a targeted, generous and easy to access entitlement programme that helps businesses of all sizes in all sectors to offset some of the costs of doing R&D. Also, the Entrepreneurs' Infrastructure Programme (EIP) offers easy to access practical support to Australian businesses. The EIP is a new approach to the way Government provides services to business. It will offer support to businesses through three streams: business management; research connections; and commercialising ideas.
>
> The TCF industry has now largely restructured and the early closure of the TCF-SBP and the BIC scheme are part of the Government's industry policy of setting the right economic environment by reducing red tape, reducing taxes, equipping businesses with key market information and the opportunity to expand or export. The objective is to improve the overall competiveness of Australian industry and encourage entrepreneurship. This will deliver a strong economy with sustainable job opportunities. The Bill is therefore compatible with the right to work and rights at work.[1]

Committee response

2.77 The committee thanks the Minister for Industry for his detailed response and has concluded its examination of this bill.

1 See Appendix 2, Letter from the Hon Ian Macfarlane MP, Minister for Industry, to Senator Dean Smith, 8 July 2014, pp 1-2.

User Rights Amendment (Various Measures) Principle 2013 [F2013L01352]

Portfolio: Social Services
Authorising legislation: Aged Care Act 1997
Last day to disallow: 4 March 2014 (Senate)

Purpose

2.78 This instrument makes changes to the User Rights Principles 1997 in response to the introduction of 'home care' under the *Living Longer Living Better* aged care reforms. Among other things, the instrument removes references to 'community care', which has been replaced by home care, and replaces these with references to 'home care'; and broadens the permitted uses for accommodation bonds for capital funding for investment in building stock.

2.79 The instrument also expands the power of an approved provider of home care to reallocate a care recipient's place. This amendment enables an approved provider to reallocate the care recipient's place to another care recipient if:

> (e) the care recipient does not meet his or her responsibilities, as described in Schedule 2 – Charter of rights and responsibilities for home care, for a reason within the care recipient's control.[1]

Background

2.80 The committee reported on the instrument in its *First Report of the 44th Parliament*.

Committee view on compatibility

Right to health and right to an adequate standard of living

Reallocation of home care services

2.81 The committee sought clarification from the minister as to how the reallocation of home care services was compatible with the right to health and an adequate standard of living. In particular, the committee sought clarification regarding:

- the criteria that will be applied for determining when a care recipient has breached their Charter responsibilities with the consequence that their place in a home care service is reallocated;
- the mechanisms available for a care recipient to appeal or seek review of a decision to reallocate their place in a home care service; and

1 New section 23.21(e), User Rights Principles 1997 (inserted by item 8).

- what, if any, assistance will be provided to a care recipient to find suitable alternative accommodation.

Assistant Minister's response

Before a care recipient begins receiving home care, the User Rights Principles require that a home care agreement must be offered to the prospective care recipient and the approved provider must provide the prospective care recipient with guidance (and, if appropriate, interpreter services) to understand the terms and effect of the proposed agreement (see section 23.93 of the User Rights Principles). The home care agreement must include, among other matters, conditions under which either party may terminate the home care services (see paragraph 21.95(d) of the User Rights Principles).

The approved provider must also give the prospective care recipient a copy of the Charter and assist them to understand it (see item 5 of the rights specified in the Charter). These provisions are designed to ensure that a care recipient is made aware of his or her rights and responsibilities and understands the circumstances in which they could place their security of tenure at risk.

If an approved provider were to seek to rely on a care recipient's failure to meet his or her responsibilities under the Charter to reallocate the care recipient's home care place, the care recipient would have the avenues of assistance and appeal outlined below, which include recourse to the Aged Care Complaints Scheme. In interpreting the Charter, Complaints Scheme officers adopt a reasonable person test.

The Commonwealth pays advocacy grants under section 81-1 of the *Aged Care Act 1997* to organisations in each state and territory to provide free, independent and confidential advocacy services to care recipients in relation to their rights.

In accordance with section 56-4 of the Aged Care Act, an approved provider of a home care service must establish a complaints resolution mechanism for the service and use the mechanism to address any complaints made by or on behalf of a person to whom care is provided through the service. The approved provider must also advise the person of any other mechanisms that are available to address complaints, such as aged care advocacy services and the Aged Care Complaints Scheme, and provide such assistance as the person requires to use those mechanisms.

A care recipient, or another person on the care recipient's behalf, can lodge a complaint with the Aged Care Complaints Scheme regarding any issue relating to an approved provider's responsibilities under the Aged Care Act, which include responsibilities in relation to security of tenure (see the Complaints Principles 2011 made under section 96-1 of the Aged Care Act). If the Complaints Scheme were to find that the loss of a home care recipient's security of tenure was an unreasonable and disproportionate response to the actions of the care recipient, the

Complaints Scheme could give a direction to the approved provider requiring the approved provider to take stated actions, such as restoration of the care recipient's home care place, to comply with the approved provider's responsibilities. failure by the approved provider to comply with a direction given by the Complaints Scheme could result in compliance action under Part 4.4 of the Aged Care Act, including the imposition of sanctions on the approved provider.

If either the complainant or the approved provider is dissatisfied with a decision made by the Complaints Scheme, they can apply to an independent statutory office holder, the Aged Care Commissioner, for examination of the decision. They may also seek review through the Commonwealth Ombudsman. Parties to a complaint are advised of these avenues of appeal in correspondence from the Scheme.

As home care is provided by the approved provider in the care recipient's own home, the reallocation of a care recipient's home care place would affect the care recipient's care and services rather than his or her accommodation. If an approved provider were to endanger the safety, health and wellbeing of a care recipient by withdrawing home care services peremptorily, without making an effort to assist the care recipient to make other arrangements, such a breach of the provider's common law duty of care would call into question the provider's suitability to be an approved provider of aged care. Action can be taken under section 10-3 of the Aged Care Act if the Secretary is satisfied that a provider has ceased to be suitable to provide aged care.

The framework in which the security of place operates (paragraph 23.21(e) of the User Rights Principles) balances the rights of care recipients to health and to an adequate standard of living with the rights of others, such as care workers. The avenues of appeal, outlined above, allow for a proportionate consideration and response to a care recipient's failure to meet his or her responsibilities as set out in the Charter.[2]

Committee response

2.82 The committee thanks the Assistant Minister for Social Services for his detailed and informative response and has concluded its examination of this instrument.

2 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Service, to Senator Dean Smith, 2 June 2014, pp 1-2.

National Gambling Reforms (Administration of ATM measure) Directions 2014 [F2014L00107]

Portfolio: Social Services
Authorising legislation: National Gambling Reform Act 2012
Last day to disallow: 13 May 2014 (Senate)

Purpose

2.83 This instrument is made under the *National Gambling and Reform Act 2012* (the Act) for the purposes of providing regulatory guidance and general requirements in relation to the approach to be taken by the National Gambling Regulator in the first six months of administering the ATM measure under the Act.

2.84 According to the explanatory statement, '[t]he ATM measure is the first that applies under the Act from 1 February 2014, and requires ATM providers and venues to introduce a $250 limit to cash withdrawals from ATMs at gaming venues, in any 24 hour period'.[1]

2.85 The instrument implements an educative and cooperative approach by:

- specifying priorities based on the Regulator's functions with respect to the ATM measure relevant to an educative approach;
- prescribing procedural requirements to ensure genuine applications for exemption are settled before responding to potential non-compliance; and
- establishing a mandatory process for 'cooperative engagement' which must be followed before responding to any potential non-compliance.

Background

2.86 The committee reported on the instrument in its *Third Report of the 44th Parliament*.

Committee view on compatibility

Right to health and an adequate standard of living

Uncertainty around the purpose and impact of the measure

2.87 The committee sought further information from the Minister for Social Services as to:

- how this instrument relates to the amendments to the Act currently before the Parliament in the Social Services and Other Legislation Amendment Bill 2013; and

1 Explanatory statement, p. 1.

- what impact the 'cooperative engagement' approach implemented by this instrument will have on the right to health and the right to an adequate standard of living.

Minister's response

As you may be aware, as a result of recent amendments to the Act to repeal the ATM measure (among other matters), the Direction no longer has any application. The repeal took effect on 31 March 2014, the date of Royal Assent, and I refer you to Schedule 1 of the *Social Services and Other Legislation Amendment Act 2014*. However, I understand a response to the matters raised is still warranted for the period in which the Direction operated. In light of these developments, a response by 24 April, rather than 14 March (as originally requested), has been agreed.

I understand from the Committee's *Third Report of the 44th Parliament* (the Report) that its key concern with the Direction relates to its understanding of this instrument's purpose. The Committee characterised this purpose as being to 'delay implementation of the enforcement provisions with respect to the ATM measure under the Act' . As the ATM measure promoted human rights, the Committee requested further information on:

- how the Direction relates to amendments in the Social Services and Other Legislation Amendment Bill 2013 (Bill), which was then before Parliament; and
- what impact the ' cooperative engagement' approach implemented by the Direction will have on human rights.

The Government's response is set out below.

Repeal of the ATM measure

As you may be aware, the Bill for the repeal of the ATM measure (and other matters) was introduced in November 2013 prior to the commencement of the ATM measure from 1 February 2014. I understand the timing of the proposed repeal may have provided the basis for confusion among some regulated entities and members of the public regarding the status of the ATM measure, and therefore the purpose of the Direction. In particular, some understood this purpose as related to, or aligned with, the proposed repeal of the ATM measure, and as intended to apply while considered by Parliament.

The purpose of the Direction was not to further or support the objectives of the proposed repeal of the ATM measure or delay implementation of enforcement provisions with respect to the ATM measure under the Act. The Direction was made in accordance with the powers under the Act to establish an approach to regulation that aimed to achieve compliance, with an emphasis on cooperation with and educating regulated entities. I note that the Regulation and Ordinances Committee scrutinised the

Direction on 5 March 2014, with regard to matters including the consistency of the instrument with its enabling legislation, without issue.

The purpose of the Direction and the regulatory approach it provided was consistent with the objectives of the Act, being (as the Committee notes), to address the harms caused by gaming machines to individuals, their families and communities. As explored further below, given the confusion over the application of the measure, the Direction's priority for education and cooperative engagement was considered appropriate, as a regulatory approach. As a practical matter, I understand the Direction also proved useful in confirming compliance was required of regulated entities.

Impact of 'cooperative engagement' approach implemented by the Direction on human rights

The educative approach to compliance provided for in the Direction, primarily in terms of the regulatory priorities specified (section 5), and the procedures for responding to non-compliance (section 8), did not prevent the Regulator from taking punitive action to enforce compliance. Rather, it emphasised the use of non-punitive strategies to facilitate compliance as an initial response. It recognised that in particular regulatory contexts (such as in the gambling context), taking premature action to penalise regulated entities for non-compliance can be counterproductive.

In the context of the former Regulator's enabling legislation, the educative approach to compliance was consistent with the obligations and the broad discretion conferred on the Regulator to promote, monitor and enforce compliance. Further, a cooperative enforcement posture is recognised as one of the most effective and sustainable ways of administering regulatory schemes. Applied appropriately, these types of regulatory approaches are well accepted as consistent with contemporary best practice.

For further information, I refer you to the Australian National Audit Office's 2007 *Better Practice Guide to 'Administering Regulation'* which, consistent with the educative approach, advocates for a graduated and escalating approach to compliance. In addition, I refer you to the recommendations of the Productivity Commission's report on *'Regulator Engagement with Small Business'* in September 2013 which demonstrates the value of engaging cooperatively with regulated entities. You may wish to note that this approach is particularly relevant for engaging small businesses which comprise a major proportion of all gaming venues subject to the previous Act.

In conclusion, as an instrument that facilitated the implementation of the ATM measure, it follows that the Direction was an instrument that supported human rights. It ensured that best practice was adopted in line with the objectives of the Government's broader deregulation agenda.[2]

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2 See Appendix 2, Letter from The Hon Kevin Andrews, Minister for Social Services, to Senator Dean Smith, 6 May 2014, pp 1-3.

Committee response

2.88 The committee thanks the Minister for Social Services for his response and has concluded its examination of this instrument.

Appendix 1

Index of instruments considered and received by the committee between 7 and 20 June 2014

Appendix 1: Full list of Legislative Instruments received by the committee between 7 and 20 June 2014

The committee considers all legislative instruments that come before either House of Parliament for compatibility with human rights. This report considers instruments received by the committee between 7 and 20 June 2014, which usually correlates with the instruments that were made or registered during that period.

Where the committee considers that an instrument does not appear to raise human rights concerns, but is accompanied by a statement of compatibility that does not fully meet the committee's expectations,[1] it will write to the relevant Minister in a purely advisory capacity providing guidance on the preparation of statements of compatibility. This is referenced in the table with an '**A**' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is not accompanied by a statement of compatibility in circumstances where it was required, the committee will write to the Minister in an advisory capacity. This is referenced in the table with an '**A***' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is exempt from the requirement for a statement of compatibility this is referenced in the table with an '**E**'.

Where the committee has commented in this report on an instrument, this is referenced in the table with a '**C**'.

Where the committee has deferred its consideration of an instrument, this is referenced in the table with a '**D**'.

Where the committee considers that an instrument does not appear to raise any human rights concerns and is accompanied by a statement of compatibility that is adequate, this is referenced in the table with an unmarked square.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[2] Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

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1 The committee has set out its expectations with regard to information that should be provided in statements of compatibility in its Practice Note 1, available at: www.aph.gov.au/joint_humanrights.

2 FRLI is found online at www.comlaw.gov.au.

In relation to determinations made under the *Defence Act 1903*, the legislative instrument may be consulted at www.defence.gov.au.

Instruments received week ending 13 June 2014

Civil Aviation Regulations 1988	
CASA 98/14 - Direction — flight time limitations for helicopter mustering operations [F2014L00682]	
AD/PHZL/79 Amdt 2 - Propeller Vibration Placard [F2014L00670]	
Currency Act 1965	
Currency (Royal Australian Mint) Determination 2014 (No. 4) [F2014L00681]	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment to the list of threatened species, ecological communities and key threatening processes under sections 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (157) (28/05/2014) [F2014L00692]	
Farm Household Support Act 2014	
Farm Household Support Minister's Rule 2014 [F2014L00687]	
Federal Financial Relations Act 2009	
Federal Financial Relations (National Partnership payments) Determination No. 75 (February 2014) [F2014L00662]	E
Federal Financial Relations (National Partnership payments) Determination No. 76 (March 2014) [F2014L00664]	E
Federal Financial Relations (National Partnership payments) Determination No. 77 (April 2014) [F2014L00667]	E
Federal Financial Relations (National Partnership payments) Determination No. 78 (May 2014) [F2014L00668]	E
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 12 of 2014 - SRS 330.1 - Statement of Financial Performance [F2014L00674]	
Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2014 - SRS 330.2 - Statement of Financial Performance [F2014L00675]	
Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2014 - SRS 800.0 - Financial Statements [F2014L00676]	
Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2014 - SRS 801.0 - Investments and Investment Flows [F2014L00677]	
Financial Sector (Collection of Data) (reporting standard) determination No. 16 of 2014 - SRS 001.0 - Profile and Structure (Baseline) [F2014L00678]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 32 of 2014) [F2014L00661]	
Higher Education Support Act 2003 - VET Provider Approval (No. 31 of 2014) [F2014L00666]	
Higher Education Support Act 2003 - VET Provider Approval (No. 39 of 2014) [F2014L00671]	

Amendment No. 2 to the VET Guidelines 2013 [F2014L00672]	
Higher Education Support Act 2003 - Revocation of approval as a VET Provider (Central Queensland Institute of TAFE) [F2014L00673]	
Income Tax Assessment Act 1936 and Taxation Administration Act 1953	
Lodgment of income tax returns for the year of income ended 30 June 2014 in accordance with the Income Tax Assessment Act 1936 and the Taxation Administration Act 1953 – Department of Human Services – parents with a child support assessment [F2014L00686]	
Income Tax Assessment Act 1997	
Income Tax (Effective Life of Depreciating Assets) Amendment Determination 2014 (No. 1) [F2014L00679]	
Income Tax Assessment Act 1997, Superannuation Industry (Supervision) Act 1993, Income Tax Assessment Act 1936, Income Tax (Transitional Provisions) Act 1997 and Taxation Administration Act 1953	
Lodgment of returns for the year of income ended 30 June 2014 in accordance with the Income Tax Assessment Act 1936, the Income Tax Assessment Act 1997, the Taxation Administration Act 1953, the Superannuation Industry (Supervision) Act 1993 and the Income Tax (Transitional Provisions) Act 1997 [F2014L00688]	
Private Health Insurance Act 2007	
Private Health Insurance (Registration) Amendment Rules 2014 (No. 1) [F2014L00685]	
Safety, Rehabilitation and Compensation Act 1988	
Safety, Rehabilitation and Compensation (Licence Eligibility – Medibank Private Limited) Declaration 2014 (No. 1) [F2014L00665]	
Safety, Rehabilitation and Compensation (Licence Eligibility – Medibank Health Solutions) Declaration 2014 (No. 1) [F2014L00669]	
Safety, Rehabilitation and Compensation (Weekly Interest on the Lump Sum) Notice 2014 [F2014L00680]	
Social Security (Administration) Act 1999	
Social Security (Administration) (Schooling Requirements - Person Responsible) Specification 2014 [F2014L00663]	
Taxation Administration Act 1953	
Taxation Administration Act Withholding Schedules 2014 [F2014L00689]	
Lodgment of account activity statements by First home saver account providers for the year ended 30 June 2014 in accordance with the Taxation Administration Act 1953 [F2014L00690]	
Taxation Administration Act 1953 and Superannuation Industry (Supervision) Act 1993	
Lodgment of statements by superannuation providers in relation to superannuation plans (other than self managed superannuation funds) for each financial year ended 30 June in accordance with the Taxation Administration Act 1953 [F2014L00691]	
Therapeutic Goods Act 1989	
Therapeutic Goods Order No. 70C - Standards for Export Only Medicine [F2014L00683]	
Medicines Advisory Statements Specification 2014 [F2014L00693]	

Instruments received week ending 20 June 2014

Aged Care Act 1997	
Grant Principles 2014 [F2014L00697]	
Approved Provider Principles 2014 [F2014L00698]	
Agricultural and Veterinary Chemicals (Administration) Act 1992. Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994, Agricultural and Veterinary Chemicals Legislation Amendment Act 2013 and Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Legislation Amendment Regulation 2014 [SLI 2014 No. 67] [F2014L00714]	
Australian Citizenship Act 2007 and Migration Act 1958	
Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 82] [F2014L00726]	C
Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998	
Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 77] [F2014L00724]	
Australian Radiation Protection and Nuclear Safety Act 1998	
Australian Radiation Protection and Nuclear Safety Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 78]	
[F2014L00722]	
Australian Securities and Investments Commission Act 2001, Corporations Act 2001 and Competition and Consumer Act 2010	
Corporations Laws Amendment (2014 Measures No. 2) Regulation 2014 [SLI 2014 No. 88] [F2014L00711]	
Autonomous Sanctions Act 2011	
Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [SLI 2014 No. 76] [F2014L00720]	
Autonomous Sanctions Regulations 2011	
Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014 [F2014L00694]	
Carbon Credits (Carbon Farming Initiative) Act 2011	
Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2014 (No. 1) [SLI 2014 No. 72] [F2014L00710]	
Civil Aviation Order 82.6 (Night vision goggles - helicopters) 2007	
CASA EX37/14 - Exemption — initial NVG pilot flight training prerequisites [F2014L00737]	
Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998	
Civil Aviation Order 95.10 Instrument 2014 [F2014L00732]	
Civil Aviation Safety Regulations 1998	
AD/BELL 206/99 Amdt 3 - Cyclic Control Stick Assembly [F2014L00699]	
CASA ADCX 012/14 — Repeal of Airworthiness Directive [F2014L00731]	
Crimes (Currency) Act 1981	

Disposal of Forfeited Articles Direction 2014 [F2014L00700]	
Crimes (Overseas) Act 1964	
Crimes (Overseas) (Declared Foreign Countries) Amendment Regulation 2014 [SLI 2014 No. 87] [F2014L00718]	
Crimes Act 1914	
Crimes Amendment (Disclosure of Information) Regulation 2014 [SLI 2014 No. 86] [F2014L00716]	
Customs Administration Act 1985, Wine Australia Corporation Act 1980 and Privacy Act 1988	
Wine Australia Corporation Legislation Amendment (Wine Labelling) Regulation 2014 [SLI 2014 No. 70] [F2014L00707]	
Defence Act 1903	
Defence Determination 2014/26, Post indexes - amendment	
Defence Determination 2014/27, Payment of transfer of recreation leave credit	
Defence Determination 2014/28, Post indexes and summer schools - amendment	
Defence Determination 2014/29, Salary non-reduction - amendment	
Defence Determination 2014/30, Recreation leave - amendment	
Education Services for Overseas Students Amendment Act 2014	
Education for Overseas Students Amendment Commencement Proclamation 2014 [F2014L00709]	E
Energy Efficiency Opportunities Act 2006	
Energy Efficiency Opportunities Repeal Regulation 2014 [SLI 2014 No. 83] [F2014L00703]	
Excise Act 1901	
Excise (Blending exemptions) Determination 2014 (No. 1) [F2014L00704]	
Fair Work Act 2009	
Fair Work (State Declarations - employer not to be national system employer) Endorsement 2014 (No. 1) [F2014L00684]	E D
Family Law (Superannuation) Regulations 2001	
Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2014 [F2014L00708]	
Food Standards Australia New Zealand Act 1991	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 6, 2014 [F2014L00702]	E
Hazardous Waste (Regulation of Exports and Imports) Act 1989	
Hazardous Waste (Regulation of Exports and Imports) Amendment (Hexachlorobenzene) Regulation 2014 [SLI 2014 No. 74] [F2014L00723]	
Health Insurance Act 1973	
Health Insurance (General Medical Services Table) Regulation 2014 [SLI 2014 No. 80] [F2014L00713]	
Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 79] [F2014L00721]	

Human Services (Medicare) Act 1973	
Human Services (Medicare) Amendment (Aged Care) Regulation 2014 [SLI 2014 No. 81] [F2014L00725]	
Income Tax Assessment Act 1997 and Income Tax Assessment Act 1936	
Tax Laws Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 90] [F2014L00712]	
Interstate Road Transport Act 1985	
Interstate Road Transport Amendment (Heavy Vehicle National Law) Regulation 2014 [SLI 2014 No. 84] [F2014L00719]	
Marriage Act 1961	
Marriage Amendment (Celebrant Fees and Charges) Regulation 2014 [SLI 2014 No. 71] [F2014L00715]	
Marriage Amendment (Celebrant Administration and Fees) Act 2014	
Marriage Amendment (Celebrant Administration and Fees) Commencement Proclamation 2014 [F2014L00717]	
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Eligible Education Providers and Educational Business Partners - IMMI 14/047 [F2014L00706]	E
National Consumer Credit Protection Act 2009	
National Consumer Credit Protection Amendment (Small Amount Credit Contracts) Regulation 2014 [SLI 2014 No. 89] [F2014L00701]	
Private Health Insurance Act 2007	
Private Health Insurance (Prostheses) Amendment Rules 2014 (No.2) [F2014L00733]	
Quarantine Act 1908	
Quarantine Service Fees Amendment (Import Clearance Fees) Determination 2014 [F2014L00736]	
Quarantine Charges (Collection) Act 2014	
Quarantine Charges (Collection) Regulation 2014 [SLI 2014 No. 68] [F2014L00734]	
Quarantine Charges (Imposition—Customs) Act 2014	
Quarantine Charges (Imposition —Customs) Regulation 2014 [SLI 2014 No. 69] [F2014L00735]	
Superannuation (Productivity Benefit) Act 1988	
Superannuation (Productivity Benefit) (Continuing Contributions) Amendment Declaration 2014 (No. 1) [F2014L00696]	
Superannuation Act 1976	
Superannuation (CSS) (Eligible Employees – Exclusion) Amendment Declaration 2014 (No. 1) [F2014L00729]	
Superannuation Act 1990	
Superannuation (PSS) Membership Inclusion Amendment Declaration 2014 (No. 1) [F2014L00727]	
Superannuation Industry (Supervision) Act 1993	

ASIC Class Order [CO 14/541] [F2014L00705]	
Therapeutic Goods Act 1989	
Therapeutic Goods Order No. 69D - Amendment to Therapeutic Goods Order No. 69 - General requirements for labels for medicines (23/05/2014) [F2014L00695]	

The committee considered 80 instruments

Appendix 2

Correspondence

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/09613

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Dean

Thank you for your letter of 13 May 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) about the G20 (Safety and Security) Complementary Bill 2014 (the Bill) and the *Commonwealth Places (Application of Laws) Act 1970* (Commonwealth Places Act).

The Committee has sought my advice on the compatibility of the Queensland *G20 (Safety and Security) Act 2013* (Queensland Act) with human rights, on the basis that the Bill would allow the Queensland Act to be applied as a Commonwealth law in places it would not otherwise have applied.

The Queensland Act was enacted by the Queensland Parliament to provide powers, offences and other arrangements it considers necessary to ensure the safety and security of the G20 Summit to be held in Queensland this year. These arrangements are consistent with arrangements for previous special events in Australia, such as the Asia Pacific Economic Cooperation forum in 2007 and the Commonwealth Heads of Government Meeting in 2011.

The powers conferred by the Queensland Act are exercisable for a limited period and apply only at those locations specified in the Queensland Act. This includes part of the Brisbane Airport which is a Commonwealth place.

The Bill does not apply the Queensland legislation, including its powers, in circumstances where that legislation otherwise would not – the Queensland Act already applies the relevant provisions to the declared security area at the Brisbane Airport. The Bill will confirm that the provisions in the Queensland Act and those in existing Commonwealth aviation legislation apply concurrently at that Commonwealth place. In addition, to avoid confusion about the source of any powers being exercised at a particular time, the Bill clarifies that, in the event there is any overlap between those sets of provisions, the provisions in the Queensland Act prevail.

In other words, the Bill does not extend the application of the Queensland provisions to any additional locations. It merely avoids ambiguity by addressing any potential overlap in the two sets of laws for an effective period of five days in November.

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On this basis, the Bill will not substantially engage and limit human rights.

The Committee also requests a statement of compatibility for the Commonwealth Places Act with Australia's human rights obligations, particularly with respect to the compatibility of measures that have or may be applied as Commonwealth law by its operation.

The Commonwealth Places Act ensures that State laws can apply to Commonwealth places within each jurisdiction to facilitate consistent and seamless application of each State's laws across the jurisdiction. Because it is necessary for the Commonwealth Places Act to apply to a large number of State laws, it has been framed in open and general terms so that State laws apply automatically to Commonwealth places without first needing to be identified and specifically prescribed.

The Commonwealth Places Act applies State laws to Commonwealth places within that State. The Act is facilitative, rather than enacting specific powers and obligations in its own right. Accordingly, the Commonwealth Places Act would have the same impact on Australia's human rights obligations as the relevant State laws being applied.

Thank you again for writing on this matter and informing me of the Committees views.
I trust this information is of assistance to the Committee.

Yours sincerely

Michael Keenan

29 MAY 2014

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator Smith

Thank you for your letter in relation to the Parliamentary Joint Committee on Human Rights' comments on the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* [F2013L01916].

I attach for the Committee's information a response prepared by the Department of Foreign Affairs and Trade which clarifies the points raised by the Committee. I trust that this information will be of assistance to the Committee in completing its review of the Regulation.

Yours sincerely

Julie Bishop
16 MAY 2014

Telephone (02) 6277 7500 Parliament House, Canberra ACT 2600, Australia Facsimile (02) 6273 4112

Response to the Parliamentary Joint Committee on Human Rights on its request for information concerning the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth)

1. This paper has been prepared by the Department of Foreign Affairs and Trade in response to the request for further information from the Chair of the Parliamentary Joint Committee on Human Rights in his letter to the Minister for Foreign Affairs and Trade of 10 December 2013 regarding the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth) (Regulation).

2. The Committee, in its *First Report of the 44th Parliament*, questioned the compatibility of this Regulation with human rights, in particular the right to a fair hearing (and any possible right of access to court) in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). It noted its intention to write to the Minister to seek clarification on this point. The Committee also drew to the Minister's attention the comments of its predecessor committee on the possible inconsistency of Australia's laws on privileges and immunities with Australia's obligations under the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). It requested the Minister to undertake a review of those laws in relation to this aspect of their operation. This paper will address each issue in turn.

Compatibility with human rights

3. There is no incompatibility between this Regulation and the human rights and freedoms recognised in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In particular, there is no legal basis on which to assert that the conferral of privileges and immunities on an international organisation would breach any rights conferred by Article 14 of the ICCPR, which provides for an accused's right to a fair trial before an impartial court or tribunal.

4. The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and tribunals". Article 14(1) goes on to outline specific provisions regarding a fair hearing, while Article 14(3) sets out the minimum guarantees of the accused in criminal proceedings. In his leading commentary on the ICCPR, Nowak elaborates further on the content of the rights conferred in Article 14(1), identifying that the principle of "equality of arms" between plaintiff and respondent (or between prosecutor and defendant) is an important component of a fair trial. This is the principle that each party to a proceeding should have an equal opportunity to present his case. Nonetheless, Nowak notes that the right to equality before courts and tribunals does not affect diplomatic privilege or parliamentary immunity.[1]

5. The Regulation also provides some restrictions on the privileges and immunities conferred on the ICRC. The purpose of conferring privileges and immunities on

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[1] Novak, M. *UN Covenant on Civil and Political Rights – CCPR Commentary (2nd Ed.)*, Kehl, 2005, pp308-309.

an organisation such as the ICRC is to assist it to fulfil its mandate. Protecting the confidential nature of the ICRC's work, including through immunity from legal processes, helps it to maintain the access it needs to perform its functions and the security of its personnel. The Regulation makes clear that the privileges and immunities conferred are for the benefit of the ICRC, therefore, and not the personal benefit of individuals (subsection 15(1)).

6. The Regulation also provides that the privileges and immunities conferred on the ICRC and its Delegates in Division 1 of the Regulation (Privileges and Immunities of the ICRC) and Division 2 (Privileges and Immunities of delegates of ICRC) do not apply if, in the ICRC's view, their application would impede the course of justice, as long as the purposes for which the privileges or immunities were conferred are not prejudiced (subsections 15(3) and 15(4). Given the ICRC's mandate to promote and ensure compliance with international humanitarian law, we expect that the ICRC would be favourably disposed to any requests from the Australian Government to waive immunity in appropriate circumstances.

Consistency of Australia's laws on privileges and immunities with Australia's obligations under CAT

7. The question of the application of immunities to serious international crimes, including torture, remains unsettled under international law. There has been limited jurisprudence on this point and such jurisprudence as there has been is not determinative. For this reason, it would be premature to propose further legislative amendments addressing this issue. As such, a review of the legislation is not warranted at this time.

Senator the Hon. Michael Ronaldson
Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Special Minister of State

Ref: M14/1698

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

Dear Senator Smith,

Thank you for your letter of 13 May 2014, drawing my attention to the Committee's comments in the Sixth Report of the 44th Parliament (the Report), concerning the Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014 (the Bill).

You sought my advice in relation to the compatibility of proposed new provisions with rights guaranteed by the International Covenant on Civil and Political Rights. Specifically, you asked for my advice as to:

1. the compatibility of new section 170 with the right to freedom of opinion and expression, and particularly:
   - whether the measure is rationally connected to its stated objective; and
   - whether the measure is proportionate to achieving that objective; and

2. the compatibility of new subsections 170(3) and 170(4) with the right to freedom of assembly, and particularly:
   - whether the measures are rationally connected to their apparent objective; and
   - whether the measures are proportionate to achieving that objective.

As background, it is noted that the amendments to the contempt provisions of the Veterans' Review Board (the Board) were in response to the Report of the Strategic Review of Small and Medium Agencies in the Attorney General's portfolio (the Skehill Review) recommendations proposing consistency between the statutory frameworks of Tribunals. To achieve this consistency, the contempt provisions of the *Administrative Appeals Tribunal Act 1975* have been replicated in the *Veterans' Entitlements Act 1986*.

The objective of the new provisions is for the Board to be able to conduct its business without disruption in a fair and equitable manner. It is noted that the Report states this objective as 'the protection of the Board and its hearings'. The proposed limitations are likely to be effective in achieving this objective because the existence of these provisions will act as a deterrent to inappropriate behaviour that would disrupt the Board and its hearings. Therefore, the proposed limitations are rationally connected to the objective.

As to the question of proportionality, it is noted that on occasion the Board operates from non-secure, non-government premises, and protections are required to ensure the safety and proper function of the Board and its members. However, the Board would not use these provisions lightly. It would require an extreme event to warrant consideration of applying the contempt provisions and the decision to prosecute would be undertaken by the Commonwealth Director of Public Prosecutions on referral from the police.

Further, in relation to the concerns raised about the nature of the penalties for the proposed offences, it should be noted that section 4B of the *Crimes Act 1914* provides for the imposition of a pecuniary penalty instead of, or in addition to, a penalty of imprisonment.

I hope the information I have provided is of assistance to the Committee.

Yours sincerely,

SENATOR THE HON. MICHAEL RONALDSON

16 JUN 2014

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/06086

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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Dear Senator Dean

Thank you for your letter dated 18 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights regarding the Crimes Legislation Amendment (Unexplained Wealth and Other Matters) Bill 2014 (the Bill). The Government welcomes the opportunity to provide the following comments in response to the issues identified by the Committee.

Right to fair hearing

The Committee has sought my clarification in relation to amendments in the Bill designed to ensure a court is not prevented from making an unexplained wealth order where a person who is subject to the order fails to appear at an unexplained wealth proceeding. The Committee notes that a possible consequence of this measure is that a person may be the subject of an unexplained wealth order without being notified of it. The Committee further notes that it has concerns regarding the compatibility of this measure with the right to a fair hearing, given that the scheme operates on the basis of a presumption of unlawful conduct which a person must rebut in order to avoid the making of an unexplained wealth order against them.

These amendments are designed to clarify the existing provisions in the *Proceeds of Crime Act 2002* (the POC Act) to ensure that a person cannot frustrate unexplained wealth proceedings by simply failing to appear before the court. They will operate in conjunction with existing provisions in the POC Act which protect the rights of a person who is subject to an application for an unexplained wealth order by imposing notification requirements on the proceeds of crime authority that has applied for an order against that person.

Under the current provisions in the POC Act, the process for seeking an unexplained wealth order commences with a proceeds of crime authority (either the Australian Federal Police or the Commonwealth Director of Public Prosecutions) making an application for an unexplained wealth restraining order (followed by a preliminary unexplained wealth order), or a preliminary unexplained wealth order. As the Committee has noted in its Report, these preliminary orders may be sought *ex parte* in some circumstances to ensure that a person does not disperse his or her assets during the time between the preliminary order being sought, and the time a final unexplained wealth order is made.

Section 179N of the POC Act sets out the notice requirements if a proceeds of crime authority has made an application for an unexplained wealth order. Subsection 179N (2) currently provides that if a court makes a preliminary unexplained wealth order, the proceeds of crime authority that has applied for the order must, within seven days:

- give written notice of the order to the person who would be subject to the final unexplained wealth order if it were made, and
- provide to the person a copy of the application for the unexplained wealth order, and affidavits used to support that order.

Subsection 179N (3) provides that the proceeds of crime authority must also ensure that the person is provided with a copy of other affidavits used to support the application for the preliminary order. The provision of this information must occur within a reasonable time before the hearing in relation to whether the unexplained wealth order is to be made.

The Bill makes two amendments to extend the period in which notice can be provided. New subsection 179N (2A) will allow a court to make an order extending the time limit for serving notice by up to 28 days where the court is satisfied that it is appropriate to do so, if a proceeds of crime authority applies before the end of the original period for serving the notice. New subsection 179N (2B) will provide that the court may extend the notice period more than once. Extending the time limit for giving notice aims to cover situations where, for example, a suspect is attempting to avoid service of the notice or is temporarily absent from the jurisdiction. A court will have the discretion as to whether to extend the time limit for serving notice, meaning that independent consideration will be given as to whether an extension is appropriate.

The Committee has requested examples of where the absence of a person who has failed to appear as required by a preliminary unexplained wealth order has frustrated the objective of the unexplained wealth scheme. The 2012 report of the Parliamentary Joint Committee on Law Enforcement from its inquiry into Commonwealth unexplained wealth legislation and arrangements noted that the unexplained wealth provisions of the POC Act are not working as intended. To date, no unexplained wealth applications have been made by proceeds of crime authorities. The aim of the Bill is to generally strengthen Commonwealth unexplained wealth laws to ensure the Commonwealth's unexplained wealth scheme is as effective as possible.

Right to privacy

In relation to the provisions of the Bill that extend the purposes for which information obtained under the coercive powers of the POC Act can be shared with a foreign authority, the Committee reiterated its expectation that statements of compatibility include sufficient justification of proposed limitations on rights, including how such limitations are proportionate to the objective sought to be achieved.

The Committee indicated that it does not intend to make further comment on this issue and has not sought further comment from me with respect to these measures. However, in response to the Committee's comments I note that the Bill does not provide a general power to share proceeds of crime information with foreign agencies. Disclosures to foreign authorities will only occur for the purpose of identifying, locating, tracing, investigating or confiscating proceeds or instruments of crime, and such disclosures will only be made where the proceeds or instruments of crime concerned would be capable of being confiscated under Australian proceeds of crime laws.

As outlined in the Bill's explanatory material, it is essential that proceeds of crime authorities have the ability to share information to effectively pursue proceeds of crime offshore, and assist our foreign counterparts in doing so. Accordingly, I consider that any limitations on rights resulting from this measure are proportionate to the aims it seeks to achieve.

Statement of compatibility

Finally, the Committee indicated that the statement of compatibility for the Bill does not address the concerns raised by the Committee on the previous Government's Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012, which lapsed when Parliament was prorogued prior to the 2013 Federal election. While I note this comment, I also note that the current Bill and its supporting materials, including the statement of compatibility, differ in a number of respects from the 2012 Bill. Officers responsible for the Bill are aware of the Committee's expectation that statements of compatibility need to address all measures with human rights implications in any particular legislative instrument.

The responsible adviser for this matter in my Office is Tim Wellington who can be contacted on (02) 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

29 APR 2014

Senator the Hon David Johnston
Minister for Defence

MA14-001547

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

Dear Chair

Thank you for your letter of 13 May 2014 regarding the report by Parliamentary Joint Committee on Human Rights (the committee) on the *Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014* (the Bill).

I note the committee seeks further advice on a number of measures provided for in the Bill in relation to the compatibility with human rights. My response to the committee is set out below.

Right to privacy

The Woomera Prohibited Area (WPA) has been the site of weapons testing since the 1950s and contains unexploded ordnance and the debris from weapons testing. The WPA is an extremely large remote land area and it is difficult for the Department of Defence to monitor the movements and activities of people on the WPA.

The non-consensual search powers under Part VIA of the *Defence Act 1903* will only apply generally where a person does not have authorisation to be on Defence premises, where they constitute a threat to safety or have committed or may commit a criminal offence in relation to the Defence premises. These powers may also apply at Defence access control points.

These powers are required to ensure that people and vehicles leaving the WPA through Defence access control points are not removing war materiel or equipment. If a person attempting to enter the WPA through an access point refuses a consensual search, it is within the power of a Defence security official to refuse to allow that person to enter the WPA. In circumstances where the person is intending to leave the WPA and refuses a consensual search, a special Defence security official requires the proposed powers to conduct a non-consensual search to ensure that no materiel, including unexploded ordnance, debris from weapons testing or war materiel is removed from the WPA.

In light of the sensitive nature of testing activities and the potential hazards associated with materiel that may be present in the WPA, a mechanism to control access and ensure people's safety is compatible with this limitation on the right to privacy.

Right to security of the person and freedom from arbitrary detention

The committee has requested advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the Australian Federal Police or member of a state or territory police force, with the right to be brought promptly before a court. In addition, advice has been requested on what protection may apply to the right to security of the person and freedom from arbitrary detention.

Defence advises the arrest and detention powers in this Bill already apply to 'Defence Premises' through Pt VIA of the *Defence Act 1903*, this Bill will only extend the application of these existing powers to the WPA.

The vast and remote nature of the WPA combined with safety concerns associated with testing may give rise to a situation where it may take time for a detained person to be brought before a member of the police force which in any event will be done as soon as practicable. This is compatible with the right to be brought promptly before a court in that a detained person will be brought before a member of a police force as soon as circumstances allow this to occur.

Right to enjoy and benefit from culture
Right to self-determination

The committee sought advice on the compatibility of the Bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by the Bill might limit Indigenous groups' enjoyment of these rights.

Indigenous groups will retain current access rights and will not require permission under this Bill. I note that section 72TB of the Bill specifically excludes existing users of the WPA from the application of the Bill. This includes Indigenous groups with an interest in the land. Additionally, permit holders under the Bill will be required to respect the rights of the local Indigenous groups and comply with all relevant laws and pertaining to native title and the protection of these sites. Defence engages in ongoing consultation and discussion with all stakeholders, including Indigenous groups, to ensure there is minimal disruption caused by Defence testing.

With respect to economic activity, the Bill only creates a permission system to access a prohibited area. Any economic activity that takes place in the WPA, specifically mining activity, is regulated by the South Australian Government under its *Mining Act 1971*.

Right to a fair trial and fair hearing rights

The inclusion in the Bill of the proposed s 121A is designed to ensure there can be no doubt about the validity of the 1989 declaration of the WPA. The purpose of s 121A is to address technical arguments that could be raised in relation to the 1989 declaration and some acts taken pursuant to it. The only perceived basis for this is that the Defence Force Regulations 1952 did not fully provide for just terms compensation for any acquisitions of property consequent on that declaration or those acts for the purposes of s 51(xxxi) of the Constitution (although Defence is not aware of any particular cases in which this may have occurred). Section 121A rectifies any constitutional deficiencies by providing just terms compensation in accordance with s 51(xxxi).

There are no *pending* or *completed* proceedings that would be affected by the proposed s 121A. Nor is Defence aware of any circumstances that would give rise to new proceedings in relation to the period covered by the proposed s 121A.

Even if there were such proceedings s 121A would merely prevent a person from attempting to indirectly escape liability by arguing that he or she could not have been in the WPA because the declaration of that area as a prohibited area was invalid as it effected an acquisition of property other than on just terms. Further, any such liability would not be imposed on a person who could not have reasonably known of the liability at the time the conduct constituting the offence was committed.

In any case, Defence is not aware of any information that suggests any person is likely to be prosecuted for an offence against reg 35 for conduct occurring before this Bill. There are no current investigations or prosecutions. Accordingly, to the best of Defence's knowledge, the proposed s 121A will not operate in practice so as to cause, indirectly, any retrospective imposition of criminal liability.

Yours sincerely

David Johnston

17 JUN 2014

THE HON ANDREW ROBB MP

MINISTER FOR TRADE AND INVESTMENT

01 MAY 2014

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

Dear ~~Senator~~ Dean

Thank you for your letter of 18 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights advising me of the Committee's concern that the "fit and proper" provision in the Export Market Development Grants Amendment Bill (EMDG) 2014 appears to limit the rights of EMDG consultants, as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Committee had noted that the statement of compatibility accompanying the bill did not fully conform to the Committee's expectations in regard to:

1. Whether the limitation is aimed at achieving a legitimate objective;
2. Whether there is a rational connection between the limitation and that objective; and
3. Whether the limitation is proportionate to that objective.

Objective of the provision

The EMDG scheme is the only significant financial assistance program for Australian small exporters. The total amount payable under the scheme is capped. Any grant that is paid on the basis of false information reduces the amount available to other applicants. Also, the amounts spent on monitoring and investigating claims reduces the overall amount available. It is not feasible for Austrade to fully verify every application (approximately 3000 applications each year). It is important that the EMDG scheme be able to operate on the basis that applications are honest.

EMDG consultants advise applicants on claims under the EMDG scheme. These consultants usually work on a success fee basis, essentially a 10 per cent

commission on grants obtained for their clients, which can be a very substantial amount. Approximately 50 per cent to 60 per cent of claims are prepared by consultants.

The Government, applicants and EMDG consultants all share an interest in the EMDG scheme maintaining broad public support. This public support depends upon public confidence in the probity of the scheme. EMDG consultants are a significant part of the scheme. They are publically linked to the scheme, undertake significant promotion of the scheme, manage the majority of applications to the scheme, and earn fees from the scheme, usually on a commission basis. The probity and good public image of EMDG consultants therefore has a significant impact on public perception of the EMDG scheme and the Government's management of it. It is therefore appropriate that just as applicants are required to be fit and proper to receive a grant, so should consultants meet a similar standard. If the scheme were to be withdrawn due to negative public perception it would cause disruption and damage to thousands of businesses.

Connection between the limitation and its objective

The "fit and proper person" test for applicants, that has been in place since 2004, provides an incentive for them to act honestly. The new provisions appropriately extend this requirement to consultants who prepare applications, often for applicants who themselves have little or no knowledge or experience of the scheme requirements. Because consultants' fees are a percentage of the grant received, there is an incentive for consultants to maximise the amount claimed. The current Bill is intended to provide a further incentive to consultants not to make false claims, and an incidental incentive to applicants not to use consultants with a poor record for financial probity.

EMDG consultants are not subject to the disciplinary rules of any professional or industrial body. The only control the government has over the conduct of consultants in the preparation of claims is through the mechanism of preventing them from preparing and lodging further claims, as proposed in the Bill. If a criminal offence (such as fraud or attempted fraud) can be proved in a particular case, a criminal prosecution can be brought, and in that case they will be automatically disqualified under s78 of the
EMDG Act from preparing applications for a period of at least 5 years. However, this will occur after the claim has been lodged, possibly after a grant has been paid and certainly after damage to the public reputation of the export grants scheme and the government's management of the scheme.

The proposed provisions will therefore protect taxpayers' funds from fraudulent or excessive claims, ensure the proper operation of the scheme and, importantly, maintain public confidence in the scheme.

Limitation proportionate to its objective

I recognise that the making of a finding that a consultant is a not fit and proper person is significant and therefore it is appropriate that such a finding should be subject to administrative law. Consultants will therefore have access to merits review by the Administrative Appeals Tribunal (AAT) of an adverse decision under s79A. In addition, consultants would be entitled to judicial review under the

Administrative Decisions (Judicial Review) Act 1977 as well as under the common law. Judicial review would consider the lawfulness of a decision under s79A of the EMDG Act, in particular, in relation to whether the decision complied with the rules of administrative law. It is also important to note that s79A operates in relation to each individual application lodged by the consultant.

If, in relation to one application, Austrade's CEO forms the opinion that the consultant who prepared it is not a fit and proper person, the application in question is taken not to have been made. However, it does not automatically affect other applications. If the same consultant later prepares a new application, that new application will be taken not to have been made only if the CEO again forms the opinion that the consultant is not a fit and proper person. In doing so, the CEO will have to take into account any relevant submissions by the consultant and any change in the circumstances, such as a successful appeal against a conviction and the lapse of time since any adverse event.

Consultants will be permitted to continue to lodge claims on behalf of their clients whilst being investigated, and only when a not fit and proper determination has been made and communicated to the consultant will they be precluded from lodging further applications. There will therefore be no disadvantage to consultants when a not fit and proper decision is delayed, as they will be permitted to continue to lodge grant applications on behalf of their clients until an adverse decision is determined.

It is important to note that a decision by the CEO that a consultant is not a fit and proper person does not operate indefinitely into the future. An excluded consultant may apply in writing to the CEO of Austrade for the CEO to revoke a not fit and proper determination and the CEO must revoke such a determination if the excluded consultant has made this application and the CEO is satisfied that the circumstances that resulted in the determination no longer exist, and the CEO is not aware of any other reason for the determination to remain in force.

I consider that, in light of these various safeguards, s79A and the related provisions proposed in the Bill are a reasonable and appropriate measure to give effect to the aim pursued. Moreover, I do not consider that they breach, or limit, a consultant's right to be protected from unlawful attacks on their reputation.

I note that very similar provisions were the subject of an examination by the Committee in the last Parliament and at that time the Committee found no matters of concern.

Yours sincerely

Andrew Robb

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC14-005720

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

Dear.
Dear Chair

Thank you for your correspondence of 13 May 2014 in relation to the Parliamentary Joint Committee on Human Rights comments with regard to the Major Sporting Events (Indicia and Images) Protection Bill 2014 (the Bill) as reported in the *Sixth Report of the 44th Parliament*.

I note the legislation received Royal Assent on 27 May 2014 and is due to commence on 1 July 2014.

The Committee has raised two issues around which it seeks clarification;

1. Criticism, review and provision of information (section 14); and
2. Power to order corrective advertisement (section 47).

Criticism, review and provision of information

The legislation provides for the use the protected indicia or images for news reporting and criticism and review. It does this by balancing a commercial use test at section 12 with an exemption at section 14.

At section 12 three elements need to be established to satisfy the commercial use test:

1. protected indicia or images are applied to the user's goods or services (section 12(1)(a));
2. the application is for the primary purpose of advertising or promotion or enhancing the demand for the goods or services (section12(1)(b)); and
3. the application would suggest to a reasonable person that the user is or was a sponsor or provider of support for the event (section 12(1)(c).

Section 14 modifies section 12(1)(c) so that where the purpose of the use of the protected indicia or images is, for example, only and genuinely to report the news or critically or satirically review the events, then such use would not suggest that a

sponsorship arrangement exists between the writer/reviewer/broadcaster and the event (which is otherwise prohibited by section 12(1)(c) above).

For a breach to occur, it would need to be considered that the images and indicia were applied by the user for the primary purpose of advertising or promoting or enhancing demand for the user's goods or services. That is, the primary purpose would not be for the purposes of genuine criticism, review or the provision of information (which is a requirement of the exemption at section 14). Further, the reasonable person test at 12(1)(c) would still need to be satisfied and all three elements of the commercial use test successfully proven through action brought by someone claiming their rights had been breached. In such a circumstance the use of the indicia or images in question would, appropriately, be considered a breach of the legislation and would not be consistent with the use envisaged by section 14.

Therefore the proposed restriction is considered appropriate in the context of the purposes of this legislation.

Power to order corrective advertisement

The Bill provides that the court may make an order requiring a person to publish at their own expense a corrective advertisement, if the court is satisfied that the person has used a protected indicia or image without authorisation. Remedies are available to the authorising bodies under the legislation as a means of protecting their commercial interests. Without sponsorship the cost of staging major international sporting events would rely heavily on government support.

The objective of the corrective advertisement mechanism is to reverse the harm done by the false impression that may be created by the unauthorised use of the event indicia and images. Although this may involve a restriction on the unauthorised user's freedom of expression, this is considered justifiable; both to alert the community to the unauthorised use and to preserve the protection of the authorised user's rights that the Bill is intended to afford. This is proportionate to the harm created by the unauthorised use because the use of advertising is an equivalent means of correcting the false impression created by the unauthorised use. The power to order corrective advertising also serves to deter future contraventions and encourages compliance.

Accordingly the limitation of a person's right to freedom of expression, including the right not to be compelled to engage in particular forms of expression is reasonable, necessary and proportionate to the objective of promoting the right of the Australian public to access and benefit from the staging of major sporting events.

Yours sincerely

2/6/14

PETER DUTTON

cc: human.rights@aph.gov.au

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Reference: 1405/01142.

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

Dear Senator

Response to question received from Parliamentary Joint Committee on Human Rights

Thank you for your letter of 13 May 2014 in which further information was requested on the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014.

My response in respect of that Bill is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
16 / 6 /2014

Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

"[T]he committee notes that, while the specific measures of the ORA Act are yet to commence, the Act itself is an operative Commonwealth law. In the committee's view, the effect of the bill is therefore properly characterised as being to remove measures that would otherwise enter into force."

"[T]he committee's usual expectation is that the statement of compatibility provide an assessment of whether the repeal of those arrangements may reduce or remove human rights protections, and whether remaining or proposed arrangements in place of the repealed measures may offer equivalent or greater protection of human rights."

"The committee therefore requests the advice of the Minister for Immigration and Border Protection as to the compatibility of the bill with the right to work and rights at work."

The right to work

Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

> *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

The Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (the Bill) does not operate to deprive people of the right to work. In particular, it does not seek to preclude non-citizens from working in Australia's offshore resources industry, or to limit the conditions under which they may work in the industry by way of a prescribed visa.

For their part, Australian citizens already have the right to work in the offshore resources industry, and the Bill does not limit their capacity to do so.

Rights at work

Article 7 of ICESCR provides for recognition of the "right of everyone to the enjoyment of just and favourable conditions of work". Such conditions include fair wages and equal remuneration, safe and healthy working conditions, equal opportunity in respect of promotion and rest and leisure.

The Bill does not operate as an impediment to the recognition of the right to just and favourable conditions of work. The *Migration Amendment (Offshore Resources Activity) Act 2013* (the ORA Act) establishes a legislative framework for a visa to be prescribed for non-citizens who are participating in, or supporting, an offshore resources activity.

The ORA Act itself is silent on what visa (other than a permanent visa) a non-citizen must hold to participate in, or to support, an offshore resources activity as this was to be determined at a later date following a period of consultation with the industry.
The appropriate visa, including relevant visa conditions, is to be prescribed in the *Migration Regulations 1994*. In any event, though visas may prescribe (by way of sponsorship obligations) certain terms and conditions that must be provided to the sponsored person,

conditions of employment more broadly are regulated under Australian workplace laws and agreements, and not under migration laws. Neither the ORA Act nor the Bill affects the geographical application of Australia's workplace laws.

The ORA Act did not address the conditions of work that would apply to a non-citizen holding a prescribed visa for the purposes of working in Australia's offshore resources industry. As the Bill seeks to repeal the provisions introduced by the ORA Act, it also does not engage conditions of work for the purposes of article 7 of the ICESCR.

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

Senator Dean Smith
Chairman
Parliamentary Joint Committee on Human Rights
PO Box 6100
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1 MAY 2014

Dear Senator

Thank you for your letter of 25 March 2014, on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), concerning the examination of the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (the Bill).

The Committee has sought clarification as to whether the proposed changes to the licensing system may limit the right to social security and the right to enjoy just and favourable conditions of work and, if so, 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 proportionate to that objective.

The Committee noted that, if passed, the Bill will have the effect of expanding and changing the eligibility criteria for licencing under the *Safety, Rehabilitation and Compensation Act 1988*, which will bring more employers, and therefore employees, under the (Commonwealth) Comcare scheme. It also noted that the 'minor variations' between the Comcare scheme and the state and territory workers' compensation schemes might reduce the amount of compensation being received by an injured worker who has moved from a state or territory scheme to the Comcare scheme. The Committee noted that such variations may represent a limitation on the right to social security and the right to enjoy just and favourable conditions of work.

The Coalition Government submits that the minor variations in compensation amounts between the Comcare scheme and the state and territory schemes merely reflect different approaches and priorities by the different jurisdictions in implementing a workers' compensation scheme, and therefore should not be considered a limitation on human rights. Regardless of which jurisdiction they fall under, employees have access to a very comprehensive no-fault compensation and rehabilitation scheme for injuries arising out of, or in the course of, their employment. With respect, the Australian Work Health and Safety and workers compensation schemes are widely recognised as the best in the world. Improvements to the Comcare scheme will improve its operation and any suggestion that people will be left worse off, compared to both national and international standards are unsustainable.

For instance, the Government notes that in many respects the Comcare scheme provides equal, if not higher, compensation to injured workers than many of the state or territory workers' compensation schemes. For example, under the Comcare scheme, weekly incapacity benefits (the income replacement component of compensation) are paid at 100 per cent of an injured worker's normal weekly earnings for up to 45 weeks. For longer term incapacity the amount is reduced to between 70 and 75 per cent of normal weekly earnings and ceases at 65 years of age. State and territory schemes mostly pay 100 per cent of normal weekly earnings for the first 13 weeks, after which payments reduce in varying increments and at

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varying time intervals from the date of injury. Those reductions result in payments ranging from 65 per cent to 95 per cent of normal weekly earnings. Comcare's longer initial payment period means that it continues to be at least as generous as the other schemes in the longer term.

Another example relates to compensation for medical expenses. Under the Comcare scheme compensation is available as long as treatment is reasonably required, which is also the case in the Australian Capital Territory, the Northern Territory and South Australia. In the other schemes (as at 30 September 2012) limits are imposed on compensation for medical expenses:

- in New South Wales, the limit is $50 000 (or a greater amount if prescribed or directed by the Workers' Compensation Commission)
- in Victoria, medical payments cease 52 weeks after the cessation of weekly incapacity benefits
- in Western Australia, medical payments are limited to $59 510 (or in exceptional medical circumstances with a severe injury to a maximum of $250 000); and in Queensland there is a five year limit on the payment of medical expenses.

Each scheme also pays for attendant care services, home help and other costs such as home modifications. All states either set fees, limit duration of payments, limit the amounts that can be paid or do a combination of these. Comcare has no limits on these costs, except that payment amounts are as Comcare determines are appropriate to the medical treatment of the compensable injury or illness.

Lump sum payments to compensate for permanent impairment also vary considerably across the schemes. As at 30 September 2012, lump sums for permanent impairment varied from a maximum of $198 365 in Western Australia to a maximum of $543 920 in Victoria. Comcare's permanent impairment maximum lump sum amount is $231 831. Lump sum death entitlement payments to surviving dependants also vary across schemes: as at 30 September 2012 they ranged from a maximum of $271 935 in Western Australia to a maximum of $538 715 in Queensland, with the Comcare scheme amount being $475 962. All schemes also separately pay funeral expenses, with the exception of Tasmania.

Based on components such as income replacement amounts, the periods for which they are paid and the reimbursement for medical and hospital costs, Comcare is one of the more generous schemes. On other scheme elements, while comparisons become more difficult because of the different emphases placed on each element of each scheme, Comcare is in the middle or upper range of benefits paid.

To the extent that these variations could be considered potential limitations on the right to social security and the right to enjoy just and favourable conditions of work, they are nonetheless proportionate to the legitimate objective they are aimed at achieving. The objective aimed at is the reduction of the regulatory burden on multi-state employers by enabling them to access a single workers' compensation jurisdiction. Reducing the regulatory burden on multi-state employers will enhance other human rights, through enabling employers to reallocate resources to growing their enterprises (which promotes the right to work), and to developing practical work health and safety programs (which promotes the right to safe and healthy working conditions).

The regulatory burden caused by multi-state employers falling under several different workers' compensation schemes is caused, in part, by the numerous minor variations between the different state and territory schemes. This regulatory burden can only be reduced by allowing these employers to move to a single workers' compensation scheme. The changes are part of reforms which will reduce the regulatory impact on the economy by $32.8 million each year for the next 10 years.

Thank you for providing me with the opportunity to clarify my position about this aspect of the Bill and I hope that the Committee takes a more real-world view in its approach to this legislation than its consideration of previous portfolio legislation.

Yours sincerely

ERIC ABETZ

Senator
Rachel Siewert
Australian Greens Senator for Western Australia

Senator Dean Smith
Chair, Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
Via email: Senator.Smith@aph.gov.au

Cc: human.rights@aph.gov.au

12 June 2014

Dear Senator Smith

Re: Save our Sharks Bill 2014

Thank you for your letter of 13 May 2014, in relation to the above bill.

I am writing to provide clarification on some matters set out in your letter, and in the Parliamentary Joint Committee on Human Rights' *Sixth Report of the 44th Parliament*.

In its report, the Committee states it seeks clarification on whether the bill is consistent with the right to life and the right to work, as recognised in article 6 of the International Covenant on Economic, Social and Cultural Rights.

The Australian Greens, in introducing this bill, believe that its key function of preventing future shark culling does not unreasonably limit the right to life.

The practical effect of the bill, should it become law, would be that no state or territory government would be able to introduce a great white shark culling program without environmental assessment.

The projections which suggest that preventing future shark culls would result in any loss of life are flawed and the effectiveness of the shark cull on reducing the likelihood of shark-related death is greatly contested.

This bill is aimed at achieving the legitimate objective of protecting our marine life, and even if a limitation on the right to life was presumed to exist by not mitigating shark attacks, there are a number of other methods including beach nets and watchtowers available to the Government which have not yet been fully explored.

THE GREENS

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Senator
Rachel Siewert
Australian Greens Senator for Western Australia

Nor do the Australian Greens, in introducing this bill, believe that its key function of preventing future shark culling unreasonably limits the right to work.

There are no projections which suggest that preventing future shark culls would result in any job losses, or any impact on the local economy, to the extent that people's right to work would be affected. Rather, it has been argued that the cull in WA this summer has had a negative impact on tourism operators as it has deterred international visitors.

I note, as the Committee's report notes, that the right to work is not absolute and may be subject to permissible limitations where they are aimed at a legitimate objective, and are reasonable, necessary and proportionate to that objective. With this in mind, even if a limitation on the right to work were presumed to exist, this would be aimed at achieving the legitimate objective of protecting our marine life, by ensuring that the population numbers of apex predators that are vital to the health and wellbeing of entire marine ecosystem are not reduced to endangered levels. The critical species are not just great white sharks, but also tiger sharks – the WA Government's public environmental review predicts about 900 tiger sharks, 25 great white sharks and only a few bull sharks will be caught over the next three years. If these animals are removed from the ecosystem, there will be a much more significant impact on not just the work of tourism operators but also of commercial fishers who rely on health oceans for abundant fish stocks.

In conclusion, because the bill does not limit the right to life, and only limits the rights to work in tourism to the extent to which it protects our marine health which is vital to promoting the broader rights of work across all marine based industries including fisheries, the Australian Greens are of the view that this bill is compatible with Australia's human rights obligations.

I thank you for bringing these matters to my attention.

Yours sincerely

Senator Rachel Siewert
Australian Greens Senator for WA

THE GREENS

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THE HON. LUKE HARTSUYKER MP
DEPUTY LEADER OF THE HOUSE
ASSISTANT MINISTER FOR EMPLOYMENT

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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27 JUN 2014

Dear Senator Smith

Thank you for your letter of 4 March 2014 to Senator the Hon. Eric Abetz, Minister for Employment, on behalf of the Parliamentary Joint Committee on Human Rights concerning the Social Security Legislation Amendment (Increased Employment Participation) Bill 2014 (now an Act). As the matter raised falls within my portfolio responsibilities as Assistant Minister for Employment, your letter was referred to me for reply. I apologise for the delay in responding.

The Parliamentary Joint Committee on Human Rights asked for clarification as to why it is considered necessary to exclude protected Special Category Visa holders from accessing the Job Commitment Bonus, and the basis for considering their inclusion may jeopardise the goals of the measure.

The Parliamentary Joint Committee on Human Rights also requested information about the proposal to extend the non-payment period for certain income support payments from 12 weeks to 26 weeks. This occurs where people receive assistance under the new Relocation Assistance to Take Up a Job programme and leave their job voluntarily without good reason or due to misconduct less than six months after they received the relocation assistance. The Act as passed on 16 June 2014, maintained the 12 week non-payment period.

Further information to assist the Parliamentary Joint Committee on Human Rights in relation to both the above matters is enclosed.

Thank you for raising this matter.

Yours sincerely

LUKE HARTSUYKER

Encl.

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Our Ref MC14-002685

Exclusion of protected Special Category Visa holders from eligibility for the Job Commitment Bonus

The Parliamentary Joint Committee on Human Rights sought clarification on 'why it is considered necessary to exclude protected Special Category Visa holders from accessing the Job Commitment Bonus, and the basis for considering the inclusion of Special Category Visa holders may jeopardise the goals of the measure'.

The Australian Government considers it necessary to exclude protected Special Category Visa holders from eligibility and this exclusion is consistent with the 2001 Social Security Agreement between Australia and New Zealand.

The Job Commitment Bonus is an incentive for Australians 18–30 years of age who have been recipients of certain income support payments for 12 months or more, to find and remain in gainful work for 12 months or more while remaining off income support.

The *Social Security Legislation Amendment (Increased Employment Participation) Act 2014* provides that a person must be an Australian resident throughout the period of work on which they rely to claim the Job Commitment Bonus.

For the purpose of the Job Commitment Bonus, the term 'Australian resident' is defined as a person who resides in Australia and who is an Australian citizen or who is the holder of a permanent visa. The term does not include a person who resides in Australia and is the holder of a protected Special Category Visa. Protected Special Category Visa holders are able to apply to become an 'Australian resident'.

Broadly, protected Special Category Visa holders are New Zealand citizens who arrived in Australia on a New Zealand passport and were in Australia on 26 February 2001, or were in Australia for 12 months in the two years immediately before this date and later returned to Australia, or who are in certain other similar categories. New Zealand citizens are able to work in Australia due to the 1973 Trans-Tasman Travel Arrangement.

The designation of protected Special Category Visa holders came as a result of the bilateral Social Security Agreement between Australia and New Zealand announced on 26 February 2001. The agreement only sets out arrangements for the payment of Age Pension, Disability Support Pension and Carer Payment to New Zealand citizens in Australia. Importantly, the agreement recognised the right of each country to determine access to social security benefits not covered by the agreement and to set related residence and citizenship rules within legislative and policy frameworks. The *Social Security Legislation Amendment (Increased Employment Participation) Act 2014* is not intended to alter access to income support related payments that were negotiated in the 2001 agreement.

The Job Commitment Bonus is not aimed at providing support to people so that they can meet the basic costs of living—that is the purpose of income support. Protected Special Category Visa holders can normally claim income support as long as they satisfy the usual qualification criteria and serve any relevant waiting periods. Protected Special Category Visa holders' ineligibility for the Job Commitment Bonus does not impact on their access to income support.

Getting more Australians into paid employment has both economic and social benefits for individuals, their families and the community and therefore it is reasonable to provide an incentive for certain young Australians to find and remain in gainful work. However, it is

necessary to set parameters on the eligibility for the Job Commitment Bonus (for example, the age requirements and the requirements for persons to have been on certain income support payments for 12 months and to remain in gainful work for at least 12 months).

Relocation Assistance to Take Up a Job

The Parliamentary Joint Committee on Human Rights sought information on the levels of assistance provided under the current 'Move 2 Work' programme, including how the present non-payment period of up to 12 weeks correlates with the applicable relocation assistance provided to eligible individuals. The Parliamentary Joint Committee on Human Rights also sought information on whether for some individuals the proposed non-payment period of up to 26 weeks may amount to more than the relocation assistance received. The *Social Security Legislation Amendment (Increased Employment Participation) Act 2014* maintains the previous 12 week non-payment period rather than the originally proposed 26 weeks non-payment period.

Under the current Move 2 Work programme eligible job seekers may be reimbursed up to $6500 if relocating with dependants and $4500 if relocating with no dependants. Under the new Relocation Assistance to Take Up a Job programme, those who relocate to a regional area, whether from a capital city or another regional area, will receive up to $6000. Those who move to a capital city from a regional area will receive up to $3000. Families with dependent children will be provided with up to an additional $3000. A maximum of $9000 of assistance is available.

The maximum financial impact of a 12 weeks non-payment period is $4197.60 for an individual receiving Parenting Payment (Parenting Payment has higher payment rates than Newstart Allowance or Youth Allowance).

The 12 week non-payment period is considered to be a penalty for job seekers who choose not to remain in a job for which they have relocated and received generous relocation assistance. While in some cases the amount of relocation assistance received by a person could be less than the financial impact of the 12 week non-payment period, it is important to note that the non-payment period will continue to be able to be ended at any time, based on existing provisions in the social security law, for certain cohorts of job seekers (including those with children) who are in severe financial hardship.

The maximum non-payment period is therefore consistent with the right to social security and the right to an adequate standard of living, as explained in the statement of compatibility with human rights for the Social Security Legislation Amendment (Increased Employment Participation) Bill 2014.

As also noted in the Social Security Legislation Amendment (Increased Employment Participation) Bill 2014 statement of compatibility with human rights, it is necessary to discourage job seekers from not only making ill-considered decisions to relocate, but from relocating purely to take illegitimate advantage of financial assistance from the Commonwealth without a genuine intention of remaining in the job for which they purportedly relocated. This will help ensure that finite resources are used for the benefit of genuine job seekers, to assist those genuine job seekers to realise their right to work.

THE HON STEVEN CIOBO MP
Parliamentary Secretary to the Treasurer

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Smith

Thank you for your letter on behalf of the Parliamentary Joint Committee on Human Rights (Committee) regarding the Committee's recent examination of the Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill 2014.

I am responding on the Treasurer's behalf and apologise for the delay in doing so, given the Bill has now passed both Houses of Parliament.

The Committee sought clarification in relation to the civil penalty regime in Schedule 1 to the Bill as to why a maximum penalty of $340,000 for an individual is considered to be appropriate. The Committee also sought further information regarding the phase-out of the net medical expenses tax offset (NMETO) in Schedule 3 to the Bill.

Schedule 1

All members who contribute to superannuation receive the same substantial tax concessions, which are provided to encourage individuals to save for their retirement. Whilst the structure of funds within the industry differs, there is no maximum amount that an individual may accumulate within their superannuation account and therefore the amount of benefit they may receive from these generous tax concessions.

Specifically, in relation to the measure in Schedule 1 to the Bill, the maximum penalty of $340,000 is considered appropriate to provide sufficient deterrence to promoters involved in schemes aimed at facilitating the illegal early release of several million dollars and targeting many members.

As noted in the statement of compatibility, a court will determine the appropriate amount of any monetary penalty, taking into account the facts and circumstances of the case, which will include the size of the superannuation fund, the value of the assets involved and the severity of the contravention. Further information is provided in the statement of compatibility.

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Schedule 3

The Committee sought further information regarding whether any limitations on the right to health that may result from the phasing out of the NMETO are reasonable and proportionate to the achievement of the Government's fiscal priorities.

The NMETO has a number of shortcomings. First, it does not provide financial assistance when the medical expense is incurred, therefore it does not necessarily make the treatment more affordable for individuals on low incomes. Secondly, only taxpayers who have a tax liability receive a benefit from the offset, therefore individuals on low incomes with no tax liability do not benefit from the offset, which undermines the principle of equity.

The phase-out and eventual repeal of this offset is aimed at the objective of allowing for more effective, alternative mechanisms and further funding of Government priorities, including health care. The Government has determined that directing funding to health care through the indirect method of the NMETO and the tax system is not the most effective way of supporting the objective of funding Australia's health care system.

The Committee also sought clarification as to whether the repeal of the NMETO is consistent with the rights of persons with disabilities, including whether the National Disability Insurance Scheme (NDIS) and other relevant supports will adequately compensate for any gap left by its abolition.

The NDIS is expected to cover all related expenses previously covered by the NMETO for those eligible for a funded plan from the NDIS and is consistent with the rights of persons with disabilities.

I trust this information will be of assistance to the Committee.

Yours sincerely

Steven Ciobo

28 APR 2014

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

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CANBERRA ACT 2600

08 JUL 2014

MC14-001861

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

Dear Senator Smith Dean

Thank you for your letter of 18 June 2014 requesting a response to the Committee's comments in the *Seventh Report of the 44th Parliament* concerning the Textile, Clothing and Footwear Investment and Innovations Programs Amendment Bill 2014 (the Bill).

I note the Committee has raised concerns about the compatibility of the Bill with the right to work and rights at work as guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee is concerned that early closure of the Textile, Clothing and Footwear Small Business Program (TCF-SBP) and the Clothing and Household Textiles Building Innovative Capability (BIC) scheme may reduce the employment opportunities of those working in the industry.

The TCF-SBP and the BIC scheme are just two of a number of programmes that were created to help Australia's TCF manufacturing industry to transition to a lower import tariff regime. These programmes are part of a range of industry support initiatives through which the Australian Government has paid over $1.2 billion to the TCF manufacturing industry since 2001–02. Tariffs on TCF items, which in 1990 ranged from 15-55 per cent, have gradually been reduced. By 1 January 2015, all TCF tariffs will be 5 per cent.

The Government's aim is to create an economy-wide environment conducive to private sector investment and jobs growth, including investment in innovation.

The Government remains committed to ensuring Australia's manufacturing industries are internationally competitive and that they move in step with the global transition to the niche, value adding and export-focused industries of the future. The $50 million Manufacturing Transition Grants Programme will support firms to transition and build capability in higher value activities in new or growing sectors. The Government also recently announced the details of a $155 million Growth Fund to ensure that workers affected by the closure of the car manufacturing industry transition to new jobs, businesses find new markets and invest in capital equipment and regions invest in infrastructure projects.

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Additionally, the R&D Tax Incentive is a targeted, generous and easy to access entitlement programme that helps businesses of all sizes in all sectors to offset some of the costs of doing R&D. Also, the Entrepreneurs' Infrastructure Programme (EIP) offers easy to access practical support to Australian businesses. The EIP is a new approach to the way Government provides services to business. It will offer support to businesses through three streams: business management; research connections; and commercialising ideas.

The TCF industry has now largely restructured and the early closure of the TCF-SBP and the BIC scheme are part of the Government's industry policy of setting the right economic environment by reducing red tape, reducing taxes, equipping businesses with key market information and the opportunity to expand or export. The objective is to improve the overall competiveness of Australian industry and encourage entrepreneurship. This will deliver a strong economy with sustainable job opportunities. The Bill is therefore compatible with the right to work and rights at work.

Yours sincerely

Ian Macfarlane

The Hon Kevin Andrews MP
Minister for Social Services

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MN14-000295

06 MAY 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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CANBERRA ACT 2600

Dear Senator Smith Dean,

Thank you for your letter of 4 March 2014 in relation to the Direction I issued on the administration of the Automatic Teller Machine (ATM) measure (the Direction), pursuant to section 110(1) of the *National Gambling Reform Act 2012* (the Act). I understand the Committee sought further information about the Direction, within the disallowance period, to assist it in forming a view on the Direction's compatibility with human rights.

As you may be aware, as a result of recent amendments to the Act to repeal the ATM measure (among other matters), the Direction no longer has any application. The repeal took effect on 31 March 2014, the date of Royal Assent, and I refer you to Schedule 1 of the *Social Services and Other Legislation Amendment Act 2014*. However, I understand a response to the matters raised is still warranted for the period in which the Direction operated. In light of these developments, a response by 24 April, rather than 14 March (as originally requested), has been agreed.

I understand from the Committee's Third Report of the 44th Parliament (the Report) that its key concern with the Direction relates to its understanding of this instrument's purpose. The Committee characterised this purpose as being to '*delay implementation of the enforcement provisions with respect to the ATM measure under the Act*'. As the ATM measure promoted human rights, the Committee requested further information on:

- how the Direction relates to amendments in the Social Services and Other Legislation Amendment Bill 2013 (Bill), which was then before Parliament; and
- what impact the 'cooperative engagement' approach implemented by the Direction will have on human rights.

The Government's response is set out below.

Repeal of the ATM measure

As you may be aware, the Bill for the repeal of the ATM measure (and other matters) was introduced in November 2013 prior to the commencement of the ATM measure from 1 February 2014. I understand the timing of the proposed repeal may have provided the basis for confusion among some regulated entities and members of the public regarding the status of the ATM measure, and therefore the purpose of the Direction. In particular, some understood this purpose as related to, or aligned with, the proposed repeal of the ATM measure, and as intended to apply while considered by Parliament.

The purpose of the Direction was not to further or support the objectives of the proposed repeal of the ATM measure or delay implementation of enforcement provisions with respect to the ATM measure under the Act. The Direction was made in accordance with the powers under the Act to establish an approach to regulation that aimed to achieve compliance, with an emphasis on cooperation with and educating regulated entities. I note that the Regulation and Ordinances Committee scrutinised the Direction on 5 March 2014, with regard to matters including the consistency of the instrument with its enabling legislation, without issue.

The purpose of the Direction and the regulatory approach it provided was consistent with the objectives of the Act, being (as the Committee notes), to address the harms caused by gaming machines to individuals, their families and communities. As explored further below, given the confusion over the application of the measure, the Direction's priority for education and cooperative engagement was considered appropriate, as a regulatory approach. As a practical matter, I understand the Direction also proved useful in confirming compliance was required of regulated entities.

Impact of 'cooperative engagement' approach implemented by the Direction on human rights

The educative approach to compliance provided for in the Direction, primarily in terms of the regulatory priorities specified (section 5), and the procedures for responding to non-compliance (section 8), did not prevent the Regulator from taking punitive action to enforce compliance. Rather, it emphasised the use of non-punitive strategies to facilitate compliance as *an initial* response. It recognised that in particular regulatory contexts (such as in the gambling context), taking premature action to penalise regulated entities for non-compliance can be counterproductive.

In the context of the former Regulator's enabling legislation, the educative approach to compliance was consistent with the obligations and the broad discretion conferred on the Regulator to promote, monitor and enforce compliance. Further, a cooperative enforcement posture is recognised as one of the most effective and sustainable ways of administering regulatory schemes. Applied appropriately, these types of regulatory approaches are well accepted as consistent with contemporary best practice.

For further information, I refer you to the Australian National Audit Office's 2007 *Better Practice Guide* to *'Administering Regulation'* which, consistent with the educative approach, advocates for a graduated and escalating approach to compliance. In addition, I refer you to the recommendations of the Productivity Commission's report on *'Regulator Engagement with Small Business'* in September 2013 which demonstrates the value of engaging cooperatively with regulated entities. You may wish to note that this approach is particularly relevant for engaging small businesses which comprise a major proportion of all gaming venues subject to the previous Act.

In conclusion, as an instrument that facilitated the implementation of the ATM measure, it follows that the Direction was an instrument that supported human rights. It ensured that best practice was adopted in line with the objectives of the Government's broader deregulation agenda.

Yours sincerely

KEVIN ANDREWS MP

SENATOR THE HON MITCH FIFIELD

ASSISTANT MINISTER FOR SOCIAL SERVICES

MC14-004269

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
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Dear Senator Smith

Thank you for your letter of 10 December 2013 to the Hon Peter Dutton MP, Minister for Health, in relation to the *Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1)* and *User Rights Amendment (Various Measures) Principle 2013*. As the Assistant Minister for Social Services, with portfolio responsibility for aged care-related matters, your letter was recently referred to me also for response in relation to the latter legislative instrument. This instrument makes amendments to home care-related provisions within the *User Rights Principles 1997* (the User Rights Principles), and similar provisions also exist for residential care.

Your letter requested information related to the following issues:

- the criteria applied for determining when a care recipient has breached their responsibilities under the *Charter of Rights and Responsibilities for Home Care* (the Charter) with the consequence that their place in a home care service is reallocated;
- the mechanisms available for a care recipient to appeal or seek review of a decision to reallocate their place in a home care service; and
- what, if any, assistance will be provided to a care recipient to find suitable alternative accommodation.

Before a care recipient begins receiving home care, the User Rights Principles require that a home care agreement must be offered to the prospective care recipient and the approved provider must provide the prospective care recipient with guidance (and, if appropriate, interpreter services) to understand the terms and effect of the proposed agreement (see section 23.93 of the User Rights Principles). The home care agreement must include, among other matters, conditions under which either party may terminate the home care services (see paragraph 21.95(d) of the User Rights Principles).

The approved provider must also give the prospective care recipient a copy of the Charter and assist them to understand it (see item 5 of the rights specified in the Charter). These provisions are designed to ensure that a care recipient is made aware of his or her rights and responsibilities and understands the circumstances in which they could place their security of tenure at risk.

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If an approved provider were to seek to rely on a care recipient's failure to meet his or her responsibilities under the Charter to reallocate the care recipient's home care place, the care recipient would have the avenues of assistance and appeal outlined below, which include recourse to the Aged Care Complaints Scheme. In interpreting the Charter, Complaints Scheme officers adopt a reasonable person test.

The Commonwealth pays advocacy grants under section 81-1 of the *Aged Care Act 1997* to organisations in each state and territory to provide free, independent and confidential advocacy services to care recipients in relation to their rights.

In accordance with section 56-4 of the Aged Care Act, an approved provider of a home care service must establish a complaints resolution mechanism for the service and use the mechanism to address any complaints made by or on behalf of a person to whom care is provided through the service. The approved provider must also advise the person of any other mechanisms that are available to address complaints, such as aged care advocacy services and the Aged Care Complaints Scheme, and provide such assistance as the person requires to use those mechanisms.

A care recipient, or another person on the care recipient's behalf, can lodge a complaint with the Aged Care Complaints Scheme regarding any issue relating to an approved provider's responsibilities under the Aged Care Act, which include responsibilities in relation to security of tenure (see the *Complaints Principles 2011* made under section 96-1 of the Aged Care Act). If the Complaints Scheme were to find that the loss of a home care recipient's security of tenure was an unreasonable and disproportionate response to the actions of the care recipient, the Complaints Scheme could give a direction to the approved provider requiring the approved provider to take stated actions, such as restoration of the care recipient's home care place, to comply with the approved provider's responsibilities. Failure by the approved provider to comply with a direction given by the Complaints Scheme could result in compliance action under Part 4.4 of the Aged Care Act, including the imposition of sanctions on the approved provider.

If either the complainant or the approved provider is dissatisfied with a decision made by the Complaints Scheme, they can apply to an independent statutory office holder, the Aged Care Commissioner, for examination of the decision. They may also seek review through the Commonwealth Ombudsman. Parties to a complaint are advised of these avenues of appeal in correspondence from the Scheme.

As home care is provided by the approved provider in the care recipient's own home, the reallocation of a care recipient's home care place would affect the care recipient's care and services rather than his or her accommodation. If an approved provider were to endanger the safety, health and wellbeing of a care recipient by withdrawing home care services peremptorily, without making an effort to assist the care recipient to make other arrangements, such a breach of the provider's common law duty of care would call into question the provider's suitability to be an approved provider of aged care. Action can be taken under section 10-3 of the Aged Care Act if the Secretary is satisfied that a provider has ceased to be suitable to provide aged care.

The framework in which the security of place operates (paragraph 23.21(e) of the User Rights Principles) balances the rights of care recipients to health and to an adequate standard of living with the rights of others, such as care workers. The avenues of appeal, outlined above, allow for a proportionate consideration and response to a care recipient's failure to meet his or her responsibilities as set out in the Charter.

I trust this information addresses the concerns of the Committee in relation to the amending instrument. Please advise if I can be of further assistance.

Thank you again for writing.

Yours sincerely

MITCH FIFIELD

2/6/14

Appendix 3

Practice Note 1 and
Practice Note 2 (interim)

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

(i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and

(ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether a consistent meaning may be found through the application of statutory interpretation principles.
- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

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

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

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates[1] provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.
- In line with the steps set out in the assessment tool flowchart[2] (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
  1. whether and how the limitation is aimed at achieving a legitimate objective;
  2. whether and how there is a rational connection between the limitation and the objective; and
  3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Practice Note 2 (interim)

Civil Penalties

Introduction

1.1 This interim practice note:

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

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

Civil penalty provisions

1.3 The committee notes that many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court.[1] These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

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

1.6 The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.[4]

The definition of 'criminal' in human rights law

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

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

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

b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.

c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed 'criminal' if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

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

When is a civil penalty provision 'criminal'?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

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

b) The nature of the penalty

1.12 The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

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

c) The severity of the penalty

1.13 In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment.

The consequences of a conclusion that a civil penalty is 'criminal'

1.14 If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalization. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being 'criminal', the criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR.

The committee's expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.[6]

1.18 The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal' and should be addressed in the statement of compatibility where appropriate.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. **In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.**

Right not to incriminate oneself

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

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

1.21 Article 14(7) of the ICCPR provides that no one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. **If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.**

1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.

2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.

3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.

4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a 'criminal' penalty is a more general one and other 'civil' sanctions imposed under legislation may raise this issue as well.

5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.

6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.

7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered 'criminal') is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

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

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

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

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

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

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

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

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

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

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

Article 15

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

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