Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Eighteenth report of the 44th Parliament

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Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 1 to 4 December 2014, legislative instruments received from 31 October 2014 to 22 January 2015, and legislation previously deferred by the committee.

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

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

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

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

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns.

1.7 Bills in this list may include bills that do not engage human rights, bills that contain justifiable (or marginal) limitations on human rights and bills that promote human rights and do not require additional comment.

- Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014;
- Commonwealth Electoral Amendment (Donation Reform) Bill 2014;
- Defence Amendment (Fair Pay for Members of the ADF) Bill 2014;
- Enhancing Online Safety for Children Bill 2014;
- Enhancing Online Safety for Children Bill (Consequential Amendments) 2014;
- Excess Exploration Credit Tax Bill 2014;
- Gambling Harm Reduction (Protecting Problem Gamblers and Other Measures) Bill 2014;

- Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Designated Coastal Waters) Bill 2014;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Miscellaneous Measures) Bill 2014;
- Private Health Insurance Amendment Bill (No. 2) 2014;
- Racial Discrimination Amendment Bill 2014;
- Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014;
- Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014;[1]
- Tax and Superannuation Laws Amendment (2014 Measures No .7) Bill 2014; and
- Tribunals Amalgamation Bill 2014.

Instruments not raising human rights concerns

1.8 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[2] Instruments raising human rights concerns are identified in this chapter.

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

1.10 The committee has also concluded its examination of the previously deferred Criminal Code (Terrorist Organisation-Islamic State) Regulation 2014 [F2014L00979] and makes no comment on the instrument.[3]

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1 The bill was amended by the Senate. The House of Representatives agreed to the amendments made by the Senate and the amended bill passed both houses on 3 December 2014. The committee's assessment that the bill is compatible with human rights is based on an assessment of the bill as enacted.

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

3 See, Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* (2 September 2014) 11.

Deferred bills and instruments

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

- Fair Work Amendment (Bargaining Processes) Bill 2014 (deferred 2 December 2014);
- Migration Amendment (Character and General Visa Cancellation) Bill 2014 (deferred 1 October 2014);
- Omnibus Repeal Day (Spring 2014) Bill 2014 (deferred 14 November 2014);
- Academic Misconduct Rules [F2014L01785];
- Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970] (deferred 2 September 2014);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184] (deferred 24 September 2014);
- Customs (Drug and Alcohol Testing) Amendment Regulation 2014 [F2014L01616];
- Extradition (Vietnam) Regulation 2013 [F2013L01473] (deferred 10 December 2013);
- Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696];
- Migration Amendment (Complementary Protection) Regulation 2014 [F2014L01617];
- Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460];
- Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461];
- Social Security (Administration) (Excluded circumstances – Queensland Commission) Specification 2014 [F2015L00002]; and
- Youth Allowance (Satisfactory Study Progress) Guidelines 2014 [F2014L01265] (deferred 25 November 2014)

Australian Citizenship and Other Legislation Amendment Bill 2014

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

Purpose

1.12 The Australian Citizenship and Other Legislation Amendment Bill 2014 (the bill) seeks to amend the *Australian Citizenship Act 2007* (Citizenship Act) to:

- extend good character requirements;
- modify residency requirements and related matters;
- amend the circumstances in which a person's approval as an Australian citizen may or must be cancelled;
- modify the circumstances in which the minister may defer a person making the pledge of commitment to become an Australian citizen; for example, where the minister is considering cancelling the person's approval as an Australian citizen on the basis that the person would not now be approved as an Australian citizen because of identity, having been assessed as a risk to security or being subject to the bar on approval related to criminal offences;
- adjust the circumstances in which a person's Australian citizenship may be revoked; for example, if the person has been approved as an Australian citizen by descent and the minister is satisfied that the approval should not have been given (except in circumstances where the revocation decision would result in the person becoming stateless);
- provide a discretion to revoke a person's Australian citizenship in circumstances where the minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation, perpetrated by the Australian citizen themselves or by a third party;
- amend the rules for obtaining citizenship by adoption to stipulate that the adoption process must have commenced before the person turned 18;
- limiting automatic acquisition of citizenship at 10 years of age to those persons born in Australia who have maintained lawful residence in Australia throughout the 10 years;
- require, for the purposes of the automatic acquisition of Australian citizenship, that a person is not taken to be ordinarily resident in Australia throughout the period of 10 years beginning on the day the person was born if they were born to a parent who had privileges or immunities under the *Diplomatic Privileges and Immunities Act 1967*, the *Consular Privileges and Immunities Act 1972*, the *International Organisations (Privileges and*

Immunities) Act 1963 and the *Overseas Missions (Privileges and Immunities) Act 1995*;

- amending the provision giving citizenship to a child found abandoned in Australia; and
- enable the minister to specify certain matters in a legislative instrument.

1.13 The bill also seeks to amend the *Migration Act 1958* to enable the use and disclosure of personal information obtained under the Citizenship Act or the citizenship regulations.

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

Power to revoke Australian citizenship due to fraud or misrepresentation – removal of court finding

1.15 Currently under the Citizenship Act the power to revoke citizenship on the grounds of fraud requires a conviction for a relevant offence (for example, the offence of false statements or representations), proven in court to the criminal standard of beyond reasonable doubt.[1]

1.16 The proposed new section 34(AA) would give the minister a discretionary power to revoke a person's Australian citizenship, up to 10 years after citizenship was first granted, where the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation by themselves or a third party. There would be no requirement that the allegations of fraud or misrepresentation in relation to the citizenship application be proven in court or that a person be convicted.[2] The power to revoke citizenship is also available in relation to the citizenship of children.[3]

1.17 The committee notes that very serious consequences flow from loss of Australian citizenship. The enjoyment of many rights is tied to citizenship under Australian law including, for example, the right to fully participate in public affairs. The committee therefore considers that the process by which citizenship may be revoked, and the safeguards that exist in relation to this process, are of great importance to the question of compatibility with human rights. The committee considers that the proposed discretionary power to revoke a person's Australian citizenship engages and may limit the following human rights and human rights standards:

- the obligation to consider the best interests of the child;
- the right of the child to nationality;

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1 See Citizenship Act, section 34.

2 Explanatory memorandum (EM), Attachment A, 2.

3 EM, Attachment A, 3.

- the right of the child to be heard in judicial and administrative proceedings;
- quality of law;
- the right to a fair hearing;
- the right to take part in public affairs; and
- the right to freedom of movement.

1.18 The committee's assessment of the compatibility of the proposed measure for each of these rights is set out below.

Obligation to consider the best interests of the child

1.19 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[4]

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

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

1.21 The committee considers that removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and limits the obligation to consider the best interests of the child. This is because the proposed discretionary power may be exercised regardless of whether or not it is in the child's best interests for such a power to be exercised. As noted above, the enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may negatively impact upon what is in the child's best interests. The statement of compatibility acknowledges that the proposed measure engages the obligation to consider the best interest of the child but argues that the limitation is justifiable.[5]

1.22 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's

4 Article 3(1).

5 EM, Attachment A, 2.

Guidance Note 1,[6] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[7] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.23 The statement of compatibility states that the objective of giving the discretionary power to the minister is to 'strengthen the integrity of the Australian citizenship programme by preventing its abuse through misrepresentation and fraud'.[8] However, the statement of compatibility does not provide supporting reasons or empirical data to demonstrate that this objective addresses a pressing or substantial concern, rather than merely an outcome regarded as desirable or convenient.[9]

1.24 Based on the information and analysis provided, the committee does not consider that the statement of compatibility adequately demonstrates that the proposed measure addresses a legitimate objective. The committee notes that, under the current law, citizenship may be revoked on the grounds of a conviction for a criminal offence involving fraud or misrepresentation in relation to the citizenship application. However, the statement of compatibility does not fully explain why the current law is insufficient for the stated objective of preventing fraud and misrepresentation. The statement of compatibility states that 'there are often limited resources to prosecute all but the most serious fraud cases in light of competing prosecutorial priorities.'[10] However, the committee considers that, in the absence of further information, 'limited resources' and 'prosecutorial priorities' alone are not sufficient justification, in and of themselves, for limiting the obligation to consider the best interest of the child.

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6 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf (accessed 21 January 2015).

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

8 EM, Attachment A, 2.

9 EM, Attachment A, 2-3.

10 EM, Attachment A, 2.

1.25 As currently drafted, the proposed amendments would allow the removal of a person's citizenship (including a child's citizenship) where the person concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves. This would mean that a child's citizenship could be revoked for conduct alleged to have been committed (but not necessarily proven) by a third party in relation to the child's application, including conduct of which the child had no knowledge, or was unable to prevent.[11] This raises the following further specific concerns in relation to whether the proposed power is rationally connected to, and a proportionate way to achieve, its stated objective so as to be justifiable under international human rights law.

1.26 First, the committee considers that there may not be a clear link between the manner in which the proposed discretionary power could operate and the stated objective of that power. The statement of compatibility states that the measure 'has a rational connection to this objective because it prevents applicants from accessing citizenship through fraud or misrepresentation, and provides a disincentive for people to provide fraudulent or misleading information on application.'[12] However, there is no apparent connection between removing a person's citizenship and the occurrence of fraud or misrepresentation of which they had no knowledge or were unable to prevent and which has not been proven. That is, it is unclear how the proposed power would provide a disincentive to a person where they had no knowledge of the fraud or misrepresentation, or where the fraud or misrepresentation had not actually occurred. The committee observes that, as noted above, the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves.[13]

1.27 Secondly, the committee considers that, in the absence of a definition of what constitutes 'fraud' or 'misrepresentation', the minister's power to revoke citizenship on the basis of, for example, minor or technical misrepresentations may not be proportionate to the stated objective of the measure.

1.28 **The committee therefore considers that the proposed discretionary power to revoke Australian citizenship without a court finding limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:**

11 EM, Attachment A, 2.

12 EM, Attachment A, 2.

13 EM, Attachment A, 2.

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The right to nationality

1.29 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the International Covenant on Civil and Political Rights (ICCPR).[14] Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

1.30 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and to not deprive a person of their nationality if such deprivation would render the person stateless.[15]

Compatibility of the measure with the right to nationality

1.31 The committee notes that the proposed power would allow for the removal of a child's Australian citizenship.[16] The committee considers that removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, therefore engages and may limit a child's right to nationality. The statement of compatibility acknowledges the proposed measure engages the right to nationality but argues that any limitation is justifiable.[17]

1.32 The statement of compatibility states that the objective of giving the discretionary power to the minister is to 'strengthen the integrity of the Australian citizenship programme by preventing its abuse through misrepresentation and fraud'.[18] However, as noted above at [1.23] to [1.25], the statement of compatibility has not provided sufficient reasoning or evidence to demonstrate that this stated objective constitutes a pressing or substantial concern as required to permissibly limit a right under international human rights law. Further, the committee considers that the statement of compatibility has not shown that there is a rational connection

14 Article 24(3) of the ICCPR.

15 Articles 1 and 8 of the Convention on the Reduction of Statelessness 1961.

16 See EM, Attachment A, 2.

17 See EM, Attachment A, 2.

18 EM, Attachment A, 2.

between the measure and the stated objective and that the measure is proportionate for the achievement of that objective (see also [1.25] to [1.27] above).

1.33 The committee notes that the minister's power to revoke citizenship could, as the statement of compatibility acknowledges, result in statelessness for some children.[19] The statement of compatibility asserts that it is 'a proportionate and reasonable measure' for a child's citizenship to be revoked even if it would make a child stateless because 'the child will only have obtained citizenship as a result of fraud or misrepresentation'.[20] However, the committee observes that the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves.[21] The committee also notes that children have different capacities and levels of maturity than adults to make judgements. Given this, the committee considers that the measure may not be proportionate to its stated objective.

1.34 The committee notes that Australia has obligations under article 8 of the CRC to preserve the identity of children, including their nationality. Additionally, the committee considers that Australia's obligations under article 8 of the CRC should be read in accordance with Australia's obligations under article 3 of the CRC to consider the best interests of the child and article 8(1) of the Convention on the Reduction of Statelessness, which provides that a state shall not deprive a person of their nationality if such deprivation would render the person stateless.[22] The committee considers rendering a child stateless in circumstances where fraud or serious misrepresentation has not been proven does not appear to be proportionate to the stated objective of the measure.

1.35 **The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding limits the right of the child to nationality. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

19 EM, Attachment A, 2.

20 EM, Attachment A, 2.

21 EM, Attachment A, 2.

22 See, also, Convention on the Reduction of Statelessness 1961 article 1.

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

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

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

1.37 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Compatibility of the measure with the right of the child to be heard

1.38 The statement of compatibility acknowledges that the proposed measure engages the right of the child to be heard but argues that the measure does not limit the right because:

> Prior to reaching a decision on whether to revoke a child's citizenship the Minister would afford the person natural justice, which would require giving the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12.[23]

1.39 The committee acknowledges that this commitment to provide natural justice is an important aspect of the right of the child to be heard. However, the committee considers that natural justice is not equivalent, or a sufficient alternative, to having a court make a determination as to 'fraud' or 'misrepresentation', particularly in light of the serious consequences of a decision to revoke a child's citizenship. The committee therefore considers that the measure may limit the right of the child to be heard.

1.40 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law. This requires a reasoned and evidence-based explanation of how the measure supports a legitimate objective, how the measure is rationally connected to that objective and how the measure is reasonable and proportionate for the achievement of that objective.

1.41 **The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right of the child to be heard. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The**

23 EM, Attachment A, 3.

committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to a fair trial and fair hearing

1.42 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and 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.

1.43 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)).

Compatibility of the measure with the right to fair hearing

1.44 Removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and may limit the right to a fair trial and fair hearing. This is because, as noted at [1.15] above, the proposed amendments remove the requirement that there be a determination of guilt proven in court to the criminal standard of beyond reasonable doubt in relation to a relevant offence (for example, the offence of false statements or representations) before the minister can exercise the power to revoke citizenship. However, the removal of the requirement of a prior conviction could in effect allow for punitive action against an individual based on the minister's determination of 'fraud' or 'misrepresentation' (either by the individual or a third party such as a migration agent). Specifically, there would be no requirement that the allegations of fraud or misrepresentation in relation to the citizenship application be proven in court or that a person be convicted.[24] The statement of compatibility argues the proposed power would not require a conviction as 'there are often limited resources

24 EM, Attachment A, 2.

to prosecute all but the most serious fraud cases in light of competing prosecutorial priorities.'[25]

1.45 The committee notes that this right was not addressed in the statement of compatibility in relation to this measure.

1.46 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

1.47 **The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to a fair trial and fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to take part in public affairs

1.48 Article 25 of the ICCPR protects the right to take part in public affairs. Article 25 provides the right to take part in public affairs and elections, and guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service.

1.49 The right to take part in public affairs applies only to citizens. In order for this right to be meaningful, other rights such as freedom of expression, association and assembly must also be respected, given the importance of free speech and protest in a free and open democracy.

1.50 The right to take part in public affairs is an essential part of a democratic government that is accountable to the people. It applies to all levels of government, including local government.

Compatibility of the measure with the right to take part in public affairs

1.51 As the proposed measure grants power to remove Australian citizenship the measure engages, and has a consequential impact on, the right to take part in public

25 EM, Attachment A, 2.

affairs. The committee is concerned that the measure may limit the right to take part in public affairs by acting as a disincentive (a 'chilling effect') for full participation in public affairs such as standing for public office. Individuals may be concerned that if they draw attention to themselves through participation in public affairs then their citizenship is open to scrutiny and may be liable to be revoked.[26] The committee notes that the right to take part in public affairs was not addressed in the statement of compatibility.

1.52 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

1.53 **The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to take part in public affairs. As noted above, the statement of compatibility does not provide an assessment of whether the right to take part in public affairs is engaged and limited. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to freedom of movement

1.54 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia, either temporarily or permanently.

1.55 The right to enter one's own country includes a right to remain in the country, return to it and enter it.[27] There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable. State parties cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

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26 This may be particularly the case in circumstances where a person is unaware of any misrepresentation and fraud that led to the granting of citizenship, and/or that any misrepresentation was minor or technical.

27 Article 12 of the ICCPR.

1.56 The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.[28]

Compatibility of the measure with the right to freedom of movement

1.57 The committee notes that if a person's citizenship is revoked under the proposed provisions then the person will be granted an ex-citizen visa.[29] The committee considers that this may limit the right to freedom of movement. This is because as noted in the statement of compatibility an ex-citizen visa ceases on a person's departure from Australia.[30] The committee is concerned that when a person who has an ex-citizen visa leaves Australia they may not be able to return, even in circumstances where Australia is their 'own country'. The committee notes that the concept of 'own country' encompasses not only a country where a person has citizenship but also one where a person has strong ties. The committee notes that the right to freedom of movement and the right to return to one's own country was not addressed in the statement of compatibility.

1.58 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

1.59 **The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to freedom of movement. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

28 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007.

29 EM, Attachment A, 3. See also *Migration Act 1958* section 35.

30 EM, Attachment A, 3.

Quality of law

1.60 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, such that people are able to understand when an interference with their rights will be justified.

Compatibility of the measure with the 'quality of law' test

1.61 As noted above, the committee considers that the proposed discretionary power may limit a range of human rights. The proposed power must therefore comply with the 'quality of law' test in order to be a justifiable limitation. However, the committee notes that the terms 'fraud' and 'misrepresentation', the basis on which a person's citizenship may be revoked, are not defined in the proposed legislation.[31] The committee further notes that the proposed measure grants broad discretionary power to the minister. The committee is therefore concerned that the terms of the proposed provision may be overly broad and insufficiently certain for the purpose of the 'quality of law' test.

1.62 **As a measure that may limit human rights, the committee considers that the proposed discretionary power may be insufficiently certain and overly broad to satisfy the 'quality of law' test. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed power to revoke citizenship is compatible with the 'quality of law' test.**

Extending the good character requirement to include applicants for Australian citizenship under 18 years of age

1.63 Currently the good character requirements under the Citizenship Act apply only to applicants aged 18 and over. The concept of 'good character' is undefined in the Citizenship Act but, as a matter of policy, is understood to cover the 'enduring moral qualities of a person' and 'whether they are likely to uphold and obey the laws of Australia, and other commitments they make through the Australian Citizenship Pledge'.[32]

1.64 The bill would extend these 'good character' requirements to applicants for Australian citizenship aged under 18 years of age.

1.65 The committee considers that the proposed extension of the good character requirement to applicants for Australian citizenship under 18 years of age engages and limits the obligation to consider the best interests of the child and the right to

31 See Australian Citizenship and Other Legislation Amendment Bill 2014.

32 Department of Immigration and Border Protection, Good character and offences, http://www.citizenship.gov.au/applying/files/character/ (accessed 19 November 2014).

protection of the family. The committee's assessment of the compatibility of the proposed measure for each of these rights is set out below.

Obligation to consider the best interests of the child

1.66 Under the CRC, Australia is required to ensure that in all actions concerning children, the best interests of the child is a primary consideration; see [1.19] to [1.20] above.[33]

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

1.67 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child,[34] and argues that the measure is consistent with the best interests of the child.[35] However, the committee considers that the extension of the 'good character' test to child applicants would add an additional requirement for Australian citizenship which may not be compatible with the best interests of the child. This is because such a requirement may operate to deny child applicants Australian citizenship. The committee is therefore of the view that the proposed measure may limit the obligation to consider the best interests of the child.

1.68 The committee notes the policy intention that, in practice, the character requirement would be applied only to persons over the age of 16 for whom it is possible to obtain police records; and that the Australian Citizenship Instructions will instruct to decision makers to consider the best interests of the child.[36]

1.69 However, the committee notes that there are no such limitations in the proposed provision. Further, the statement of compatibility advises that, 'if the department becomes aware of an applicant who has character issues and is younger than 16, it would be possible to assess that applicant against the character requirement.'[37] Given this, an assessment of the human rights compatibility of the measure must take into account the possibility that, as currently drafted, children under 16 (including very young children) may be subject to the 'good character' test.

1.70 The statement of compatibility identifies the objective of the measure as 'upholding the value of citizenship and ensuring uniformity and integrity across the citizenship programme.'[38] It argues that the measure is needed for consistency with the 'good character' requirements under the Migration Act. In particular, the

33 Article 3(1) of the CRC.

34 EM, Attachment A, 4.

35 EM, Attachment A, 4.

36 EM, Attachment A, 4.

37 EM, Attachment A, 4.

38 EM, Attachment A, 4.

statement of compatibility asserts that 'it is appropriate that the assessment of the character of applicants for citizenship is at least as thorough as the assessment of character in the migration context.'[39] However, in the absence of any detailed explanation for this assertion, it is not apparent to the committee whether the measure, in seeking such consistency, may be regarded as addressing a pressing or substantial concern for the purposes of international human rights law.

1.71 The statement of compatibility further notes that 'a number of citizenship applicants [have been minors with]…significant criminal histories'.[40] In the absence of any evidence in support of this assertion, it is not apparent to the committee that the measure is needed to achieve its stated objective or to address a substantial and pressing concern.

1.72 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.73 The committee notes the following with respect to the proportionality of the measure in relation to the stated objective.

1.74 First, the committee notes that both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[41] The committee notes that, as children's psychosocial capacity is not fully developed, children may be more likely to respond to impulses, make mistakes, take risks or respond to peer pressure without full regard for the consequences or impact of their actions. This in turn means that children may be at increased risk of contact with the criminal justice system due to their level of development.

1.75 In this context, the committee is concerned that the denial of Australian citizenship to a child on the basis of such conduct is not in accordance with accepted understandings of the capacity and culpability of children under international human rights law. The committee further notes that international human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society. The committee therefore considers that the denial of a child's citizenship on

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39 EM, Attachment A, 4.

40 EM, Attachment A, 3.

41 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) http://www.un.org/documents/ga/res/40/a40r033.htm (accessed 19 November 2014).

the basis of a 'good character' test, and its ongoing (and possibly lifelong) effect, may impose a disproportionately adverse effect on that child's best interests.

1.76 Second, as noted above at [1.60] the statement of compatibility states that the measure is necessary because a 'number' of child applicants had significant criminal histories. However, depending on the number of such applicants (minors with significant criminal histories) and the commensurate risk to society, the committee considers that the measure may not be a proportionate way to achieving its stated objective.

1.77 **The committee considers that the proposed extension of the good character requirement limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective having regard to the different capacities of children.**

Right to protection of the family

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

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

Compatibility of the measure with the right to protection of the family

1.80 The committee is concerned that the provisions may mean that, in circumstances where parents of minors successfully apply for citizenship, the citizenship of those minors may be denied on 'good character' grounds, thereby risking the permanent separation of the family. The committee therefore considers that the measure also engages and limits the right to the protection of the family.

The committee notes that the right to protection of the family was not addressed in the statement of compatibility.

1.81 **The committee considers that the proposed extension of the good character requirement may limit the right to protection of the family. As noted above, the statement of compatibility does not provide an assessment of whether the right to protection of the family is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether and on what basis there is a rational connection between the proposed extension of the good character requirement and that objective; and**
- **whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective.**

Citizenship to a child found abandoned in Australia

1.82 Section 14 of the Citizenship Act currently provides that a person is an Australian citizen if they are found abandoned in Australia as a child unless the contrary is proved.[42]

1.83 Proposed section 12(8) would replace current section 14 of the Citizenship Act to provide that a person found abandoned in Australia as a child is taken to have been born in Australia and to be an Australian citizen by birth, unless it is proved that the person was outside Australia before they were found abandoned or they are not an Australian citizen by birth.[43]

1.84 The committee considers that the measure engages and may limit the obligation to consider the best interest of the child as discussed below.

Obligation to consider the best interests of the child

1.85 Under the CRC, Australia is required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration; see [1.19] to [1.20] above.[44]

42 Citizenship Act, section 14.

43 EM, Attachment A, 12.

44 Article 3(1) of the CRC.

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

1.86 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child.[45] The committee notes that the proposed provision creates additional qualification requirements for Australian citizenship which may not be in the best interests of the child. The committee therefore considers that the measure may limit the obligation.

1.87 The statement of compatibility states that the objective of replacing current section 14 of the Citizenship Act is to 'clarify the meaning of the abandoned child provision.'[46] As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective. 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. However, the statement of compatibility does not provide supporting reasons to demonstrate that this objective addresses a pressing or substantial concern.

1.88 Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. In this regard, it is unclear whether there is a rational connection between the stated objective of the measure and the terms of the measure itself. This is because, while the stated objective of the measure is to 'clarify' a provision (with the implication that there is no substantive change to the provision), the proposed measure in fact introduces a new factor that can disqualify an abandoned child from being an Australian citizen, which is that the child was 'outside Australia at any time before the [they were] found abandoned in Australia as a child'.

1.89 **The committee considers that introduction of a new factor that can disqualify an abandoned child from being an Australian citizen may be a limitation on the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether the proposed amendments to citizenship for an abandoned child are aimed at achieving a legitimate objective; and**

45 EM, Attachment A, 12.

46 EM, Attachment A, 12.

- **whether and on what basis the proposed amendments to citizenship for an abandoned child are rationally connected to achieving a legitimate objective; and**
- **whether the proposed amendments to citizenship for an abandoned child are a reasonable and proportionate measure for the achievement of that objective.**

Limiting automatic citizenship at 10 years of age

1.90 Currently section 12 of the Citizenship Act provides that a child born in Australia will automatically be an Australian citizen if either their parent is a citizen or permanent resident when they were born or the child is 'ordinarily resident' in Australia for their first 10 years of life.[47] There is a limited exception in cases where the child's parent is an enemy alien.

1.91 The bill would amend section 12 to deny automatic citizenship for a child born in Australia in any of the following circumstances arising at any time during the child's first 10 years of life:

- one or both of the child's parents were foreign diplomats;
- the child did not hold a valid visa (that is, they were present in Australia as an unlawful non-citizen);
- the child travelled outside Australia and did not hold a visa permitting them to travel to, enter and remain in Australia (this will not apply to New Zealand citizens); or
- one or both of the child's parents came to Australia before the child was born, did not hold a substantive visa at the time of the child's birth and was an unlawful non-citizen at any time prior to the child's birth (a bridging visa, criminal justice visa or enforcement visa will not be considered to be a substantive visa).[48]

1.92 As the measure amends the circumstances in which Australian citizenship may be granted to children, ordinarily resident in Australia for the first 10 years of their life, the committee considers that it engages the obligation to consider the best interests of the child.

47 The current definition of 'ordinarily resident' is if the child has their home in Australia or it is their permanent abode even if he or she is temporarily absent from Australia. In effect, this means that a child born and raised in Australia automatically becomes an Australian citizen on their tenth birthday, regardless of whether they or their parents hold a valid visa.

48 See item 12 of the bill.

Obligation to consider the best interests of the child

1.93 Under the CRC, Australia is required to ensure that in all actions concerning children the best interests of the child is a primary consideration; see [1.19] – [1.20] above.[49]

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

1.94 The statement of compatibility states that the measure engages the obligation to consider the best interests of the child.[50] However, while article 3 of the CRC requires the child's best interest to be considered as a primary consideration, the assessment of the measure does not explicitly state that it limits the consideration of the best interests of the child as a primary consideration.[51] The statement of compatibility states only that in introducing the provision the department is taking into account the best interests of the child.[52]

1.95 However, the committee notes that it is difficult to envisage circumstances in which it would be in a child's best interest to be refused Australian citizenship, where the child was born in Australia and had spent their first 10 years in the country. Accordingly, any limitation on this right would need to be very clearly and well justified to be regarded as permissible for the purposes of international human rights law.

1.96 **The committee considers that the proposed amendment to the 10-year rule for citizenship limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

49 Article 3(1) of the CRC.

50 EM, Attachment A, 12.

51 EM, Attachment A, 11.

52 EM, Attachment A, 10.

Personal ministerial decisions not subject to merits review

1.97 Currently, a decision refusing to grant or approve citizenship, or revoke citizenship, under the Citizenship Act is subject to full merits review by the Administrative Appeals Tribunal (AAT). The AAT provides an independent review process, considering afresh the facts, law and policy relating to certain administrative decisions.

1.98 The bill proposes removing the power of the AAT to review a decision made by the minister personally under the Citizenship Act, if the minister has stated that the decision was made in the public interest.[53] No definition of what might constitute the public interest is included in the bill.[54]

1.99 The committee considers that the removal of merits review by the AAT may engage the right to a fair hearing as discussed below.

Right to a fair hearing

1.100 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals; see [1.42] – [1.43] above.

Compatibility of the measure with the right to a fair hearing

1.101 The committee notes that, as described above, the right to a fair hearing applies in both criminal and civil proceedings, including where rights and obligations are to be determined. The bill would preserve judicial review under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. However, judicial review cannot examine the merits of the decision, and is limited to cases where there is an identifiable error of law. The committee therefore considers that judicial review is not equivalent or a complete substitute for access to merits review by the AAT, and so does not fully mitigate the possible limitation on the right to a fair hearing.

1.102 The committee notes that administrative review may provide an important check on ministerial or government decisions with the potential to limit the rights of an individual.

1.103 Accordingly, the committee considers that the removal of merits review by the AAT may limit the right to a fair hearing. However, this issue was not identified in the statement of compatibility.

1.104 **The committee considers that the measure may limit the right to a fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The**

53 See item 72, proposed new subsection 52(4).

54 See item 69, proposed new subsection 47(3)(3A).

committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

Ministerial power to set aside decisions of the AAT if in the public interest

1.105 Currently under the Citizenship Act, a decision refusing or cancelling approval for a person to become an Australian citizen, because the person was not of good character or because of doubts as to the person's identity, is subject to review by the AAT. The AAT is empowered to make a decision setting aside that refusal or cancellation.

1.106 The bill proposes empowering the minister to set aside such a decision made by the AAT if the minister's delegate had originally decided that an applicant for citizenship was not of good character, or was not satisfied as to the person's identity, and the minister is satisfied it is in the public interest to set aside the AAT's decision.

1.107 The committee considers that the proposed power to set aside a decision of the AAT engages the right to a fair hearing.

Right to a fair hearing

1.108 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals; see [1.42] – [1.43] above.

Compatibility of the measure with the right to a fair hearing

1.109 The statement of compatibility notes that the measure engages the right to a fair hearing. However, the statement of compatibility concludes that the measure does not limit the right to a fair hearing as affected applicants will still be entitled to seek judicial review.[55] As set out at [1.101], the committee does not consider that judicial review is equivalent to, or an effective substitute for, merits review.

1.110 As the measure allows the minister to substitute and therefore effectively overrule the decision of the AAT, the committee considers that the measure may limit the right to a fair hearing by effectively removing a person's right to a hearing before an independent and impartial tribunal.

55 EM, Attachment A, 15.

1.111 Accordingly, the committee considers that the potential limitation on the right to a fair hearing by the measure needs to be justified for the purposes of international human rights law.

1.112 **The committee considers that the proposed power to set aside AAT decisions may limit the right to a fair hearing. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Extension of bars to citizenship where a person is subject to a court order

1.113 Currently, section 24(6) of the Citizenship Act requires that a person not be approved for citizenship by conferral when a prescribed period of time has not passed since they were in prison for certain offences, or the person is subject to proceedings in relation to certain offences.

1.114 The proposed amendments would extend this bar on approval for citizenship to cases where a person is subject to home detention or a court order in connection with proceedings for a criminal offence, or that requires the person to participate in a residential scheme (including a residential drug rehabilitation scheme or a residential program for those experiencing mental illness).[56] As a result, the committee considers that the measure engages the rights to equality and non-discrimination on the grounds of mental illness or disability.

Rights to equality and non-discrimination

1.115 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the ICCPR.

1.116 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.

56 Proposed section 24(6); EM, Attachment A, 5.

1.117 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, on the basis of race, sex or disability),[57] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[58] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[59]

1.118 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.

1.119 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.

1.120 Article 12 of the CRPD requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Compatibility of the measure with the rights to equality and non-discrimination

1.121 The statement of compatibility identifies that the right to equality and non-discrimination is engaged by the measure and notes that, 'on its face, [it]… discriminate against persons with a mental illness'. This is because the proposed bar on approval for citizenship 'extends to people who have a mental illness and who have been subject to an order of the court requiring them to participate in a residential program for the mentally ill'.[60] The committee agrees that the measure engages and limits the right to equality and non-discrimination.

1.122 The statement of compatibility states that the measure pursues the legitimate objective of 'ensuring that citizenship is only available to those people who are not subject to an obligation to the court,'[61] and argues that this is important as '[b]eing of good character is a fundamental tenet of the citizenship programme'.[62]

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57 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.

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

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

60 EM, Attachment A, 6.

61 EM, Attachment A, 6.

62 EM, Attachment A, 6.

1.123 However, based on the information and analysis provided, the committee does not consider that the statement of compatibility adequately demonstrates that the proposed measure addresses a legitimate objective. As noted at [1.23] above, to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are needed for a legitimate objective. 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.

1.124 The statement of compatibility further argues that the amendments are proportionate to the stated aim because:

> …they reflect the criminal law, which imposes consequences for committing a criminal offence on all persons, including those with a mental illness. The amendments therefore do not impose an arbitrary or unreasonable limitation on the rights of persons with a mental illness to enjoy non-discriminatory treatment under the law.[63]

1.125 However, the committee considers that there is no clear relationship between this explanation of the measure and the terms of the measure itself. This is because, while the explanation of the measure refers to 'consequences for committing a criminal offence',[64] the measure is considerably broader and would affect people who have not committed a criminal offence but are merely involved in 'proceedings for an offence'. This would include people who have not been convicted and who are on bail or on remand, or who have been determined to be unfit to plead or have been found not guilty of an offence by reason of mental illness. The effect of the measures as currently drafted would bar a person who is subject to a court order from citizenship whether or not they had been convicted of a crime. The committee therefore considers that the measure may not be proportionate to its objective.

1.126 **The committee considers that the extension of bars to citizenship limits rights to equality and non-discrimination. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed extension of bars to citizenship where a person is subject to a court order is compatible with the right to equality and non-discrimination, and particularly:**

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

63 EM, Attachment A, 6.

64 EM, Attachment A, 6.

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

Tabling statement

1.127 The bill proposes inserting a new section into the Citizenship Act to require the minister to cause a statement to be tabled in each House of Parliament when the minister makes a decision that is not reviewable by the AAT, or decides to set aside a decision of the AAT.[65] The committee considers that this measure may engage the right to privacy.

Right to privacy

1.128 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. However, this right may be subject to permissible limitations.

Compatibility of the measure with the right to privacy

1.129 The proposed provision provides that the tabling statement must not include the name of the person affected by the decision. However, the committee considers that there may be instances in which a person's identity could be inferred from the information in the tabling statement.

1.130 In particular, the committee notes that the tabling statement will set out the minister's decision and give the reasons for the minister's decision. The reasons will set out a person's personal circumstances or the minister's opinion of a person's character.

1.131 However, the statement of compatibility does not identify the right to privacy as being engaged, and so does not provide an assessment of the compatibility of the measure with the right to privacy.

1.132 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

1.133 **The committee considers that the measure limits the right to privacy. As noted above, the statement of compatibility does not provide an assessment of whether the right to privacy is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the tabling statement in Parliament could lead to an individual being identified either directly or indirectly and how this is compatible with the right to privacy, and particularly:**

65 See item 73 of the bill, proposed new section 52B.

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

Biosecurity Bill 2014

Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014

Quarantine Charges (Imposition—General) Amendment Bill 2014

Quarantine Charges (Imposition—Customs) Amendment Bill 2014

Quarantine Charges (Imposition—Excise) Amendment Bill 2014

Portfolio: Agriculture
Introduced: House of Representatives, 27 November 2014

Purpose

1.134 The Biosecurity Bill 2014 (the bill), Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014, Quarantine Charges (Imposition—General) Amendment Bill 2014, Quarantine Charges (Imposition—Customs) Amendment Bill 2014, and the Quarantine Charges (Imposition—Excise) Amendment Bill 2014 form a package of five bills which seek to provide for a new regulatory framework to replace the *Quarantine Act 1908* (together, the bills).

1.135 The bill would provide a regulatory framework for managing the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health; the environment; and the economy. The bill would also provide a regulatory framework to manage biosecurity risks—including the risk of listed human diseases—entering Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory. The bill would also give effect to Australia's international obligations, including under the World Health Organization International Health Regulations 2005 (International Health Regulations), the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures 1994 (SPS Agreement) and the Convention on Biological Diversity 1992 (Biodiversity Convention).

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

Background

1.137 The bill is substantially similar to the Biosecurity Bill 2012, which the committee considered in its *First Report of 2013*.[1]

1 Parliamentary Joint Committee on Human Rights, *First Report of 2013* (February 2013) 14.

1.138 The committee considers that the bills are compatible with human rights. The committee's general approach is to only provide substantive analysis on bills that raise human rights concerns. However, in light of the significant regulatory changes proposed by the bills, and the committee's previous comments on these bills, the committee provides the following brief analysis.

Introduction of a new regulatory framework to replace the *Quarantine Act 1908*

1.139 The committee considers that the bill, in seeking to manage a number of risks to human, animal and plant health, engages and limits a number of human rights.

Multiple rights

1.140 As set out in the statement of compatibility, the bill engages multiple rights including:

- Right to life;[2]
- Right to freedom from torture and cruel, inhuman or degrading treatment;[3]
- Right to liberty and freedom from arbitrary detention;[4]
- Right to freedom of movement;[5]
- Right to a fair trial and fair hearing rights;[6]
- Right to privacy;[7]
- Right to freedom of association;[8]
- Rights of the child;[9]
- Right to an adequate standard of living;[10]
- Right to health;[11]
- Right to enjoy and benefit from culture;[12] and

2 Article 6(1), International Covenant on Civil and Political Rights (ICCPR).

3 Article 7, ICCPR.

4 Article 10, ICCPR.

5 Article 12, ICCPR.

6 Article 14, ICCPR.

7 Article 17, ICCPR.

8 Article 22, ICCPR.

9 Article 24(1), ICCPR and Article 3, Convention on the Rights of the Child.

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

11 Article 12, ICESCR.

- Rights of persons with disabilities.[13]

Compatibility with multiple rights

1.141 The committee considers that the bills limit a number of human rights as set out above. For example, the human health provisions of the bill, such as those relating to isolation and treatment, limit the right to freedom of movement and the right to privacy.

1.142 The committee considers that the bills have been drafted in a manner which is consistent with Australia's human rights obligations and that limitations on rights have been well considered with appropriate safeguards. The committee notes that the statement of compatibility provides a comprehensive justification for provisions that limit human rights consistent with the committee's Guidance Note 1.

1.143 The committee notes that it previously raised concerns with a number of provisions in the 2012 version of the bill, primarily in relation to reverse burden offence provisions, strict liability offence provisions, and civil penalty provisions. The committee considers that these provisions have been appropriately and sufficiently justified in the statement of compatibility for the bill.

1.144 **The committee considers that, while the bills limit multiple rights, the limitation on rights imposed by the bills are justified and compatible with Australia's human rights obligations.**

12 Article 15, ICESCR.

13 Articles 3 and 5, Convention on the Rights of Persons with Disabilities.

Family Tax Benefit (Tighter Income Test) Bill 2014

Sponsor: Senator David Leyonhjelm
Introduced: 27 November 2014

Purpose

1.145 The Family Tax Benefit (Tighter Income Test) Bill 2014 (the bill) proposes to amend the *A New Tax System (Family Assistance) Act 1999* to reduce the amount payable to families under Family Tax Benefit A (FTB A) from 1 July 2015.

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

Background

1.147 The bill was introduced into the Senate on 27 November 2014 and negatived at the second reading stage on 4 December 2014. In light of the fact that the bill is not proceeding, the committee provides a brief analysis and advice-only comment.

Reduction in Family Tax Benefit A payments to families

1.148 The bill would reduce eligibility for FTB A payments for certain families based on their income, and reduce the amount of FTB A payments to certain families based on their income. The explanatory memorandum explains that, if the bill were passed, 247 600 families would have their FTB A payments reduced, including 89 700 families who would no longer be eligible for any FTB A payment. Amongst those affected by the change would be 5530 families who have incomes between $50 000 and $65 000 and are in receipt of child maintenance payments.

1.149 The committee considers that FTB A is a form of social security and therefore the measure engages the right to social security. The committee is concerned that the measure may limit the right to social security by reducing access to social security, particularly for a number of families receiving less than the median household income. It may be, however, that if the right is limited the limitation can be justified.

Right to social security

1.150 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Access to social security is required when a person has no other income or 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).

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

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

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

Compatibility of the bill with the right to social security

1.153 The statement of compatibility acknowledges that the bill may engage the right to social security, but concludes:

> …there would be no incompatibility [of the bill] with properly-defined human rights. Human rights should not include a right to social security and assistance. That would imply a right to other people's money.[1]

1.154 The committee notes that Australia has voluntarily accepted obligations under the seven core UN human rights treaties and that the committee's role is to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations. One such obligation is the right to social security under article 9 of the ICESCR.

1.155 The committee notes that the bill would limit access to FTB A for certain families and reduce the amount of FTB A which certain families would be entitled to under current law. Accordingly, the bill would limit the right to social security.

1.156 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

1.157 The committee notes that the committee's Guidance Note 1 provides guidance to legislation proponents on when human rights may be limited, and how

1 Explanatory memorandum 5.

any such limitation may be justified in accordance with international human rights law.

1.158 **The committee therefore considers that the proposed amendments to the FTB A limit the right to social security. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. Noting that the bill is not proceeding, the committee draws the attention of the legislation proponent to the requirements for the preparation of statements of compatibility, as set out in the committee's Guidance Note No. 1.**

Federal Courts Legislation Amendment Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 27 November 2014

Purpose

1.159 The Federal Courts Legislation Amendment Bill 2014 (the bill) seeks to amend the *Federal Court of Australia Act 1976* and the *Federal Circuit Court of Australia Act 1999* to:

- provide an arrester with the power to use reasonable force to enter premises in order to execute an arrest warrant;
- confer jurisdiction on the Federal Circuit Court of Australia (FCCA) in relation to certain tenancy disputes;
- enable additional jurisdiction in relation to tenancy disputes to which the Commonwealth is a party to be conferred on the Federal Circuit Court of Australia by delegated legislation; and
- allow for delegated legislation to be made to modify the applicable state and territory law where appropriate, and to clarify the jurisdiction and the enforcement of an exercise of that jurisdiction.

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

Conferral of jurisdiction on the Federal Circuit Court for tenancy disputes

1.161 As outlined above, the bill would confer jurisdiction on the FCCA in relation to certain tenancy disputes where the Commonwealth is a lessor or lessee. The bill would also enable additional jurisdiction in relation to tenancy disputes to be conferred on the FCCA—for example, where the Commonwealth is a sublessor or sublessee.

1.162 The bill would also enable delegated legislation to modify the applicable state and territory law to confirm the jurisdiction of the FCCA.

1.163 As the bill alters the forum through which tenancy disputes involving the Commonwealth may be resolved, the committee considers that the bill engages the right to a fair hearing.

Fair hearing rights

1.164 The right to a fair hearing are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). 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.

Compatibility of the measure with fair hearing rights

1.165 The statement of compatibility explains that the bill engages fair hearing rights and in relation to this measure concludes:

> This amendment promotes the right to a fair hearing. Currently, in most jurisdictions, the applicable law provides for resolution of tenancy disputes in a state or territory tribunal, which can lead to inconsistency of approach. While superior courts may also be able to hear these matters, it is not considered an appropriate use of these courts' resources. Moreover, these courts are more costly than the Federal Circuit Court, meaning there is currently no suitable or affordable forum to hear these disputes. The conferral of jurisdiction on the Federal Circuit Court will provide a cost effective and efficient forum to resolve Commonwealth tenancy disputes, promoting the right to a fair hearing.[1]

1.166 The committee considers that, while consistency across Australia in the resolution of tenancy disputes may benefit the Commonwealth, the bill may not protect fair hearing rights for those engaged in tenancy disputes with the Commonwealth.

1.167 For example, the committee notes that residential tenancy disputes involving the Commonwealth are currently dealt with under state and territory law, which contains various procedural and substantive protections for tenants. Those safeguards include low cost dispute resolution and various protections against unlawful or unjust eviction. The bill, on the other hand, offers no such safeguards and leaves unspecified the rights of the parties, the law to be applied, and the powers of the FCCA.

1.168 The committee notes that removing the jurisdiction of state and territory tribunals and granting it to the FCCA may increase costs and reduce access to dispute resolution. Accordingly, the committee considers that this measure may limit the right to a fair hearing.

1.169 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

1.170 **The committee considers that the proposed conferral of jurisdiction on the Federal Circuit Court of Australia in relation to certain tenancy disputes where the Commonwealth is a lessor or lessee may engage fair hearing rights. The committee**

1 Explanatory memorandum 5.

therefore seeks the advice of the Attorney-General as to whether the conferral of jurisdiction on the Federal Circuit Court of Australia for tenancy disputes is compatible with fair hearing rights, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is a reasonable and proportionate way to achieve its stated objective.**

Freedom of Information Amendment (New Arrangements) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 2 October 2014

Purpose

1.171 The Freedom of Information Amendment (New Arrangements) Bill 2014 (the bill) repeals the *Australian Information Commissioner Act 2010* and amends the *Freedom of Information Act 1982* (the FOI Act), the *Privacy Act 1988* (Privacy Act) and the *Ombudsman Act 1976* (the Ombudsman Act) and other Acts.

1.172 The bill would abolish the Office of the Australian Information Commissioner (OAIC) and amend the FOI Act and Ombudsman Act to provide for:

- the removal of specific external review of FOI decisions by the OAIC, providing instead for the Administrative Appeals Tribunal (the AAT) to have sole jurisdiction for external merits review of FOI decisions;
- compulsory internal review of FOI decisions (where available) before a matter can proceed to the AAT;
- the Attorney-General to take over responsibility from the OIAC for FOI guidelines, collection of FOI statistics and the annual report on the operation of the FOI Act; and
- the Ombudsman to have sole responsibility for the investigation of FOI complaints.[1]

1.173 The bill would amend the *Australian Human Rights Commission Act 1986* and the Privacy Act to provide for there to be an Australian Privacy Commissioner, who would be an independent statutory office holder within the Australian Human Rights Commission. The Australian Privacy Commissioner would be responsible for the exercise of privacy functions under the Privacy Act and related legislation.

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

Removal of review by the OAIC

1.175 As set out above, the bill would abolish the OAIC leaving the AAT as the sole forum for external review of FOI decisions.

1.176 The committee notes that, currently, review of FOI decisions by the OAIC may commence before an internal review process has been completed. If an applicant does not agree with the OAIC's review, they may then seek review of the decision with the AAT.

1 Revised Explanatory Memorandum (REM) 2.

1.177 In addition, individuals who are denied a FOI request may seek external review from the OAIC. The OAIC does not charge any fee to conduct its reviews. In contrast, there are generally fees payable for access to AAT review.

1.178 The committee therefore considers that the abolition of the OAIC may engage the right to an effective remedy as individuals would only be able to have a FOI decision reviewed if they can afford the AAT fees.

Right to an effective remedy

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

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

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

Compatibility of the measure with the right to an effective remedy

1.182 The statement of compatibility identifies the right to an effective remedy as being engaged by the measure. In concluding that the measure is compatible with the right to an effective remedy, the statement of compatibility states:

> The remedies available in privacy matters will be substantially the same…
>
> The availability of internal review, external merits review by the AAT, further appeals to the courts on a question of law, access to judicial review and a right to complain to the Ombudsman ensure that there is comprehensive access to an effective remedy for FOI matters.[2]

1.183 However, the committee notes that currently individuals may access both the OAIC and the AAT for merits review of FOI decisions. That is, individuals are able to access two forums of merits review before needing to access the courts. The bill would therefore reduce access to review by removing one forum of review.

1.184 Further, the committee notes that there is generally an $861 fee to access AAT review (which can be reduced to $100 in certain circumstances). By abolishing

2 REM 4.

the OAIC and leaving the AAT as the sole avenue for external merits review of FOI decisions, the bill would remove access to free external merits review of most FOI decisions.

1.185 In light of these considerations, the committee considers that the bill may limit the right to an effective remedy. This is because the current arrangements for FOI requests facilitates individuals determining whether there has been a breach of human rights.

1.186 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.187 **The committee considers that the proposed removal of specific external review of FOI decisions by the OAIC may limit the right to an effective remedy. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Attorney-General as to whether the removal of access to free external merits review of FOI decisions is compatible with the right to an effective remedy, and particularly:**

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

Higher Education and Research Reform Amendment Bill 2014

Portfolio: Education
Introduced: House of Representatives, 4 September 2014

Higher Education and Research Reform Bill 2014

Portfolio: Education
Introduced: House of Representatives, 3 December 2014

Purpose

1.188 The Higher Education and Research Reform Amendment Bill 2014 (the original bill) sought to amend the *Higher Education Support Act 2003* (HESA). The original bill was rejected by the Senate on 2 December 2014.

1.189 Schedule 1 of the original bill would:

- remove the cap on the number of Commonwealth funded places in sub-bachelor degree courses, such as diplomas, advanced diplomas and associate degrees;
- introduce Government subsidies to bachelor and sub-bachelor courses at private universities and non-university higher education providers;
- reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent;
- remove the current maximum student contribution amounts;
- provide for the merging of the FEE-HELP and HECS-HELP loan schemes for all higher education students;
- remove the up-front payment discount for HECS-HELP loans and the voluntary repayment bonus for HELP loans; and
- remove the FEE-HELP lifetime limit and loan fee.

1.190 Schedule 2 of the original bill would require higher education providers with 500 or more equivalent full-time Commonwealth supported students to direct up to 20 per cent of additional revenue received from the deregulation of student contributions to a new Commonwealth Scholarship Scheme.

1.191 Schedule 3 of the original bill would change the indexation rate of HELP debts from the current Consumer Price Index (CPI) to the Treasury 10-year bond rate, up to a maximum of six per cent per annum.

1.192 Schedule 4 of the original bill would reduce the minimum repayment income threshold for HELP debts to $50 638 in 2016-17 and introduce a new repayment rate of two per cent.

1.193 Schedule 5 of the original bill would:

- allow universities to charge Research Training Scheme students a capped tuition fee which will be deferrable through HELP; and

- amend the *Australian Research Council Act 2001* to allow additional investment in research through the Future Fellowships scheme, apply indexation and add an additional forward estimate amount.

1.194 Schedule 6 of the original bill would remove the current lifetime limits on VET FEE-HELP loans and the VET FEE-HELP loan fee.

1.195 Schedule 7 of the original bill would discontinue the HECS-HELP benefit from 2015.

1.196 Schedule 8 of the original bill would replace the current Higher Education Grants Index (HEGI) with the CPI from 1 January 2016.

1.197 Schedule 9 of the original bill would change the name of the University of Ballarat to Federation University Australia.

1.198 Schedule 10 of the original bill would allow New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2015.

1.199 The Higher Education and Research Reform Bill 2014 (the new bill) was introduced into the House of Representatives on 3 December 2014. The new bill is substantially similar to the original bill, but with the following changes:

- amendments to legislative guidelines to clarify that overseas and other non-Commonwealth supported students should not be charged less than the level of tuition fees and subsidies available for Commonwealth supported students;
- maintenance of the CPI as the HELP indexation rate, and provisions for HELP indexation relief for primary carers of children up to five years of age; and
- amendment of the Other Grants Guidelines (Education) 2012 to restructure the Higher Education Participation Programme requirements and introduce three programs targeted to increasing access and participation in higher education by students from disadvantaged backgrounds.

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

Background

1.201 The committee reported on the original bill in its *Twelfth Report of the 44th Parliament*.[1] The original bill was rejected by the Senate on 2 December 2014 and the new bill was introduced into the House of Representatives the next day.

1.202 Due to the similarity of the bills, the committee has decided to report on both bills together.

1 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13.

Committee view on compatibility

1.203 The committee notes that the response states that many of the measures do not limit rights. However, many of the measures in the bill clearly do limit rights.

1.204 The minister's response could instead have acknowledged when a measure limits a human right, directly or indirectly, and then set out the minister's justification of that limitation in accordance with international human rights law. The committee draws the minister's attention to the committee's Guidance Note 1 on how and when limitations of rights may be justified. In its analysis of the measures and the minister's response, when the committee is of the view that a measure limits a right, the committee has reached its views on compatibility having regard to the justifiability of that limitation.

Right to education

Adequacy of statement of compatibility

1.205 The statement of compatibility provides a brief description of a number of measures said to engage the right to education. However, the committee considered that the general descriptions of the effect of the measures were insufficient for the committee to conduct assessments of the human rights compatibility of the legislation.

1.206 The committee sought the advice of the Minister for Education on whether each of the measures in schedules 1, 2, 3, 4, 5, 6, 7 and 8 of the original bill are compatible with Australia's international human rights obligations and for each individual measure:

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

Right to equality and non-discrimination

Disproportionate impact of measures on women

1.207 The committee noted that the measures in schedules 1, 3 and 4 of the original bill, while neutral on their face, may have a disproportionate impact on women. According to the Australian Bureau of Statistics (ABS), women are more likely to be out of the workforce caring for children; and women with children are more likely to be in part-time work than men with children. Accordingly, women are more likely to take longer to pay off their HELP debts and, consequently, to pay more for their education than men.

1.208 The committee requested the advice of the Minister for Education as to whether the measures in schedules 1, 3 and 4 are compatible with the rights to equality and non-discrimination on the grounds of gender.

Minister's response on Schedule 1—expansion of the demand driven system to include sub-bachelor courses

Schedule 1 includes the following measures:

- the removal of the cap on the number of Commonwealth funded places in sub-bachelor degree courses, such as diplomas, advanced diplomas and associate degrees
- the introduction of Government subsidies to bachelor and sub-bachelor courses at private universities and non-university higher education providers the reduction of subsidies for new Commonwealth supported students at universities by an average of 20 per cent
- the removal of the current maximum student contribution amounts
- the merging of the FEE-HELP and HECS-HELP loan schemes for all higher education students
- the removal of the up-front payment discount for HECS-HELP loans and the voluntary repayment bonus for HELP loans
- the removal of the FEE-HELP lifetime limit and loan fee.

The impact of these measures on the right to education, and the right to equality and non-discrimination, are analysed separately below. The reforms will affect the full range of sub-groups with the student population, including women who make up the majority of the students. In 2013, there were almost a million domestic higher education students, with women comprising around 56 per cent of all students enrolled, as well as of all students commencing in that year. As such, the reforms to higher education clearly have important implications for women, as they do for men, both in terms of their impact on fees and subsidies, and on access and quality.

Does this schedule limit human rights?

Expansion of the demand driven system to include sub-bachelor courses

Right to education

The Government believes that this measure provides for more opportunity and choice in the higher education system, supporting the right to education for around 48 000 additional students each year by 2018. This measure removes the discriminatory treatment of students who wish to enrol in sub-bachelor courses, including those at private and non-university higher education providers. These sub-bachelor courses provide vocational qualifications as well as effective pathways to further education for disadvantaged students. Expanding Government subsidies to these places will mean that they are more affordable for students, which will in turn increase access to higher education.

Right to equality and non-discrimination

This measure is fully compatible with the right to equality and non-discrimination. The extension of subsidies to include sub-bachelor courses will provide more opportunities for all people to access higher education suitable to their needs and capabilities. In particular, people who take time out of the workforce will have

access to more Government support for retraining or updating their qualifications as a result of the extension of subsidies to sub-bachelor courses.

Proportionality to policy objectives

The investment in this measure is proportionate to the need to improve access to sub-bachelor courses at higher education providers, to provide opportunities for vocational training and pathways to higher education, particularly for disadvantaged students.

Committee response

1.209 **The committee thanks the minister for his response on this aspect of the measure. The committee considers that the expansion of the demand driven system to include sub-bachelor course does not limit the right to education and the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 1—extension of subsidies to private and non-university higher education providers

Right to education

The Government believes that this measure is fully compatible with the right to education, providing for an expansion in access to include students undertaking courses at private universities and at non-university higher education providers. The extension of subsidies will create greater competition in the higher education market, expanding the choices and opportunities for students, and creating a downward pressure on course costs.

Private providers have indicated that, as a result of the subsidy, they will be able to decrease their course costs. This will increase the choices available to students and will remove a significant financial barrier to higher education facing many students. As a result of this measure, the Government expects that by 2018 around 35 000 additional students each year will gain access to Government subsidies for their education.

Right to equality and non-discrimination

This measure will not infringe on the right to equality and non-discrimination. It will remove the discriminatory treatment against students attending private and non-university providers. Currently, students who wish to undertake their undergraduate study at these providers are not eligible to receive any Government subsidy for their education and must pay a loan fee. Private universities and non-university higher education providers may be able to deliver courses more suited to a student's needs and, under this measure, will be eligible to receive Government support, removing this element of discrimination against students attending private and non-university providers. This measure will enable students to have equal access to Government subsidies for higher education, regardless of their choice of provider.

Additionally, more women than men are enrolled in courses at private providers. This means that women are more likely to benefit from the extension of the demand driven system to include private providers. As private providers have indicated they will be able to lower course costs, women will benefit from the reduced financial burden of undertaking study at the provider of their choice, and

will be able to access Government subsidies.

Proportionality to policy objectives

The investment in this measure is proportionate to the need to improve access to higher education, and reduce costs for students wishing to study at private and non-university providers. As well as improving access, this measure will drive greater competition and quality across the sector.

To manage the costs, non-university providers will be funded at a lower rate (70 per cent) which recognises the unique, and often legislated, demands on universities, including those relating to research and community outreach, while still providing a level of funding that will encourage competition.

Committee response

1.210 **The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education and non-discrimination and has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 1—reduction of subsidies for new Commonwealth supported students at universities

Right to education

This measure will reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent. Commonwealth Grant Scheme funding tiers will also be simplified and restructured from eight to five funding tiers, providing a more coherent basis for funding different units of study with regard to teaching methods and the infrastructure required to support delivery.

This measure will not of itself increase course costs for students. Private providers receiving Government subsidies for the first time will have the ability to reduce course costs, which will provide benefits for those who choose to enrol at these providers.

There will be no negative impact on the right to education. This right will continue to be assured by the HELP scheme which will ensure that all higher education students at registered providers will be able to defer the full cost of their study. There will not be any requirement to repay any HELP debt until a person's income reaches the minimum repayment threshold of more than $50 000 per year, and any repayments will continue to be within moderate and reasonable limits, based on income.

Right to equality and non-discrimination

This measure will not limit the right to equality and non-discrimination. The reduction of subsidies applies to all new Commonwealth supported students equally, regardless of their course. There is no reason to expect any disproportionate impact on women. In fact the new cluster rates are specifically designed to moderate the impact on important disciplines such as teaching and nursing, in which women are more represented.

Proportionality to policy objectives

This measure will save $1.95 billion over four years. Given it can be achieved without compromising access, it is proportionate to the objective of contributing to

> the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system.

Committee response

Right to education

1.211 **The committee thanks the minister for his response**

1.212 However, the committee notes that article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to recognise that, with a view to achieving the full realisation of the right to education:

> Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

1.213 The committee considers that the proposed 20 per cent reduction in the subsidy for Commonwealth-supported students at university may be considered a retrogressive measure for human rights purposes. It will reduce the current level of government support for higher education students and in this respect represents a limitation on the progressive introduction of free education.

1.214 The committee notes that a retrogressive measure may nevertheless be permissible for the purposes of international human rights law if it is in pursuit of a legitimate objective and is rationally connected to, and a proportionate way to achieve, that objective. The committee notes that the minister's response identifies the objective of the measure as:

> …contributing to the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system. [2]

1.215 The minister's response assesses the measure as not limiting the right to education as it will not result in the introduction of upfront payments.

1.216 However, the committee notes that, while students will not have to pay fees upfront as a result of this measure, the total cost of their education would rise directly as a result of this reduction in Commonwealth subsidy. Accordingly, the committee considers that the measure does limit the right to education by increasing the total cost of education for students. As this limitation is not acknowledged by the minister, his response provides no evidence to support a conclusion that the measure is a justifiable limitation on the right to education.

1.217 The committee notes that budgetary constraints have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights. However, the committee notes that a 20 per cent reduction in support for each Commonwealth-funded student is a significant reduction, and accordingly evidence explaining why such a cut is

2 Explanatory memorandum (EM) 2.

nevertheless a proportionate reduction in terms of the right to education is required. Such information was not provided in the statement of compatibility or the minister's response.

1.218 **On the basis of the information available, the committee therefore considers that the reduction in subsidies for new Commonwealth supported students at universities may be incompatible with the right to education. The committee has concluded its examination of this aspect of the original bill.**

Right to equality and non-discrimination

1.219 **The committee thanks the minister for his response on this aspect of the measure. The committee is of the view that the measure limits the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

Minister's response on Schedule 1—removal of the cap on student contribution amounts

> Right to education
> The introduction of greater competition into the higher education market, in the form of fee deregulation, will result in greater price differentiation among providers. Higher education providers will be able to set their own course fees, and to compete on price and quality to attract students.
> Competition between providers will create downward pressure on fees. As indicated above the right to education will continue to be protected by the HELP scheme which will ensure that all eligible higher education students will be able to defer the full cost of their study and will not be required to make any repayments until they are earning sufficient income.
> Right to equality and non-discrimination
> The Government does not believe that this will limit the right to equality and non-discrimination in any way. It is an explicit aim of these reforms to improve choice and ensure that all people, regardless of gender, will have the opportunity to choose the course that best suits their needs.
> Proportionality to policy objectives
> This policy is critical to achieve the long-term objective of improving Australia's higher education sector to compete in a global market. It will enable higher education providers to improve the quality and diversity of course offerings, in order to stand out in the higher education market, which will help to promote greater quality and choice across the system.

Committee response

Right to education

1.220 **The committee thanks the minister for his response.**

1.221 However, the committee notes that, if fees were to rise as a result of the removal of the statutory cap on student contributions, the measure may be

incompatible with the right to education to the extent that it reduces the affordability (and thus accessibility) of higher education and, more generally, on the basis that the ICESCR requires the progressive realisation of free tertiary education.

1.222 In this respect, while the minister states that increased competition in the higher education market will 'create downward pressure on fees', the committee considers that evidence is required to show that increased competition will result in downward pressure on fees across all disciplines of study. In the absence of further information, the committee considers that the measure may be an unjustifiable limitation on the obligation to make education equally accessible to all as required by article 13 of the ICESCR.

1.223 **The committee therefore seeks further information from the minister, including any relevant modelling, case studies or analysis, in support of the assessment that removing the cap on student contributions will not reduce access to education.**

Right to equality and non-discrimination

1.224 **The committee thanks the minister for his response on this aspect of the measure. The committee is of the view that the measure limits the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 1—merging of the FEE-HELP and HECS-HELP loan schemes

> Right to education
> This measure will have no impact on the right to education. As the major differences between the HECS-HELP and FEE-HELP loan schemes will be removed in this package of reforms, the two loan schemes will be merged to simplify arrangements for students and providers. The removal of these anomalies for students will support and expand the right to education, as detailed below in the discussion of 'Removal of the loan fee and lifetime limit on FEE-HELP loans'. The eligibility criteria for accessing a HELP loan have not been altered, ensuring ongoing access to higher education for all student groups that previously had access to the HECS-HELP and FEE-HELP schemes.
> Right to equality and non-discrimination
> This measure will not impact on the right to equality and non-discrimination.
> Proportionality to policy objectives
> This measure is a logical extension of other measures, providing for a simplification of existing programme arrangements without any impact on access.

Committee response

1.225 **The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to**

education or the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.

Minister's response on removal of the up-front payment discount and the voluntary repayment bonus for HELP loans

Right to education

This measure is fully compatible with the right to education. It would not prevent a person from accessing higher education. HELP will continue to be available to allow students to defer their tuition costs if they choose not to pay these up-front.

Right to equality and non-discrimination

The removal of the voluntary repayment bonus and the up-front payment discount restores the right of all students to be treated equally. Currently some students obtain a financial benefit because they may have sufficient income to make voluntary repayments, or can afford to pay up-front for their courses.

Proportionality to policy objectives

This measure will contribute to sustainability of the HELP system and repair of the Budget without any negative impact on access.

Committee response

1.226 **The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education or the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 1—removal of the loan fee and lifetime limit on FEE-HELP loans

Right to education

The removal of the lifetime loan limit and the loan fee for FEE-HELP under this schedule also removes barriers to higher education. Under the current HELP scheme, the lifetime limit that a person may borrow is $96 000, or $120 002 for medicine, dentistry and veterinary science courses.

The HELP loan fee and limit can create barriers to access for people who are unable to afford upfront contributions, particularly when they have incurred HELP debts for previous study. If a student's FEE-HELP balance is such that the fees charged by the provider would cause them to go over the limit, and they do not have private resources, the system effectively denies them the opportunity to study at a private provider or in an unfunded sub-bachelor or postgraduate course. In contrast, undergraduate students at public universities are not subject to any limit and can undertake as many courses at this level at public universities as they choose.

This represents a major inequity in the system, discriminating against students attending private providers and undertaking unsubsidised sub-bachelor courses. The lifetime limit is also a potential barrier to access for students in unfunded postgraduate courses. The removal of the loan fee and lifetime limit is critical to addressing the inequities for these various categories of students.

Given the phase out of undergraduate fee-paying places in public universities, the FEE-HELP loan fee now only applies to students at private universities and non-

university higher education providers. In addition, FEE-HELP loans tend to be larger on average than those incurred by students in
Commonwealth supported places. The limit on loans mean that there may be significant limitations to access to retraining or to further study for an individual who already has a HELP loan, particularly when the burden of the loan fee is added to the existing cost of the course. Abolition of the loan fee and the lifetime limit will increase accessibility to higher education.

Right to equality and non-discrimination

The removal of the loan fee and the loan limit ensures equitable access for students, regardless of the type of course or the provider the student has chosen. Removing the loan fee will reduce costs for students currently studying without any Commonwealth subsidy and it will also remove pricing inequity between public and private providers, discussed above. Based on 2013 data, it is estimated that removing the loan fee will benefit more than 5O 000 higher education students per year. The average loan fee in 2013 for such students was around $2600 per year. Additionally, the removal of the lifetime HELP loan limit and the loan fee will provide more pathway options and opportunities to retrain or to update qualifications if they have taken time out of the workforce. This can be particularly important for women given their tendency to have greater caring responsibilities. Additionally, there are more women in fee-paying places than men. This indicates that the FEE-HELP loan fee has a greater financial impact on women than men. By removing the punitive FEE-HELP loan fee and lifetime limit there will be fewer financial barriers to access to higher education for women. More women are likely to benefit from these changes than are men.

Proportionality to policy objectives

This measure will ensure that students are not denied access to higher education because they cannot meet the upfront costs, and will ensure the costs of higher education are manageable for all students. It is also a critical element in ensuring consistent treatment of students and providers across the higher education system.[3]

Committee response

1.227 **The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education and the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 2—creation of Commonwealth scholarships scheme

Schedule 2 of the Bill provides for the creation of a Commonwealth Scholarship scheme. This would require providers with 500 or more equivalent full time Commonwealth supported students to set aside 20

3 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 1-6.

per cent of additional revenue raised from the deregulation of student contributions to a scholarship fund to support disadvantaged students.

Does this schedule limit human rights?

The measure will help support an individual's right to education by creating a Commonwealth Scholarship scheme to expand access to higher education for disadvantaged students. This scholarship scheme will be run by providers to provide tailored, individualised support for disadvantaged students enrolled in higher education at that provider. This could take the form of help with costs of living while they study, fee exemptions, relocation expenses, or tutorial and other academic support.

This measure will support the right to education for disadvantaged students by removing barriers to further study. The Commonwealth Scholarship scheme may also promote the right to an adequate standard of living, depending on what type of support a higher education provider offers for its students.

This measure also guards against the possibility of a two-tiered system emerging by ensuring that all providers receiving significant additional revenue, including the largest and most prestigious universities, will need to meet access and equity objectives.

There are more women from disadvantaged backgrounds who study in higher education than disadvantaged men, and as such women are more likely than men to gain the benefits of the new Commonwealth Scholarship scheme.

Are the actions taken proportionate to the policy objective?

This measure promotes equity and access to higher education. Requiring providers to set aside one dollar in every five of additional revenue to support disadvantaged students is reasonable. This will create many thousands of scholarship opportunities for disadvantaged students, and it is proportionate to the policy objective of promoting equity and access to higher education for disadvantaged students.[4]

Committee response

1.228 **The committee thanks the minister for his response on this aspect of the measure. The committee considers that the measure does not limit the right to education and the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

4 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 7.

Minister's response on schedule 3—change to indexation of HELP loans

Schedule 3 changes the indexation of HELP loans from the Consumer Price Index (CPI) to the 10 year Government bond rate, capped at 6 per cent per annum.

Does this schedule limit human rights?

Right to an adequate standard of living

This measure will not limit the right to an adequate standard of living. Replacing CPI indexation with bond rate indexation will not create increased costs for students while they study, and they will still be able to defer the entire cost of their tuition through the HELP scheme. As is currently the case, they will not be required to make any repayments until they are earning a good income. This measure will not lead to any change to the rate of annual repayments or the proportion of annual household income directed towards repaying their HELP debt. Therefore, while graduates may take longer to repay their HELP loans, there will be no reduction in their annual disposable income as a result and no impact on their capacity to maintain an adequate standard of living.

Right to education

This measure will not limit the right of a person to access higher education. It is possible that the application of the bond rate of indexation to HELP debts may create an incentive for some students to pay back their debts earlier or pay their costs upfront, however there will be no requirement for students to pay more before or during their study as a result of this measure. HELP will continue to provide the opportunity for all Australian students to defer their tuition costs.

Furthermore, the measure will ensure the sustainability of HELP for the long term, meaning that future generations of students will also be able to borrow their share of the cost of their tuition.

Right to equality and non-discrimination

Under the current system, the population that tend to earn lower incomes or spend time out of the workforce take longer to repay their debts. On average, women tend to repay their student loans over a longer period of time than men. This is in a large part due to the greater likelihood that women will elect to work part time or exit the workforce, and the greater likelihood of being in lower paid professions. This results in the Government on average providing women with a higher deferral subsidy as a percentage of outstanding debt (refer Table 1 below).

The Government also provides an effective subsidy to students who will never repay some or all of their debt, Debt Not Expected to be Repaid (DNER). On average women benefit more from this subsidy than men, and this will not change under the reforms (refer Table 1).

The reforms may increase the time it will take for part time workers, or those who elected to leave the workforce, to repay their HELP debt. However, this would apply to all such groups, regard less of gender.

Women will not face any limitations to their right to access a HELP loan, and therefore higher education courses, as a result of the change in indexation. They will not have to pay any of their tuition costs upfront, and will have access to Government subsidies for more courses, including sub-bachelor courses, and courses at private providers, that may be more suitable to their needs.

Are the actions taken proportionate to the policy objective?

This measure will more accurately reflect the cost of borrowing to the Government, recognising the rapidly increasing cost to the Government of borrowing money in order to provide HELP loans. This measure will also effectively remove the indirect subsidy that all taxpayers contribute to higher education students.

The Government 10 year bond rate, with a cap of 6 per cent per annum, is much lower than the rate of a commercial loan. This means that a student would still pay very little interest on their HELP loan compared to an equivalent loan with a bank or a financial institution. This measure will provide certainty for students through the creation of the interest rate 'safety cap', ensuring that HELP loans will not be indexed at a rate higher than 6 per cent per annum.

The proposed change to the bond rate is proportionate to the policy objectives of repairing the Budget, and ensuring that the HELP scheme remains sustainable into the future.[5]

5 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 8-9.

Table 1: Outstanding HELP debt by gender and age as at 30 June 2013

Age on completion	Outstanding debt ($m)	Deferral subsidy as a percentage of debt	DNER as a percentage of debt
Males			
- less than 30	9,778	17.0%	19.5%
- 30 to 55	2,161	11.9%	29.1%
- over 55	114	5.0%	66.1%
All Males	12,053	15.9%	21.7%
Females			
- less than 30	12,503	18.2%	20.7%
- 30 to 55	3,212	13.2%	26.4%
- over 55	174	5.1%	65.7%
All Females	15,889	17.0%	22.4%
All groups	27,942	16.6%	22.1%

Source: Australian Government Actuary

Note: deferral subsidy is the cost to the Government of providing students with concessional loans which have no real interest rate. That is the difference between the Government's cost of borrowing and the Consumer Price Index.

Committee response

Right to an adequate standard of living

1.229 **The committee thanks the minister for his response on this aspect of the measure. The committee considers that the measure is compatible with the right to an adequate standard of living and has concluded its examination of this aspect of the original bill.**

Right to education

1.230 **The committee thanks the minister for his response on this aspect of the measure.**

1.231 However, the committee notes that increases in the cost of higher education may reduce access to education for students who are, or consider themselves to be or likely to be, unable to afford those costs.

1.232 The committee notes that a central pillar of the Australian system of higher education is the ability of students to defer the costs of their education until they start earning a salary above a certain threshold. While this aspect of the system remains essentially unchanged, the committee notes that the proposed change to indexation may operate as a disincentive to certain students (such as those unable to pay upfront). Any such disincentive would be inconsistent with the obligation under the ICESCR to ensure that higher education is equally accessible and progressively free.

1.233 In addition, while the minister states that the measure will ensure the sustainability of HELP for the long term, no evidence has been provided to support this claim.

1.234 The committee notes, however, that the new bill would maintain CPI as the HELP indexation rate and accordingly there would be no change to the current arrangements for indexation of HELP loans.

1.235 **The committee therefore concludes its examination of this measure.**

Right to equality and non-discrimination

1.236 **The committee thanks the minister for his response.**

1.237 The committee considers that the measure in the original bill may indirectly discriminate against women due to its disproportionate impact on women with children. As previously noted, this is because such women are more likely than men to be out of the workforce caring for children; and more likely to be in part-time work.[6] Where these women are earning below the repayment threshold for HELP, their higher education debts are likely to grow faster than inflation if indexed at the bond rate as a result of the change in schedule 3. This would result in a longer period of paying off their debts and, consequently, to higher education costs than men.

1.238 The committee notes that the minister's response does not address the issue of indirect discrimination, and does acknowledge that the measure may increase the time it takes for part-time workers, or those who have chosen to leave the workforce, to repay their HELP debts, and will increase the total cost of their education.

1.239 However, the committee notes that the new bill would maintain CPI indexation of HELP debts. In addition, the new bill would provide indexation relief for primary carers of children up to five years of age. The committee considers that, compared to existing arrangements for HELP debts, the measures in the new bill would substantially address gender inequality in the cost of education. As women are predominantly the primary care giver of young children, the new bill would effectively freeze the HELP debts of women while they take time off work to raise their children (up until the age of five).

1.240 **The committee therefore concludes its examination of this measure on the basis that the revised bill is compatible with the right to equality and non-discrimination.**

6 Australian Bureau of Statistics website, '4102.0 - Australian Social Trends, Nov 2013: Employed Mothers(a), Selected Main Reason Returned To Work, November 2011', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features10Nov+2013 (accessed 8 September 2014).

Minister's response on schedule 4—new repayment threshold for HELP loans

Schedule 4 of the Bill creates a new repayment threshold for HELP loans. When a person's annual income reaches $50 638 they would be required to repay the HELP debt at a rate of 2 per cent per annum.

Does this schedule limit human rights?

Right to an adequate standard of living

This schedule does not impact on the right to an adequate standard of living. The $50 638 minimum repayment threshold is well above the minimum liveable wage, and will be annually adjusted to take inflation into account.

Additionally, to minimise the impact of the introduction of a lower minimum repayment threshold, graduates who earn more than $50 637 but less than the previous minimum repayment threshold (estimated to be $56 264 in 2016-17) would only be required to pay 2 per cent of their annual income towards the HELP scheme. Taxpayers with incomes in this range would be required to pay back around $1013-$1125 in 2016-17.

Those who have accessed a HELP loan and believe that they are experiencing serious financial hardship will be able to apply to the Australian Taxation Office to defer their payments, or to the Department of Finance to have their debt waived, further safeguarding the right to an adequate standard of living.

For the above reasons, there is no risk that this measure will limit the right to an adequate standard of living.

Right to education

This measure does not limit the right to access higher education. Annual payments will remain within the current reasonable limits, and will continue to be income-contingent, which will ensure this measure does not impact on the right to an adequate standard of living or create a significant deterrent to accessing higher education.

Right to equality and non-discrimination

This measure is fully compatible with the right to equality and non-discrimination on the grounds of gender. The new repayment threshold applies to everyone, regardless of gender and still represents an income substantially above the minimum liveable wage.

Women are more likely than men to work part-time, and to remain under the minimum repayment threshold. This means that women are less likely to be required to make any repayments at all on their HELP loans. Furthermore, when a person's income, regardless of gender, falls below the repayment threshold for any financial year, they would not be required to direct any proportion of their income towards repayments.

Are the actions taken proportionate to the policy objective?

This measure is proportionate to the policy objective of ensuring the long-term sustainability of HELP, while not adversely impacting on the lives of graduates by requiring repayments on a low income level. By reducing the minimum income repayment threshold, the Government will ensure that individuals who have the financial means will begin to repay their HELP debts earlier and will reduce the level of doubtful debt incurred through HELP loans.[7]

Committee response

1.241 **The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education and the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee also considers that the measure does not limit the right to an adequate standard of living and is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 5—funding for future fellowships scheme

Schedule 5 of the Bill will provide funding for the Future Fellowships scheme, and amend the Australian Research Council Act (ARC Act) to apply an efficiency dividend for 2014-15, before applying indexation to existing amounts and adding an additional forward estimate for funding into the 2017-18 financial year.

This schedule will allow Research Training Scheme (RTS) students to be charged a capped student contribution amount, which will allow providers to offset the 10 per cent reduction in funding for the RTS announced in the Budget.

Does this schedule limit human rights?

This measure will not limit the right to education. RTS students that are charged a tuition fee amount will be able to defer the fee through the HELP scheme in the same manner as tuition fees for undergraduate places subject to meeting the eligibility criteria for the HELP scheme. This will ensure that eligible RTS students will not have to pay this contribution amount upfront.

Additionally, the low cap of $3900 per EFTSL for high-cost courses and $1700 per EFTSL for low-cost courses will ensure that this price signal is not a deterrent for students to commence higher degrees by research. This is a small proportion of the total cost of the RTS course, and will not restrict access to tertiary education or higher degrees by research.

7 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 10-11.

Additionally, the amount provided over the forward estimates to the ARC is a substantial increase in funding. This will allow the ARC to fund high-quality research to address the challenges Australia will face in the future, and to improve the quality of people's lives, as well as support the development of new industries to remain competitive in the global knowledge market. The overall increase in funding will expand the capacity of the ARC to support higher degrees by research, and graduate research capabilities.

Are the actions taken proportionate to the policy objective?

The RTS measure will save approximately $174 million over three years, and will help to create a sustainable funding model for research students into the future. Given the significantly better employment and wage outcomes that postgraduates have when compared to bachelor level graduates, it is reasonable to ask RTS students to contribute a small proportion of the total cost of their course.

The application of a one-off efficiency dividend is proportionate to the policy objective of repairing the Budget, while the continuation of funding is reasonable given the importance of research to Australia's continued economic growth into the future.[8]

Committee response

1.242 **The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education and the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 6—removal of the VET FEE-HELP loan fee and the lifetime loan limit

Schedule 6 provides for the removal of the VET FEE-HELP loan fee and the lifetime loan limit.

Does this schedule limit human rights?

As discussed under Schedule 1, the removal of the loan fee and the lifetime loan limit will remove barriers to higher education and improve access for students. This is fully compatible with the right to education.

Restricting the amount that a student may borrow for their education impedes the ability of people to retrain, change careers or update their qualifications after a period out of the workforce. This measure will create more pathways for students and workers who need to access additional

8 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 12.

study or training over their lifetimes, without the barrier of a punitive loan fee or up-front costs for their course.

It is estimated that over 80 000 students undertaking vocational education and training will benefit each year from the removal of the loan fee. In 2013, the average VET FEE-HELP loan fee was around $1600 per student.

Most VET FEE-HELP students are women. In 2013, two-thirds of students accessing VET FEE-HELP loans were women (67 100 out of 100 000). Eligible female students were slightly more likely to access a loan (83 per cent) than eligible male students (79 per cent). As a result, removal of the VET FEE-HELP and loan-fee limits will be of significant benefit to women, and can be expected to further improve their access to vocational education and training and therefore opportunities for labour force participation.

Are the actions taken proportionate to the policy objective?

This measure is proportionate to the objective of ensuring equitable treatment and removing elements of discrimination against students studying VET courses in unsubsidised places. This will protect their right to access relevant VET courses regardless of their capacity to pay. The cost of these measures is manageable in the context of the overall balanced package of reforms.[9]

Committee response

1.243 **The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education or the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 7—discontinuation of the HECS-HELP benefit

Schedule 7 discontinues the HECS-HELP benefit.

Does this schedule limit human rights?

This will not have adverse effects on higher education access. The Kemp-Norton Review of the Demand Driven System found that the HECS-HELP Benefit has not created any significant incentive for students to choose courses in the targeted areas of maths, science, education or nursing since its inception in 2008 and recommended that it be removed.

Furthermore, the uptake of the programme was low and did not justify the costs of administering the scheme. In 2011-12 only 2500 benefits were granted to graduates, and in 2012-13 only 7220 benefits were granted.

9 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 13.

In light of this, the Government has decided to remove this ineffective programme. It will not impede access to higher education, or affect eligibility for HELP loans in any way.

Are the actions taken proportionate to the policy objective?

The removal of the HECS-HELP benefit is reasonable given that it was not successful in creating behavioural change, or providing an incentive for students to choose courses in the targeted areas.

The removal of this programme is expected to save $87 million over three years from 2015-16. The discontinuation of inefficient schemes such as the HECS-HELP benefit will contribute to the repair of the Budget.[10]

Committee response

1.244 **The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education and the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

Minister's response on schedule 8—Higher Education Grants Index calculation

Schedule 8 replaces the Higher Education Grants Index calculation with CPI.

Does this schedule limit human rights?

This schedule is fully compatible with the right to education. The calculation of all higher education grants under the Higher Education Support Act 2003 at CPI will ensure the continued and sustainable growth of funding.

Are the actions taken proportionate to the policy objective?

It is reasonable to simplify the indexation arrangements for higher education grants. This measure is part of a government-wide initiative to streamline and reduce the complexity of Government programmes.

This measure will also ensure the sustainable growth of Government funding to the higher education sector, including research grants and Australian Postgraduate Awards. It is proportionate to the policy objective of ensuring the continued excellence of Australia's higher education

10 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 14.

providers, as well as the objective of creating sustainable funding arrangements into the future.[11]

Committee response

1.245 **The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

11 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 15.

Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426]

Portfolio: Prime Minister and Cabinet
Authorising legislation: Public Service Act 1999
Last day to disallow: 2 March 2015

Purpose

1.246 The *Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014* (the direction) amends the *Australian Public Service Commissioner's Directions 2013* (the directions) to remove the requirement that certain employment decisions need to be notified in the Public Service *Gazette* and makes some unrelated technical amendments.

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

Background

1.248 The committee reported on the directions when they were introduced in its *Sixth Report of 2013*.[1]

1.249 The directions prescribe the minimum standards with which agency heads and Australian Public Service (APS) employees must comply in order to meet their obligations under the *Public Service Act 1999,* and support agency heads to fulfil their responsibilities in respect of their employer powers.

1.250 The committee raised concerns in relation to Chapter 2 of the directions, and specifically the requirement for notification of certain employment decisions in the *Gazette*. This included the employee's name (unless the relevant agency head decides the name should not be included), and information about that person's appointment, promotion and termination, including the grounds for termination. The grounds for termination included that the employee:

- lacked essential qualifications;
- had non-performance or unsatisfactory performance of duties;
- was unable to perform duties due to physical or mental incapacity;
- failed to satisfactorily complete an entry level training course; and
- breached the Code of Conduct.

1 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 133-134.

1.251 The committee noted that the publishing of employment decisions, particularly in relation to the termination of a person's employment, limited the right to privacy.

1.252 The committee also noted that public notification that a person's employment was terminated because they were unable to perform duties due to physical or mental incapacity also engaged rights under the Convention on the Rights of Persons with Disabilities (CRPD).

1.253 In response to the committee's concerns, the Australian Public Service Commissioner (the Commissioner) conducted a review of the gazettal requirements. The current direction amends the directions to remove most of the requirements to notify of termination decisions. However, termination on the grounds of breach of the Code of Conduct will continue to be notified in the *Gazette*.

Notification of termination decisions in the Gazette

1.254 The committee thanks the Commissioner for reviewing the directions in response to the committee's concerns, and notes that the amendments to the directions address the committee's concerns in relation to the compatibility of the directions with the CRPD.

1.255 However, while the amendments largely address the committee's concerns in relation to the compatibility of the measure with the right to privacy, the committee remains concerned that the requirement to notify termination on the grounds of breach of the Code of Conduct in the *Gazette* remains in the directions. The committee considers that the retention of this requirement engages the right privacy.

Right to privacy

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

Compatibility of the measure with the right to privacy

1.257 The statement of compatibility concludes that the direction generally advances human rights. While it identifies the continued notification of decisions relating to termination on misconduct grounds as a limitation on the right to privacy, it concludes that the measure 'is considered reasonable, necessary and proportionate'.[2]

2 Statement of compatibility 6.

1.258 However, it is unclear to the committee whether the continuing publishing of termination decisions may be regarded as a justifiable limit on the right to privacy. Any such limitation must be shown to be aimed at achieving a legitimate objective, being one that is necessary and addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.259 In this regard, the statement of compatibility identifies the objectives of the measure as being 'public interest grounds' and because such information 'may be useful to prospective APS employers'.[3] The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1, and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.

1.260 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 useful. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

1.261 **The committee considers that the publishing of termination decisions for breach of the Code of Conduct limits the right to privacy. As set out above, the statement of compatibility has not clearly established that the limitation is in pursuit of a legitimate objective. The committee therefore seeks the advice of the Minister Assisting the Prime Minister for the Public Service as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

3 Explanatory memorandum (EM) 5.

Competition and Consumer (Industry Codes—Franchising) Regulation 2014 [F2014L01472]

Portfolio: Treasury
Authorising legislation: Competition and Consumer Act 2010
Last day to disallow: 2 March 2015

Purpose

1.262 The Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the regulation) regulates the conduct of participants in franchising relationships.

1.263 The regulation replaces the Trade Practices (Industry Codes—Franchising) Regulations 1998 (the Franchising Code). It requires franchisors to disclose certain information to franchisees, prescribes minimum standards in franchise agreements, and provides dispute resolution processes.

1.264 The regulation creates civil penalties of 300 units for the breach of certain provisions in the Franchising Code.

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

Civil penalties provisions

1.266 The regulation creates civil penalties of 300 units for the breach of certain provisions in the Franchising Code. As set out in the committee's Guidance Note 2, civil penalty provisions engage fair trial rights and rights to a fair hearing. They may also engage criminal process rights such as the presumption of innocence.

Right to a fair trial and fair hearing rights

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

1.268 Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law. Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and

procedures that apply in relation to civil matters; that is, proof is on the balance of probabilities.

1.269 However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

Compatibility of the measure with the right to a fair trial and fair hearing rights

1.270 The statement of compatibility states that 'the Regulation does not engage any of the applicable rights or freedoms'.[1]

1.271 However, the committee notes that as the regulation includes civil penalty provisions it engages the right to a fair trial and fair hearing rights.

1.272 The committee notes most of the civil penalty provisions apply only to breaches of the Franchising Code by the franchisor (such as in relation to a franchisor's disclosure obligations). In those cases, given the regulatory context, the committee does not consider those provisions constitute a limitation on human rights.

1.273 However, other civil penalty provisions (such as the obligation to act in good faith (clause 6) and attendance at mediation (clauses 39 and 41) apply to both franchisor and franchisee. The committee's Guidance Note 2 sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties, including the committee's expectations in relation to assessing the human rights compatibility of such provisions.[2]

1.274 In general, it will not be necessary to provide an assessment of human rights compatibility where the civil penalty provision is in a corporate context and the penalties are small.[3] In this case, however, given that franchisees may be individuals or small business and that the civil penalties may be quite large (300 penalty units), the committee considers that an assessment of whether the civil penalty provisions may be criminal for international human rights law is required.

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1 Explanatory memorandum (EM) 5.

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf (accessed 15 January 2015).

3 The committee also notes that the civil penalty provisions allow for a penalty of up to 300 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that Regulations should not be authorised to impose fines exceeding 250 penalty units for a body corporate.[3]

1.275 **On this basis, the committee considers that the criminal process rights in article 14 of the ICCPR may be engaged. The committee therefore seeks the advice of the Minister for Small Business as to whether the civil penalty provisions in the regulation are compatible with the right to a fair trial and fair hearing rights.**

Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al‑Raqqa Province, Syria [F2014L01634]

Portfolio: Foreign Affairs and Trade
Authorising legislation: Criminal Code Act 1995
Last day to disallow: 26 March 2015

Purpose

1.276 The Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al‑Raqqa Province, Syria [F2014L01634] (the regulation) makes it an offence under section 119.2 of the *Criminal Code Act 1995* (the Criminal Code) to enter, or remain in, the al-Raqqa Province in Syria.

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

Background

1.278 Section 119.2 of the Criminal Code makes it an offence for a person to intentionally enter, or remain in, a declared area in a foreign country where the person is reckless as to whether the area is a declared area. Under section 119.3 of the Criminal Code, the Minister for Foreign Affairs (the minister) may declare an area in a foreign country for the purposes of section 119.2 if the minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.

1.279 The committee considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) in its *Fourteenth Report of the 44th Parliament*.[1] The bill was passed by both Houses of Parliament and received Royal Assent on 2 November 2014.

1.280 The committee considered that the declared area offence provisions introduced by the bill were likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

1.281 Subsequent to the committee's analysis of the bill, the bill was amended to remove the ability of the minister to declare whole countries or neighbouring countries as declared areas (see section 119.3(2A) of the Criminal Code).

Determination of al-Raqqa Province as a declared area

1.282 As a result of the regulation, it is a criminal offence under section 119.2 of the Criminal Code for a person to enter, or remain in, al-Raqqa province. The committee notes that the al-Raqqa province covers an area of approximately 19 000

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 34-44.

square kilometres and, prior to the civil war in Syria, was home to over 1 000 000 residents.[2]

1.283 In order to prove the offence the prosecution is only required to prove that a person intentionally entered into (or remained in) al-Raqqa province and was reckless as to whether or not it had been declared by the minister. The prosecution is not required to prove that the person had any intention to undertake a terrorist or other criminal act. A person accused of entering or remaining in al-Raqqa province bears an evidential burden—that is, to establish a defence they must provide evidence that they were in the declared area solely for a legitimate purpose as defined by the Criminal Code.

Multiple rights

1.284 As stated above, the committee has previously concluded that the declared area offence provisions of the Criminal Code are likely to be incompatible with:

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and
- the right to equality and non-discrimination.[3]

Compatibility of the determination with multiple rights

1.285 In light of the committee's previous conclusion that the declared area offence provisions in the Criminal Code are incompatible with human rights, it follows as a matter of law that the declaration of al-Raqqa province in Syria for the purposes of the declared area offence provision is also likely to be incompatible with human rights.

1.286 Further, the committee considers that the statement of compatibility for the regulation does not meet the requirements set out in the committee's Guidance Note 1 or the Attorney-General's Department's guidance on the preparation of statements of compatibility.

1.287 While the committee acknowledges that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective for the purposes of international human rights law, the committee considers that the statement of compatibility does not provide a

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2 Syrian Arab Republic Central Bureau of Statistics, *Syrian Population By Sex And Governorate According To Civil Affairs Records On 1 / 1 / 2011 (000),* available at http://www.cbssyr.sy/yearbook/2011/Data-Chapter2/TAB-1-2-2011.htm (accessed 6 January 2015).

3 The amendment to the declared area provisions to remove the minister's ability to declare entire countries, while welcome, does not alter the committee's initial analysis and conclusions on the bill.

sufficiently detailed or evidence-based analysis to establish that the regulation pursues a legitimate objective. For example, the statement of compatibility simply states:

> The Declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia's national security.
>
> …The risk of a successful terrorist attack occurring in Australia is high and the limitation imposed by the Declaration is necessary to assist in the prevention of an attack on Australian soil. This is particularly so given that ISIL is using al-Raqqa province as a base of operations and Australians have travelled to Iraq and Syria to participate in the foreign conflict.[4]

1.288 The committee notes that proponents of legislation must provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. 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. In this respect, the committee considers that the statement of compatibility does not provide sufficient information as to the specific need for the declaration of the al‑Raqqa Province as a declared area for the purposes of section 119.2 of the Criminal Code. In particular, the statement of compatibility provides no analysis of the particular threat to Australia's national security, or how any such threat is addressed by declaring the area of al-Raqqa. Further, the statement does not say why it is not possible to rely on measures that are less restrictive of human rights, such as the existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries.

1.289 **As the committee has already concluded that the declared area offence provisions are incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement, and the rights to equality and non-discrimination, it follows that the declaration of the Al‑Raqqa Province under that offence provision is also incompatible with those human rights.**

4 Explanatory statement 2.

Dental Benefits Rules 2014 [F2014L01748]

Portfolio: Health
Authorising legislation: Dental Benefits Act 2008
Last day to disallow: 26 March 2015

Purpose

1.290 The Dental Benefits Rules 2014 (the 2014 rules) repeal and replace the Dental Benefits Rules 2013, and set out who is eligible to provide services for which dental benefits will be paid and who is eligible for dental benefits.

1.291 The 2014 rules make a number of changes to the previous rules, including:

- changing the date for which a state or territory is eligible for dental benefits to 30 June 2015 to continue to allow patients to access public sector dental treatment under the program;
- introducing a requirement that a patient be eligible for Medicare at the time the dental service is provided;
- establishing the 2015-2016 cap on the amount of benefits payable over a two consecutive calendar year period and setting it at $1000 (in line with the 2014-2015 cap);
- requiring dentists to give their Medicare provider number on invoices and claim forms to aid in claim processing by the Department of Human Services;
- introducing a number of changes to dental benefits vouchers;
- renumbering of groups in the Dental Benefits Schedule; and
- a number of technical amendments.

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

Cap on benefits

1.293 The committee considers that the 2014 rules engage the right to heath and the right to social security.

1.294 The committee considers that the capping of the amount of dental benefits payable over a two consecutive calendar year period at $1000 may limit the right to health and the right to social security. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

Right to health

1.295 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.

Right to social security

1.296 The right to social security is protected by article 9 of 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.

1.297 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).

1.298 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to health and 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.

1.299 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.[1]

1 Further information on the content of this right can be found in the Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

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

1.300 The statement of compatibility identifies the 2014 rules as engaging the right to health and the right to social security. It concludes that the instrument 'protects and advances' these rights and is 'therefore compatible with Australia's human rights obligations'.[2]

1.301 However, in relation to the introduction of a cap on benefits (limited to a benefit of $1000 over two consecutive years), the committee notes that the measure may limit the right to health. This is because a person who needs to have extensive dental work may reach the $1000 cap before all necessary dental work is completed, and may therefore not have the means to access all necessary dental care.

1.302 The committee further notes that the contributions to the cost of dental services through the Medicare system is a form of social security. Noting the potential for the measures to result in reduced access to dental services, the committee considers that any such result would amount to a reduction in the current level of social security available through Medicare, and therefore represent a limitation on the right to social security.

1.303 The statement of compatibility provides no assessment of the measure or of its potential limitation on the right to health. The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective.

1.304 **The committee considers that the cap of $1000 for dental services over a two year consecutive calendar period may limit the right to social security and the right to health. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:**

- **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 a reasonable and proportionate way to achieve that objective.**

2 Explanatory statement (ES) 10.

Eligibility for dental benefits

1.305 The 2014 rules introduce a change to the benefits scheme, and therefore engage the right to social security and the right to health. The committee considers that requiring that a patient be eligible for Medicare at the time the dental service is provided may reduce current levels of access to dental benefits. The committee therefore provides the following assessment of whether any such limitation may be regarded as justifiable for the purposes of international human rights law.

Right to social security and right to health

1.306 The content of these rights described above at [1.295] to [1.299].

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

1.307 The statement of compatibility states that the purpose of this measure is to align the 2014 rules with 'other Commonwealth health programmes'.[3] In support of the conclusion that the measure protects and advances the right to health it states:

> The change requiring a patient to be eligible for Medicare at the time the dental service is rendered will have a negligible impact on human rights because to be determined eligible for the Child Dental Benefits Schedule the person is required to be eligible for Medicare.[4]

1.308 However, it is unclear to the committee on the basis of the information provided, whether requiring a person to be eligible for Medicare at the time a service is provided may, in practice, result in a reduction to current levels of access to dental benefits. Any such reduction in access may be a retrogressive measure for human rights purposes. A retrogressive measure is any measure that directly or indirectly leads to a backwards step being taken in the level of rights protection. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified and has been introduced after careful consideration of all alternatives.

1.309 **The committee therefore seeks the advice of the Minister for Health as to whether the requirement that patients be eligible for Medicare at the time a dental service is provided is likely to lead to some people no longer being eligible for dental benefits.**

1.310 **If the changes will result in existing patients losing eligibility for dental benefits, the committee considers that this may limit the right to social security and the right to health. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:**

- **whether the measure is aimed at achieving a legitimate objective;**

3 ES 10.

4 ES 11.

- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is a reasonable and proportionate way to achieve that objective.**

Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 [F2014L01714]

Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 (No. 2) [F2015L00029]

Portfolio: Health
Authorising legislation: Health Insurance Act 1973
Last day to disallow: N/A (due to repeal)

Purpose

1.311 The Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 (the regulation) amends the Health Insurance (General Medical Services Table) Regulation 2014 to set a time limitation on specific general practice attendances funded through the Medicare Benefits Schedule (MBS).

1.312 The Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 (No. 2) (the regulation two) amends the Health Insurance (General Medical Services Table) Regulation 2014 to extend the same amendment as provided in the regulation to consultations by certain Non-Vocationally Registered General Practice items. As the effect of the regulation two is the same as the regulation the analysis provided in respect of the regulation applies equally to regulation two.

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

Background

1.314 The regulation was registered with the Federal Register of Legislative Instruments (FRLI) on 16 December 2014 and was due to commence on 19 January 2015.

1.315 However, on 16 January 2015 the regulation was repealed by the Health Insurance (General Medical Services Table) Repeal (Duration of Attendance) Regulation 2015 [F2015L00049], meaning that the amendments contained in the regulation will not come into effect. Given this, the committee provides the following brief analysis and advice-only comment.

Time limitation on specific general practice attendances

1.316 Medicare is a universal health care system that provides financial support for medical services, including GP services.

1.317 Currently (and prior to the making of the regulation), Medicare provides a rebate for GP consultations of less than 20 minutes. Such consultations are either Level A or Level B consultations for the purposes of Medicare billing, based on the complexity of the consultation as determined by the consulting doctor using their professional expertise. The rebate for Level A consultations is $16.95 and the rebate for Level B consultations is $37.05.

1.318 The regulation was intended to introduce time limitations for Level A and Level B consultations. The amended Level A rebate was to apply to consultations lasting less than 10 minutes, and the amended Level B rebate to apply to consultations lasting at least 10 but less than 20 minutes.

1.319 The effect of the intended change was to be that, whereas previously relatively complex consultations lasting less than 10 minutes would attract the larger Level B Medicare rebate, such consultations would attract only the lesser Level A Medicare rebate.

1.320 By effectively increasing the cost of such consultations, the committee considers that the intended change to the government rebate for GP services engages both the right to health and the right to social security.

Right to health

1.321 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.

1.322 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.

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

Compatibility of the measure with the right to health

1.324 In concluding that the instrument is compatible with human rights the statement of compatibility states:

> The amendments will improve Medicare by ensuring that Medicare services billed by practitioners are more reflective of the actual time spent with patients. It will advance rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.[1]

1.325 However, the committee considers that the measures may increase costs for patients and restrict access to medical services for those with limited financial means. For example, doctors may elect to increase their fees in order to compensate for lower rebates, thereby passing higher costs onto patients. Additionally, the measures may result in doctors performing longer consultations in order to claim the higher Level B rebate, leading to longer waiting lists for GP services. Accordingly, the committee considers that the regulation may limit the right to health.

1.326 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

Right to social security

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

1.328 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 Explanatory statement (ES) 5.

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

Compatibility of the measure with the right to social security

1.330 The committee notes that the contributions to the cost of GP services through the Medicare system is a form of social security.

1.331 As noted above, in concluding that the instrument is compatible with human rights the statement of compatibility states that the intended amendments 'advance rights to health and social security'.[2]

1.332 However, noting the potential for the measures to result in increased costs to patients for GP services, the committee considers that any such increase would amount to a reduction in the current level of social security available through Medicare, and therefore represent a limitation on the right to social security. Accordingly, the committee reiterates its usual expectation that statements of compatibility provide an assessment of the human rights compatibility of measures limiting human rights.

1.333 **The committee therefore considers that the introduction of time limitations on specific general practice attendances limits the right to health and the right to social security. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. Noting that the regulations have been repealed by the Health Insurance (General Medical Services Table) Repeal (Duration of Attendance) Regulation 2015 [F2015L00049], the committee draws to the attention of the Minister for Health the requirements for the preparation of statements of compatibility, as set out in the committee's Guidance Note 1.**

2 ES 5.

Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014 [F2014L01715]

Portfolio: Health
Authorising legislation: Health Insurance Act 1973
Last day to disallow: 26 March 2015

Purpose

1.334 The Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014 (the regulation) amends the Health Insurance (General Medical Services Table) Regulation 2014, the Health Insurance (Diagnostic Imaging Services Table) Regulation 2014 and the Health Insurance Regulations 1975 to implement 2014-15 Budget measures.

1.335 The regulation includes the following changes to the Health Insurance (General Medical Services Table) Regulation 2014 (GMST):

- the Medicare Benefits Schedule (MBS) fees for optometry services is reduced by 5.88 per cent;
- the charging cap that currently applies to optometrists accessing the MBS is removed, enabling them to set their own fees in a similar manner to other health providers;
- the period between being able to claim Medicare rebateable comprehensive eye examinations is extended from two years to three years for asymptomatic people aged under 65 years; and
- the period between claiming Medicare rebateable comprehensive eye examinations is reduced from two years to one year for asymptomatic patients aged 65 years and over.

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

Reduction in MBS fees for optometry services and removal of charging cap

1.337 The committee considers that the regulation engages the right to heath and the right to social security.

1.338 The committee notes that the changes introduced by the regulation will impact on the cost to patients of optometry services. The reduction of the MBS fees for optometry services (and associated Medicare rebate) and removal of the cap on fees charged by optometrists appear likely to lead to an increase in patient fees for optometry services. The committee therefore considers that these measures limit the right to health. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

Right to health

1.339 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.

1.340 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.

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

Compatibility of measures with the right to health

1.342 While the statement of compatibility identifies the measures as engaging the right to health, it concludes:

> …the reduction in the Medicare fees for optometric services will…improve the effectiveness of Medicare. While it will reduce the Medicare rebate received by patients for these services, this is a reasonable and proportionate amendment to ensure that Medicare remains financially sustainable;
>
> [The]…removal of the charging cap that currently applies to optometrist[s] accessing the Medicare Benefits Schedule (MBS) will enable these optometrists to set their own fees in a similar manner to other health providers accessing the MBS. This amendment does not affect the right to health or the right to social security[.][1]

1.343 However, as noted above, the committee considers that the two measures individually and together are likely to increase the cost of optometry services. To the extent that any such increases may reduce access to those services for persons with

1 Explanatory statement 9.

limited financial means, the committee considers that the measures may limit the right to health.

1.344 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide reasoned and evidence-based explanations of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a 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.

1.345 In this respect, the committee considers that the statement of compatibility for the regulation does not meet the requirements set out in the committee's Guidance Note 1 or the Attorney-General's Department's guidance on the preparation of statements of compatibility. The statement of compatibility states that the reduction in the medicate rebate will ensure that Medicare remains financially sustainable, but provides no supporting evidence or analysis to show that that is a pressing or substantial concern, and not merely desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

1.346 **The committee considers that the reduction in MBS fees for optometry services and the removal of the charging cap for optometry services limits the right to health and social security. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Health as to whether the reduction in the MBS fees for optometry services and removal of the charging cap on optometrists is compatible with the right to health, and particularly:**

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

Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 26 March 2015

Purpose

1.347 The Migration Amendment (Partner Visas) Regulation 2014 (the regulation) amends the *Migration Regulations 1994* to increase visa application charges by 50 per cent for the subclasses 100 (Partner (Permanent)), 300 (Prospective Marriage (Temporary)) and 801 (Partner (Permanent)).

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

Increase to visa application charges

1.349 The committee considers that the regulation engages the right to the protection of the family.

1.350 The committee considers that the increases to visa application charges (VACs) may limit the right to protection of the family of Australian citizens and residents who wish to live permanently in Australia with their partner. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

Right to protection of the family

1.351 The right to respect for the family is protected 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.

1.352 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 limit this right.

Compatibility of the measure with the right to protection of the family

1.353 The statement of compatibility for the bill states that no human rights are engaged by the regulation.

1.354 However, the committee notes that the fees for the affected visa classes were, prior to the making of the regulation, already considerable. Given this, the 50 per cent increase to the VACs could make it less affordable and therefore more difficult for an Australian citizen or resident to bring their partner to Australia. For

example, spouses may be separated for a prolonged period of time as they save for the VACs. Accordingly, the committee considers that the regulation may limit the right to the protection of the family.

1.355 The committee notes that, from an international human rights law perspective, it is legitimate for the Australian government to charge visa processing fees and to ensure that visa applicants are suitably vetted. However, the committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

1.356 **The committee considers that the increase to visa application charges limits the right to protection of the family. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the increases to certain visa application charges are compatible with the right to protection of the family, and particularly:**

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

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014

Portfolio: Communications
Introduced: House of Representatives, 22 October 2014

Purpose

2.3 The Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (the bill) amends the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* and the *Australian Communications and Media Authority Act 2005* to remove a number of existing requirements, including to:

- introduce a new formula for captioning for subscription sports services, allowing the captioning target to be averaged across a group of sports channels;
- remove existing reporting requirements on free-to-air broadcasters to report on whether they have complied with captioning requirements; and
- exempt new subscription services from meeting captioning targets for a period of 12 months (which could extend to almost two years depending on when the new service commences).

Background

2.4 The committee reported on the bill in its *Sixteenth Report of the 44th Parliament*.[1]

Right to equality and non-discrimination

2.5 The committee sought the advice of the Minister for Communications as to the compatibility of the amendments to the captioning obligations with the right to equality and non-discrimination and the related rights of persons with disabilities under the Convention on the Rights of Persons with Disabilities (CRPD) (including monitoring compliance with obligations under the CRPD), and particularly:

1 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 1-5.

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

Minister's response on averaging of captioning requirements

Captioning amendments proposed in Schedule 6 - Background

The Committee has sought advice on proposed amendments to captioning obligations, and their compatibility with the right to equality and non-discrimination and the related rights of persons with disabilities under the Convention on the Rights of Persons with Disabilities (CRPD). I note that in particular the Committee is seeking advice on whether the proposed changes are aimed at achieving a legitimate objective.

Captioning supports access to a range of services, including television services, by people who are hearing-impaired. To enhance access to captioning for this audience the *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* introduced Part 9D to the BSA, which mandates targets for captioning of free-to-air and subscription television programs, and sets out a framework for determining captioning quality. Compliance with the Part 9D captioning obligations is a license condition for commercial free-to-air and subscription broadcasters.

Part 9D replaced the previous exemption orders process administered by the Australian Human Rights Commission under the *Disability and Discrimination Act 1992* (DDA). With the introduction of Part 9D (which is prescribed under the DDA), broadcast licensees' are exempt from further action for unlawful discrimination under the DDA. This prescription creates a level of regulatory certainty for broadcasters and viewers as the television captioning obligations are administered by the one body, the Australian Communications and Media Authority (the ACMA).

Consistent with the Government's deregulation agenda, the amendments to Part 9D introduced by the Broadcasting Bill aim to reduce industry compliance costs, increase flexibility for broadcasters in the way they meet their captioning obligations, and achieve greater administrative simplicity.

The proposed amendments will not reduce annual captioning targets, including future legislated increases for subscription television, or the quality of captioning services provided by both free-to-air and subscription television broadcasters.

The Broadcasting Bill also removes or amends a number of spent or redundant provisions in Part 9D, including provisions that relate to captioning targets from previous financial years. Additionally, some aspects of existing legislation are unnecessarily complex as drafted, and the Broadcasting Bill simplifies these.

The amendments proposed by the Broadcasting Bill aim to achieve the legitimate objective of reducing unnecessary and costly regulation. It is important to note that in doing so, the amendments will not have a significant impact on viewers, and will

better support the ability of television licensees' to provide captioning services that benefit Australians with a disability.

Averaging of captioning requirements across sports channels

The Committee has expressed a concern that the proposed changes to captioning requirements for sports channels may result in a reduction in the amount of sports content being made available to those who are hearing-impaired.

The Bill repeals existing subsections 130ZV(1) to (4) and replaces these with new subsections 130ZV(1) to (3). The effect of the amendment is to remove spent captioning targets for the 2012 and 2013 financial years, enhance the readability of the provisions and introduce a modified formula in subsection l 30ZV(3) for captioning targets for subscription television sports services.

The provisions have been drafted to ensure that:

- the overall number of hours of captioned programming does not change from existing legislative requirements, and
- there is no reduction in the number of sports channels subject to captioning requirements.

The proposed amendment aims to introduce flexibility for subscription television licensees in meeting their obligations, without changing the number of total hours of captioned programming available to viewers. It operates to allow subscription television licensees to redirect one third of each relevant sports channel's captioning target to another sports channel offered by the same channel provider, for example FOX SPORTS.

Hearing-impaired audiences will benefit from broadcasters being better able to provide captioning for services that are of greater interest to those viewers. To ensure continued diversity of captioning across sports programs, licensees will still be required to meet a captioning target of at least two thirds of the existing captioning target on each individual channel, provided the rest of the annual captioning target is met with captioned content screened on one or more of their other sports channels. This ensures that subscription broadcasters will be prevented from directing all of the aggregated captioning target towards a channel devoted to a particular sport.

Committee response

2.6 **The committee thanks the Minister for Communications for his response. The committee considers that the change to allow averaging of captioning targets does not limit the right to equality and non-discrimination and has concluded its examination of this aspect of the bill.**

Minister's response on removing annual reporting requirements

The Committee has sought advice on whether the removal of annual reporting requirements is compatible with the rights to equality and non-discrimination such as are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and the related rights of persons with disabilities, such as

provided for under articles 5, 9 and 13 of the CRPD. The Committee's concern is based on the view that removing annual reporting requirements would result in a reduction in transparency and capacity to monitor compliance with captioning arrangements.

The Bill repeals subsections 130ZZC(1) to (4) of Part 9D, which provide that commercial television broadcasting licensees and national broadcasters must, within 90 days after the end of each financial year, prepare and give to the ACMA a report relating to the licensee's compliance with their captioning obligations. The proposed amendment will have the effect of removing annual report requirements for free-to-air television broadcasters in relation to their compliance with captioning obligations. Compliance arrangements will instead be based on existing mechanisms within the BSA, including sections 147 and 150 of the BSA which enable viewer complaints to the ACMA about alleged breaches of Part 9D, and the ACMA's discretionary powers to investigate broadcasters' compliance with licence conditions along with broadcast content matters generally.

In recent years, captioning requirements on the free-to-air television sector have gradually increased such that it is now required to provide 100 per cent captioning from 6am to midnight on primary channels, and for news or current affairs programs transmitted on primary channels at any time. This means it is now clear to consumers when services do not meet captioning requirements on the primary channel, making it appropriate for compliance to be assessed on the basis of complaints and other existing measures provided for in the BSA, rather than through annual reporting arrangements.

Although to date there has only been one reporting cycle, the ACMA reported a high level of compliance with the annual captioning target requirements for the 2012-13 reporting period. For instance, 100 per cent of commercial free to air broadcasters and 99 per cent of subscription broadcasters achieved their annual captioning target. The limited compliance issues identified by the ACMA for the first reporting cycle were of the kind normally associated with new broadcasting regulations so soon after their introduction.

There are significant compliance incentives for broadcasters to meet their captioning obligations. The ACMA will investigate genuine captioning complaints and where it identifies issues of concern, including where it sees a systemic problem with the performance of a broadcaster, will consider a range of responses to ensure broadcaster compliance. Responses can include requiring broadcasters to implement additional procedures to improve quality, or formal measures such as enforceable undertakings, and remedial directions. In severe cases, section 143 of the BSA provides that the ACMA can cancel a broadcaster's licence.

These compliance incentives, increased consumer transparency and high industry compliance rate strongly indicate that the removal of annual reporting requirements for free-to-air broadcasters will not reduce the effectiveness of the captioning arrangements, and will therefore not represent a limitation on the right to equality and non-discrimination.

Committee response

2.7 **The committee thanks the Minister for Communications for his response. The committee considers that the changes to reporting requirements limit the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justifiable and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the bill.**

Minister's response on exemptions from captioning requirements for new subscription services

The Committee has also sought advice on whether the minimum 12 month exemption from captioning requirements for new subscription television channels is consistent with the obligation of State Parties to take appropriate measures to ensure persons with disabilities have equal access to information and communications, as provided for under article 9 of the CRPD.

The Bill adds new subsection 130ZV(6), that will provide that new subscription television services transmitted by a licensee are exempt from the captioning targets established by section I 30ZV for a period of one to almost two years, depending on when the new service commences. To qualify for the exemption the subscription television service must predominantly consist of programs not previously transmitted in Australia prior to the commencement of the service. Under the proposed new subsection, the exemption from captioning obligations would apply from service commencement until after the financial year beginning on the first 1 July that is at least one year after the service commenced. For example, if a new subscription television service commenced on 1 September 2015, the applicable exclusion period would be 1 September 2015 to 30 June 2017.

The proposed automatic exemption is designed to encourage subscription television licensees to bring new content and channels to Australian audiences and would only apply to channels that mainly consist of content not previously transmitted in Australia. This requirement will also avoid creating an incentive to do little more than 'rebrand' existing content.

Subscription television licensees can currently apply to the ACMA to temporarily exempt channels from captioning obligations on the grounds that providing captioned services would result in unjustifiable hardship. An exemption order exempts a specified subscription television service provided by the licensee from its annual captioning targets for a specified period (one to five financial years). This hardship is likely to be greater for start-up services that do not have established audiences. In practice the ACMA has approved the significant majority of applications (e.g. in December 2013 the ACMA received 41 applications for exemption orders for 2013-14 and made all 41, or 100 per cent, of these). An automatic exemption process would save both licensees and the ACMA resources in completing and considering applications.

However as it is expected that the automatic exemption will encourage investment in new channels and content the ultimate beneficiaries will be hearing-impaired viewers who will have access to a greater diversity of captioned content over time.[2]

Committee response

2.8 **The committee thanks the Minister for Communications for his response.**

2.9 However, the committee remains concerned that a blanket exemption from captioning requirements for all new subscription television services for at least one year may have an adverse impact on deaf and hearing impaired viewers. If there are no captioning requirements for all new television subscription content then such content will be inaccessible to deaf and hearing impaired viewers during the period of the exemption. As such, the measure limits the right to equality and non-discrimination.

2.10 The committee notes that the right to equality and non-discrimination can be limited if the limitation is aimed at achieving a legitimate objective. The stated objective of the measure is to 'encourage subscription television licensees to bring new content and channels to Australian audiences'. It is also intended to save both licensees and the Australian Communications and Media Authority (ACMA) resources, as new subscription services would not need to make an application for an exemption.

2.11 While the committee appreciates the desire for efficient regulation of television broadcasting, a human right may only be limited to achieve an objective that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not clear to the committee in this case that the stated objectives of encouraging new content and regulatory efficiency amount to legitimate objectives for the purposes of international human rights law.

2.12 Further, even if the stated objectives were sufficient to justify the limitation on the right to equality and non-discrimination, it is not clear to the committee that the limitation is proportionate to those objectives. This is because there is currently a mechanism by which a subscription service can seek an exemption if required (that is, through an application to ACMA, which must assess each application on its merits).

2.13 **The committee therefore considers that the automatic exemption for at least 12 months for all new subscription services from the requirement to provide captioning of content may be incompatible with the right to equality and non-discrimination. The committee has concluded its examination of this aspect of the bill.**

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2 See Appendix 1, Letter from the Hon. Malcolm Turnbull MP, Minister for Communications, to Senator Dean Smith (received 6/1/2015) 2-5.

Commonwealth Places (Application of Laws) Act 1970

Portfolio: Justice

Act No. 121 of 1970

Purpose

2.14 The application of state laws to Commonwealth places is generally governed by the *Commonwealth Places (Application of Laws) Act 1970* (the CP Act), which was enacted in response to a decision of the High Court in 1970.[1] That case found section 52(i) of the Constitution excludes the direct application of state laws to Commonwealth places.[2]

2.15 The effect of the CP Act is that the provisions of an applied state law generally take effect as a Commonwealth law in relation to the Commonwealth place.[3]

Background

2.16 The committee consider the CP Act in the context of its examination of the G20 (Safety and Security) Complementary Act 2014 in the *Sixth Report of the 44th Parliament*,[4] *Ninth Report of the 44th Parliament*[5] and *Tenth Report of the 44th Parliament*.[6]

2.17 The committee reported on the CP Act in its *Eleventh Report of the 44th Parliament*.[7] The committee determined that, as the CP Act effectively provides for the enactment of Commonwealth laws without the requirement for a human rights

1 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89. See also *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* [1970] HCA 58; (1970) 124 CLR 262; and *R v Phillips* [1970] HCA 50; (1970) 125 CLR 93).

2 Section 52(i) of the Constitution provides: The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes.

3 See *Pinkstone v R* [2004] HCA 23; 219 CLR 444 at [34], where McHugh and Gummow JJ described the applied state law as operating as 'a surrogate federal law'. See also McHugh J in *Cameron v R* [2002] HCA 6; 209 CLR 339, at [46].

4 Parliamentary Joint Committee on Human Rights, *Sixth Report of the 44th Parliament* (14 May 2014) 15-17.

5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 107-109.

6 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 163-165.

7 Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* (2 September 2014) 2-5.

assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*,[8] it would undertake an assessment of the CP Act for compatibility with human rights (as provided for by section 7(b) of the *Human Rights (Parliamentary Scrutiny) Act 2011*). The committee therefore requested that the Minister provide a statement of compatibility for the CP Act to assist in the committee's assessment of the human rights compatibility of the CP Act. The committee also indicated 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.'[9] As no statement of compatibility was provided, the committee's assessment of the compatibility of the CP Act with human rights was conducted on the basis of information publicly available.

2.18 In its assessment in the *Eleventh Report of the 44th Parliament*, the committee considered that the CP Act is likely to be incompatible with human rights, and recommended that newly applied state laws be subject to an assessment of human rights compatibility. It also recommended that the CP Act be amended to provide that state laws apply only insofar as they are compatible with Australia's obligations under international human rights law. The committee also requested further information from the Minister for Justice regarding categories of Commonwealth places.

State laws applied by the CP Act

Multiple rights

2.19 The committee noted that the CP Act was likely to engage multiple human rights, and requested the Minister for Justice to provide it with categories of Commonwealth places to which the *Commonwealth Places (Application of Laws) Act 1970* applies.

Minister's response

> I refer to the comments of the Parliamentary Joint Committee on Human Rights in its Eleventh Report of the 44th Parliament concerning the *Commonwealth Places (Application of Laws) Act 1970* (the Commonwealth Places Act). I note that the Government cannot provide legal advice to the Committee. However, I provide the following general comments for your consideration.
>
> The Committee has sought further information about categories of Commonwealth places to which the Commonwealth Places Act applies. Section 3 of the Commonwealth Places Act defines a 'Commonwealth place' to be a place (not being the seat of government) with respect to

8 See *R v Porter* [2001] NSWCCA 441; 165 FLR 301; 53 NSWLR 354; [41] (Spigelman CJ, with whom Studdert J and Ireland AJ agreed).

9 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, para 1.524.

which the Commonwealth Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth. Section 52 of the Constitution gives the Commonwealth Parliament exclusive powers to make laws with respect to:

> i) the seat of government of the Commonwealth and all places acquired by the Commonwealth for public purposes;
>
> ii) matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth;
>
> iii) other matters declared by the Constitution to be within the exclusive power of the Parliament.

Therefore, the most significant category of Commonwealth places is 'all places acquired by the Commonwealth for public purposes', such as airports, post offices, defence establishments and other Commonwealth places throughout the States.

As the status of a Commonwealth place can at times be a complex question, the Commonwealth Places Act was created to ensure consistency of laws across a state jurisdiction and provide legal certainty consistent with underlying federal considerations. The Commonwealth passed the Act to avoid the potential for unpredictable legal 'vacuums' created in places acquired by the Commonwealth. This followed the High Court decision in *Worthing v Rowell and Muston Pty Ltd (1970) 123 CLR 89* (Worthing), in which the High Court considered whether Mr Worthing could rely on state lifts and scaffolding legislation to support a personal injury claim against his employer. The High Court held (by a 4-3 majority) that state lifts and scaffolding legislation did not apply as the laws were enacted after the place in question had been acquired by the Commonwealth and become a Commonwealth place.

The Committee noted that it considers the Commonwealth Places Act is likely to be incompatible with human rights. It is unclear from the Committee's report on what factual basis the Committee has come to the conclusion that Australia is likely to be in breach of its obligations, nor does it identify which obligations or treaty the Commonwealth Places Act is inconsistent with. In response to these concerns, I wish to clarify that the Act is a facilitative Act which operates to 'pick up' state legislation and apply it in Commonwealth places except in certain circumstances. This is critical to the orderly operation of Australia's legal system. The constitutional position of the Commonwealth within the federation requires such arrangements in certain areas.

The Commonwealth Places Act picks up specific powers and obligations of state law which may have applied to a Commonwealth place in the federal context. In that sense, it is not intended to affect the balance of Australia's human rights obligations.

> The Committee has also recommended that newly enacted state laws which would be picked up by the Commonwealth Places Act are subject to an assessment of human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. State laws are made by state parliaments and are subject to relevant state parliamentary processes. It would not be appropriate for the Commonwealth to assess the content of state laws for their human rights compatibility.
>
> The Committee also recommended that the Commonwealth Places Act should be amended to provide that state laws apply only to the extent that they are compatible with Australia's obligations under international human rights law. I do not consider that this would be an appropriate reform. Australia, comprised of the Commonwealth and the States and Territories, has obligations under the international human rights treaties. The Commonwealth does not have responsibility to ensure the consistency of State and Territory laws with these obligations- that is a matter for the relevant Parliaments. As set out above, the purpose of the Commonwealth Places Act is to ensure consistency and certainty of laws across a state.[10]

Committee response

2.20 **The committee thanks the Minister for Justice for his response.**

2.21 As noted above, the CP Act allows provisions of a state law to take effect as a Commonwealth law in relation to the Commonwealth place.[11] Such Commonwealth laws are 'facilitative' of state laws regardless of whether or not applied state laws comply with Australia's international human rights obligations.

2.22 This minister's response confirms that the CP Act permits the application of state laws to Commonwealth places irrespective of whether they engage or limit human rights, and the committee is concerned that there may be numerous state laws applying to Commonwealth places that engage and significantly limit human rights.[12]

2.23 The committee notes that the CP Act was enacted in 1970, prior to the development of parliamentary human rights scrutiny mechanisms. The committee acknowledges that the human rights implications of the CP Act may have been less

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10 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 2/10/2014) 1-2.

11 State laws which are applied are subject to express or implied limitations on the legislative power of the Commonwealth Parliament. Those state laws that are inoperative by virtue of inconsistency with a Commonwealth law and thus invalid to the extent of the inconsistency pursuant to section 109 of the Constitution, are not applied by the CP Act.

12 See, for example, *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), part 6A; *Summary Offences and Sentencing Amendment* (Vic); *Vicious Lawless Association Disestablishment Act* 2013 *(VLAD)* (Qld) *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 *(Qld).*

apparent to Parliament or the executive in that context. However, with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which is intended to ensure human rights assessment of (generally) all new and proposed Commonwealth legislation, the operation of the CP Act effectively reduces the intended scope of human rights assessment of Commonwealth legislation.

2.24 The committee notes the minister's view that it 'would not be appropriate for the Commonwealth to assess the content of state laws for their human rights compatibility'.

2.25 However, the committee notes that, in reporting to various treaty body committees, the Commonwealth is required to (and does) respond to human rights concerns in relation to both Commonwealth and state laws. The federal government possesses relevant powers to ensure compliance with Australia's international obligations.[13] The committee further notes that the division of federal-state responsibilities does not negate Australia's obligations under international human rights law.[14]

2.26 In light of the scheme of the CP Act and the Commonwealth's obligations and powers in respect of human rights, the committee is of the view that the application of state laws via the CP Act should be subject to requirements for any such state laws to be assessed for compatibility with human rights.

2.27 Accordingly, the committee reiterates its conclusions and recommendations set out in the committee's *Eleventh Report of the 44th Parliament*.[15] In particular, the committee reiterates its suggestion that newly applied state laws be subject to an assessment of human rights compatibility.

2.28 **The committee recommends that newly applied state laws be subject to an assessment of human rights compatibility.**

2.29 **The committee recommends that the *Commonwealth Places (Application of Laws) Act 1970* be amended to provide that state laws apply only insofar as they are compatible with Australia's obligations under international human rights law.**

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13 See Australian Constitution, sections 51(xxix), 52(i), 109.

14 See, for example, Vienna Convention on the Law of Treaties, 1969, article 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1 – 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 27 August 2014).

15 Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* (2 September 2014) 5.

Minerals Resource Rent Tax Repeal and Other Measures Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 1 September 2014

Purpose

2.30 The Minerals Resource Rent Tax Repeal and Other Measures Bill 2014 (the bill) seeks to repeal the mineral resources rent tax (MRRT) by repealing a number of acts (schedule 1).[1] It also seeks to make consequential amendments to other legislation,[2] required as a result of the repeal of the MRRT (schedules 2 - 9).

2.31 The 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);
- income support bonus (schedule 8); and
- schoolkids bonus (schedule 9).

2.32 The bill also seeks to 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

2.33 The 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] and subsequently in its *Eighth Report of the 44th Parliament*.[4]

2.34 The measures were then reintroduced as the Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No. 2], which the committee reported on in its *Ninth Report of the 44th Parliament*.[5]

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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) 35-40.

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

5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 56-62.

2.35 The committee then reported on the bill in its *Twelfth Report of the 44th Parliament*.[6]

2.36 The bill was passed by both Houses of Parliament and received Royal Assent on 5 September 2014.

Right to social security and an adequate standard of living

Deferral of proposed increase in compulsory superannuation contribution

2.37 The committee sought the Treasurer's advice as to whether the deferral of the proposed increase to the compulsory superannuation contribution by 10 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 a reasonable and proportionate measure for the achievement of that objective.

Repeal of low-income superannuation contribution

2.38 The committee sought the Treasurer's advice as to whether the repeal of the low-income superannuation contribution 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 a reasonable and proportionate measure for the achievement of that objective.

Repeal of the low-income support bonus

2.39 The committee sought the Treasurer's advice as to whether the measure to repeal the low-income support bonus 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 a reasonable and proportionate measure for the achievement of that objective.

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6 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 15-20.

Minister's response

I note the Bill passed both Houses of Parliament on 2 September 2014 and the Minerals Resource Rent Tax Repeal and Other Measures Act 2014 (the Act) received Royal Assent on 5 September 2014.

Subsequent to the Bill passing, the Parliamentary Joint Committee on Human Rights sought further information as to whether it is compatible with the right to social security and the right to an adequate standard of living.

Given the current fiscal situation, the Act is a necessary and proportionate response to the failure of the Minerals Resource Rent Tax (MRRT) to raise the forecast revenue to fund the associated measures. The objective of the Act is to ensure the measures linked to the revenue expected from the failed MRRT did not result in the Government living beyond its means.

The Act does not result in payments being reduced to below the minimum level necessary for recipients to meet their basic needs in relation to essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education. The Government is advised the Act is therefore compatible with human rights.[7]

Committee response

2.40 **The committee thanks the Parliamentary Secretary to the Treasurer for his response.**

2.41 However, the committee notes that the response does not provide further information regarding the compatibility of the measures with Australia's international human rights obligations. Instead, the response reiterates the government's view that the measures are compatible. The committee refers to Guidance Note 1 on the committee's website regarding the requirements for statements of compatibility and the type of information required to justify measures that limit a human right.

2.42 **On the basis of the information provided, the committee considers that the deferral of the proposed increase in compulsory superannuation contributions, the repeal of the low-income superannuation contribution and the repeal of the low-income support bonus may be incompatible with the right to social security and the right to an adequate standard of living.**

7 See Appendix 1, Letter from the Hon. Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith (dated 11/12/2014) 1.

Telecommunications Legislation Amendment (Deregulation) Bill 2014

Portfolio: Communications
Introduced: House of Representatives, 22 October 2014

Purpose

2.43 The Telecommunications Legislation Amendment (Deregulation) Bill 2014 (the bill) contains a number of amendments, including to:

- repeal the *Telecommunications Universal Service Management Agency Act 2012* to abolish the Telecommunications Universal Service Management Agency (TUSMA);
- transfer TUSMA's functions and contractual responsibilities to the Department of Communications;
- amend the *Australian Communications and Media Authority Act 2005*, *Export Market Development Grants Act 1997* and *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act) to make amendments consequential on the regulation of the supply of telephone sex services via a standard telephone service being removed from the Consumer Protection Act;
- amend the *Do Not Call Register Act 2006* to enable an indefinite registration period for numbers on the register; and
- reduce requirements on carriage service providers in relation to customer service guarantees.

Background

2.44 The committee reported on the bill in its *Sixteenth Report of the 44th Parliament*.[1]

Committee view on compatibility

Repeal of Part 9A of the Consumer Protection Act

Rights of the child

2.45 The committee sought the advice of the Minister for Communications as to whether the proposed repeal of Part 9A of the Consumer Protection Act (CPA) is compatible with the rights of the child, and particularly:

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

1 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 23-24.

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

Minister's response

The Committee has sought advice on whether the repeal of Part 9A is compatible with the rights of the child, and whether the deregulation of Part 9A may expose children to a risk or harm.

Part 9A currently has two key regulatory functions:

1. Regulating the prefixes of numbers used by telephone sex services; and
2. Preventing telephone sex services from being bundled with the supply of other goods and services.

Although Part 9A previously contained provisions specifically aimed at protecting children from accessing age restricted content via telephone sex services, these provisions were repealed following the introduction of the *Communications Legislation Amendment (Content Services) Act 2007*, which introduced a new Schedule 7 into the *Broadcasting Services Act 1992* (the BSA) and amalgamated the regulation of all content services delivered via carriage services.

Schedule 7 of the BSA includes a strong range of measures specifically designed to prevent children from accessing R 18+ content via a range of platforms, including via telephone sex services by effectively:

- requiring an application for access to the content;
- requiring proof of age that the applicant is over 18 years of age;
- ensuring a risk analysis of the kind of proof of age submitted;
- verifying the proof of age by applying the risk analysis;
- providing warnings as to the nature of the content;
- providing safety information for parents and guardians on how to control access to the content;
- limiting access to the content by the use of a PIN or some other means;
- including relevant quality assurance measures; and
- requiring age verification records be retained for a period of 2 years after which the records are to be destroyed.

In summary, the proposed repeal of Part 9A is compatible with the rights of the child. The existing protections under the BSA that help ensure children are protected from

adult content (delivered by telephone sex services or other means) remain and are not impacted by the proposed repeal of Part 9A.[2]

Committee response

2.46 **The committee thanks the Minister for Communications for his response.**

2.47 The committee notes that the minister's response states that Part 9A of the CPA is not required to ensure the protection of children from the harm of telephone sex services because of the existing protections in schedule 7 of the BSA. In order to ensure no diminution in protection of children from harm as required by the Convention on the Rights of the Child, schedule 7 of the BSA must provide equivalent protection to Part 9A of the CPA. The committee notes that schedule 7 of the BSA effectively imposes a regulatory regime on telephone sex service providers that is based on industry codes of conduct. The committee considers that the minister's response has not explained how the protections in schedule 7 are equivalent to those proposed to be repealed in Part 9A of the CPA which imposes mandatory compliance obligations.

2.48 **The committee therefore seeks the advice of the Minister for Communications as to whether schedule 7 of the BSA offers a comparable level of protection for children from the harm of telephone sex services to that provided by Part 9A of the CPA as required by the Convention on the Rights of the Child.**

2 See Appendix 1, Letter from the Hon. Malcolm Turnbull MP, Minister for Communications, to Senator Dean Smith (received 6/1/2015) 1-2.

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

Portfolio: Social Services
Authorising legislation: Social Security (Administration) Act 1999
Last day to disallow: 1 September 2014 (Senate)

Purpose

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

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

2.51 Income management will apply to vulnerable families and individuals in the Ceduna and surrounding region, including:

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

Background

2.52 The committee has previously held an inquiry into the Stronger Futures in the Northern Territory Bill 2012 and related legislation,[1] and is currently commencing a new examination into the legislation.

2.53 The committee reported on the instrument in its *Tenth Report of the 44th Parliament*.[2]

1 Parliamentary Joint Committee on Human Rights, *Stronger Futures in the Northern Territory Act 2012 and related legislation*, Eleventh Report of 2013, June 2013.

Racial discrimination

The rights of equality and non-discrimination

2.54 The committee sought the advice of the Minister for Social Services as to whether the income management measures in the Ceduna and Surrounding Regions are compatible with the rights to equality and non-discrimination in light of the potential for indirect racial discrimination, and particularly:

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

Gender discrimination

The rights of equality and non-discrimination

2.55 The committee sought the advice of the Minister for Social Services as to whether income management measures within the Ceduna and Surrounding Regions are compatible with gender equality under the rights to equality and non-discrimination, and particularly:

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

Disempowerment and discrimination under compulsory income management measures

Right to social security and an adequate standard of living

2.56 The committee sought further advice from the Minister for Social Services as to whether the income management scheme is compatible with the rights to social services and an adequate standard of living, and particularly:

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

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2 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 111-118.

Right to privacy

2.57 The committee sought the Minister for Social Services' advice as to whether the restrictions on the autonomy of individuals to control their own finances through income management measures is compatible with the right to privacy, and particularly:

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

The right to self-determination

2.58 The committee requested further information from the Minister for Social Services on the consultative process, within the Ceduna and Surrounding Regions area specifically.

2.59 The committee sought further advice from the Minister for Social Services as to whether the income management scheme is compatible with the right to self-determination, and particularly:

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

Minister's response

General advice

Income management supports vulnerable individuals and families by helping to ensure that a portion of a person's income support and family payments are spent on essential needs, and limiting expenditure on excluded items such as alcohol, tobacco, pornography and gambling goods and services.

The programme promotes the protection of human rights by ensuring that income support payments are spent in the best interests of welfare payment recipients and their dependents, whilst also helping to improve their budgeting skills so that they can meet priority needs. To the extent that the programme limits human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of the programme [as set out in Part3B of the *Social Security (Administration) Act 1999*], which include:

- reducing immediate hardship and deprivation by directing welfare payments to the priority needs of recipients, their partner, children and any other dependents;
- helping affected welfare payment recipients to budget so that they can meet their priority needs;
- reducing the amount of discretionary income available for alcohol, gambling, tobacco and pornography;
- reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments;
- encouraging socially responsible behaviour, particularly in relation to the care and education of children; and
- improving the level of protection afforded to welfare recipients and their families.

Evaluations of the income management programme to date have found that there are many positive perceptions that income management promotes socially responsible behaviour and improves wellbeing for communities and children. The programme has been found to help direct funds towards people's priority needs and that the BasicsCard has been a useful tool to ensure income managed funds are spent on essential items.

In addition to engagement of the human rights obligations as outlined in the committee's report, *The Tenth Report of the 44th Parliament*, income management also supports a range of other human rights obligations. The right to housing is promoted by helping to ensure that a portion of a person's income support payments is spent on priorities such as housing costs (for example, rent). The programme also promotes the rights of children by ensuring that a portion of income support payments is used to cover essential goods and services, which in tum improves the living conditions for the children of income support recipients. It therefore advances the right of children to benefit from social security, the right of children to the highest attainable standard of health and the right of children to an adequate standard of living (articles 24, 26 and 27 of the Convention on the Rights of the Child, respectively).

The Legislative Instrument in question establishes the Ceduna region as a declared income management area for the purposes of Part 3B, Section 123UCA, and 123UFA of the Social Security (Administration) Act (the Vulnerable and Voluntary measures of income management). Due to the nature of the Voluntary measure, it is unlikely to be incompatible with human rights obligations given that individuals choose to be on this measure and any limitation on their rights is not imposed. The State of South Australia has previously been declared a Child Protection Income Management area.

Consultations

The Government funded Ninti One Ltd to conduct a scoping study in August 2013 in Ceduna and the neighbouring communities of Oak Valley, Scotdesco, Koonibba and Yalata to ask people what they thought about income management. Community members, service providers and a range of key stakeholders, particularly the West Coast Alcohol and Substance Misuse Action Group took part in the study to gauge community views on income management and its potential to assist with some of the social issues facing communities in the Ceduna region. A summary of the final project report is available on the Ninti One website http://www.nintione.com.au/news/new-report-ceduna-income-management-report

The Department held consultations about income management in the Ceduna region in South Australia in February 2014. Over 50 meetings were held with community members as well as key stakeholders including health clinics, local councils, Aboriginal corporations, outback stores, local organisations, the police and schools.

Overall, feedback from the consultations was positive with community members acknowledging problems with alcohol and drug abuse and some children not receiving enough food. In addition, participants at various meetings supported voluntary income management and recognised that the BasicsCard, in particular, may assist with reducing substance abuse and provide more food for children.

The final report can be found at http://www.dss.gov.au/our-responsibilities/families-andchildren/programs-services/income-management/income-management-cedu.na-regionconsultations-report

Advice on specific human rights compatibility issues

1. The rights of equality and non-discrimination

a. Racial discrimination

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

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

The relevant international treaties define discrimination as 'impermissible differentiation of treatment among persons or groups that result in a

person or a group being treated less favourably than others, based on a prohibited ground for discrimination, such as race' . However, the United Nations Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant'.

As discussed above, the introduction of income management to Ceduna and Surrounding Region is aimed at achieving a legitimate objective: to reduce immediate hardship and deprivation by directing welfare payments to the priority needs of recipients, their partner, children and any other dependents, amongst other things.

Income management is not applied based on race or cultural factors. People may go onto income management for a range of reasons. In areas where there is income management, people can be eligible for income management because they:

- receive particular welfare payments, and/or
- have been referred for income management, or
- have volunteered to participate.

The introduction of income management into Ceduna and Surrounding Region does not discriminate on the basis of race. Anyone residing in the prescribed area is eligible for income management, as long as specific eligibility criteria are met. Income management is therefore not targeted at people of a particular race, but to income support recipients who meet particular criteria.

The Ceduna region was chosen as a new site for the operation of income management following strong support from the community and having regard to a range of criteria, including unemployment levels, youth unemployment, skills gaps, the number of people receiving welfare payments, and the length of time people have been on income support payments. These factors are reasonable, objective and non-race based criteria.

To the extent that the income management measures may disproportionately affect Indigenous people, any such limitation is reasonable and proportionate to achieve the objectives of the programme. As evidenced by the evaluations of income management conducted to date in the locations in which it operates, the programme has led to an increase in funds being directed towards people's priority needs, leading to improvements in wellbeing for individuals, families and children.

There are two distinct pathways through which a person may be determined to be a Vulnerable Welfare Payment Recipient. The first involves a comprehensive assessment by a qualified social worker, and the second involves a person meeting a set of criteria that deems them Vulnerable due to the payment type that they receive, or have received

(see Social Security (Administration) (Vulnerable Welfare Pavment Recipient) Principles 2013). The cultural background of the individual and his or her family is not relevant to this process. In relation to Child Protection Income Management, which is not yet operating in Ceduna and Surrounding Region, it is expected that the same model operating in Playford will be introduced following finalisation of the bilateral agreement with the South Australian Government. This involves a consent-based approach to referrals by the Department for Education and Child Development to the Department of Human Services. Individuals can also choose to volunteer for income management if they decide that it would be beneficial to themselves and/or their family.

Sufficient regard has been paid to the rights and interests of those affected. Extensive consultations undertaken in the region found that, on the whole, people were in favour of the introduction of income management. Protections to safeguard against error or abuse, via review and appeal rights, are in place under the programme. There are also set criteria which must be followed to assess whether income management would help an individual, preventing any abuse in discretionary application.

b. Gender discrimination

1.350 The committee therefore seeks the advice of the Minister for Social Services as to whether income management measures within the Ceduna and Surrounding Regions are compatible with gender equality under the rights to equality and non-discrimination, and particularly:

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

The income management measures within the Ceduna and Surrounding Regions are compatible with gender equality under the rights to equality and non-discrimination. As discussed above, income management is aimed at achieving a legitimate objective and is targeted to vulnerable people on specified income support payments who meet a certain criteria, as opposed to being targeted to persons who have a particular characteristic, such as gender.

A person who is in receipt of a 'category H' welfare payment may be eligible for the income management measures introduced into Ceduna and Surrounding Region so long as they also meet other criteria. The 'eligibility' payments under this category are not payments which are targeted to women or which are known to be received predominately by women, such as Family Tax Benefit which is not, on its own, an eligibility payment for the purposes of the programme.

To the extent that the income management programme may limit the rights of women to full enjoyment of equality and non-discrimination, as indicated above (see racial discrimination) in the case of the Vulnerable Welfare Payment Recipients measure of income management, an assessment or set of specific criteria is used in the first instance to determine whether income management would help that particular individual or family. This assessment is gender neutral and proportionate to achieving the objectives of income management. Ongoing support is then provided on a case-by-case basis. Women can also choose to volunteer for income management if they decide that it would be beneficial to themselves and/or their family. A significant proportion of people consulted during community consultations were women, and, given the outcomes of the consultations were positive. This suggests that there is strong support for the introduction of the measures from women in the communities. It is worth noting that there was also strong support from women in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands for the introduction of income management in that location.

In other areas where the two measures set out in this Determination already operate, data suggests that women are less likely than men to have income management applied under the Vulnerable measure, with only 43% of participants being female. Additionally, women are more likely than men to volunteer with 58% of all participants in the voluntary measure being women. Evaluations of income management have found that women in particular value being able to volunteer for income management and have found it beneficial in reducing humbugging.

2. Rights to social security and an adequate standard of living

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

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

In relation to engaging the right to social security, the United Nations Committee on Economic, Social and Cultural Rights has stated that implementing this right requires a country to, within its maximum available resources, provide 'a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.

Income management does not limit the right to social security as the programme itself does not detract from the eligibility of a person to receive income support or reduce the amount of a person's social security entitlement. Instead, it provides a mechanism to ensure that certain recipients of social security entitlements who are found to be vulnerable use a proportion of their entitlement to acquire essential goods and services such as rent, utilities and food. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access and maintain benefits 'in cash or in kind'. The programme does not at all detract from the situations in which someone has a right to social security, such as unemployment and workplace injury, and family and child support, it simply supports a person further once they have achieved their right to receive social security.

With regards to the right to an adequate standard of living, income management does not limit this right given that the programme supports individuals to achieve and maintain an adequate standard of living through the purchase of essential goods and services, including food, clothing, water and housing, which are all classified as priority needs under Part 3B of the Act and which income managed funds can be used to purchase. The programme therefore aims to advance this right through ensuring that money is available for priority goods and services such as housing, food and clothing, in situations where individuals need additional support to meet these needs. In turn, this helps stabilise an individual's living circumstances and financial situation, enabling them to focus on caring for children and/or joining or returning to work.

Income management does not restrict the availability, adequacy and accessibility of essential needs required to maintain an adequate standard of living. The availability, adequacy and accessibility of essential needs is maintained through the ability of income managed recipients to purchase goods and services through a range of payment options, including via direct deductions to third parties through the Department of Human Services and a wide footprint of merchants which accept BasicsCard, both within and outside of areas in which income management currently operates. Recipients are not required to pay for replacement BasicsCards. The process is much simpler to access than through mainstream banking services, where non-income managed funds would usually be held, and there is much more tailored and intensive support available.

3. Right to privacy

1.369 The committee therefore seeks the Minister for Social Services' advice as to whether the restrictions on the autonomy of individuals to control their own finances through income management measures is compatible with the right to privacy, and particularly:

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

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

As discussed above, the income management programme is aimed at achieving a legitimate objective. The programme does not limit the right not to have one's privacy, family and home unlawfully or arbitrarily interfered with. In the case of the Vulnerable Welfare Payment Recipients measure of income management, income management is lawfully targeted and may be triggered via an assessment or set of specific criteria used to determine whether income management would help that particular individual or family - it is not applied in a blanket approach. Individuals can also choose to volunteer for income management if they decide that it would be beneficial to themselves and/or their family, which is not imposed.

It has been noted in evaluations that some people may feel ashamed by having income management applied. However, these evaluations also note that other people have found a sense of pride in being able to better manage their money and meet their basic needs. In all areas where income management is in operation, a Voluntary measure is in operation alongside the compulsory measures to reduce the likelihood of a person being stigmatised by income management.

With the reduced likelihood of a person being stigmatised through the concurrent operation of the Voluntary measure, it is a reasonable and proportionate limitation to the right to privacy in order to promote other rights such as the rights of the child and the right to an adequate standard of living.

The allocation of income managed funds is arranged through consultation with the Department of Human Services to determine where funds should be directed, and an individual may also seek assistance through Financial Wellbeing and Capability services. Referrals to additional support services such as the Financial Wellbeing and Capability services are free and confidential.

4. Right to self-determination

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

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

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

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

The income management programme does not impinge on the right to self-determination as it does not affect the means of subsistence of political status of any person or group. While income management does to an extent limit a person's ability to freely spend their social security payments on excluded good (alcohol, Gambling products, tobacco and pornography), it does not impact on or interfere with their right to freely pursue their economic, social or cultural development.

This limitation is reasonable and proportionate to achieve a legitimate objective, as discussed above, and is necessary to promote other rights by ensuring that income support payments are used to meet the essential needs of vulnerable people and their dependents, and that these people are protected against risks of homelessness and financial exploitation. Any limitation that may occur is therefore necessary to pursue the legitimate objectives of the programme.

The people in Ceduna and Surrounding Region were also consulted about how income management might support people and what model would work best. These consultations found that people in the region were, on the whole, in favour of income management.[3]

Committee response

2.60 **The committee thanks the Minister for Social Services for his response. The committee considers that the response provides useful information which requires further analysis and inquiry by the committee. Noting that the committee is currently undertaking a broader inquiry: *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and intends to report in mid-2015, the committee will consider this response as part of that broader inquiry.**

Senator Dean Smith
Chair

3 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 22/09/2014) 2-9.

Dissenting Report

1.1 The committee has concluded that measures contained in the *Minerals Resource Rent Tax Repeal and Other Measures Bill 2014* may be incompatible with the right to social security and the right to an adequate standard of living. I disagree with these findings.

1.2 Of the measures contained in the bill, the committee drew attention to the deferral of the proposed increase in compulsory superannuation contributions, the repeal of the low-income superannuation contribution and the repeal of the low income support bonus.

1.3 The committee's judgement that deferring for ten years the gradual increase in the minimum percentage of wages, salary and other earnings that must be paid as superannuation contributions for the purposes of the superannuation guarantee (SG) charge may be incompatible with human rights appears to be based on a misunderstanding of both the underlying policy goal and the basic mechanism through which Australia's superannuation requirements operate.

1.4 Superannuation is a mechanism that removes a person's ability to access part of their earnings for a period of time, generally several decades, to achieve public policy objectives. The objective of compulsory superannuation is to help ensure that individuals do not leave themselves without funds to live on in their old age, and in so doing, can also reduce the cost to the public purse by reducing the need for individuals to draw on social security payments.

1.5 The committee has failed to establish that superannuation is a form of 'social security.' Superannuation accounts remain the property of the individual and the eventual benefits provided to holders are delivered solely based on contributions and the performance of their investments. Superannuation is a "private" market and therefore, it is not clear what is the "social security" aspect of superannuation contributions

1.6 Superannuation policy is a form of enforced saving. Attempting to draw simple links between the precise levels of mandated superannuation and the human rights outcomes of the policy is problematic. Different policy settings will involve different tradeoffs between how much on an individual's income they can access immediately and how much they can access at some future date.

1.7 For example, the logic underlying the committee's determination appears to be based on the notion that the greater the mandated superannuation saving the more positive the human rights outcome will be. This is by no means clear. Indeed, if the superannuation requirements are set so high as to deprive individuals of income that they need to support their immediate living standards — and potentially better prepare themselves for retirement, by purchasing a home for example — then such a policy might be harmful for the individual as well as the community overall.

1.8 As noted in the Explanatory Memorandum to the Bill, increasing compulsory superannuation payments impacts on an individual's take home pay as well as on business's capacity to employ workers in the context of Australia's slower overall economic growth:

> With mining investment at or near its peak, a transition to new sources of economic growth is needed. … Businesses are contending with high operating costs and current challenging economic conditions, which is placing pressures on their viability and their ability to employ people.
>
> Given that increases in the [Superannuation Guarantee] are funded largely from reductions in take-home wages or business profits, rephasing the SG could boost near-term economic activity. Any reductions in businesses' overall wages bills would lower their operating costs, while employees could also receive more take-home pay in the near term.

1.9 Another issue that appears to have been given insufficient weight in the committee's deliberations is the impact of the Act on the sustainability of the social security system.

1.10 The committee based its adverse finding on the Minister's alleged lack of explanation in response to the committee's request for further advice as to whether the measures in the bill are compatible with the rights to social security and the right to an adequate standard of living.

1.11 In my view, the Minister has explained that the measure is a proportionate and appropriate means of addressing the need to maintain a sustainable welfare system for the community. The Minister noted that given the current fiscal situation, the Act was both a necessary and proportionate response to the failure of the Minerals Resource Rent Tax (MRRT) to raise the forecast revenue to fund the associated measures, including the low-income superannuation contribution and the low income support bonus.

1.12 The Minister further stated that:

> The Act does not result in payments being reduced to below the minimum level necessary for recipients to meet their basic needs in relation to essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education.

1.13 Put simply, the tax failed to raise the revenue forecast. Given this, the repeal of the measures in the Act that were contingent on this revenue was a legitimate policy objective that was both prudent and fiscally responsible. I cannot therefore support the committee's conclusion that the measures may be incompatible with the right to social security and the right to an adequate standard of living.

Senator Matthew Canavan
Committee Member

Appendix 1

Correspondence

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
Parliament House
CANBERRA ACT 2600

19 NOV 2014

Dear Senator

I refer to your further letter of 28 October 2014, concerning the Parliamentary Joint Committee on Human Rights' review of the Commonwealth Cleaning Services Repeal Instrument 2014.

The Committee's assertion that the repeal of the Commonwealth Cleaning Services Guidelines may breach Australia's Human Rights obligations is unfounded as is the assertion that revoking the Guidelines disproportionately impacts workers based on their racial background. The latter allegation is, to be frank, repugnant. I firmly repudiate any such claims. Not even the unions make such a bizarre and offensive assertion.

I again re-iterate that the Cleaning Services Guidelines were a small scale Government procurement policy that would have applied to less than one per cent of the cleaning workforce. It is not the role of the Australian Government to impose policies over and above the safety net provided through the established workplace relations framework. In particular, it is not this Government's policy to permit special wage fixing deals for highly unionised industries, to misuse the Government's procurement rules to serve union interests, or to circumvent the role of the Fair Work Commission.

The Guidelines were flawed and applied to less than one percent of the entire cleaning industry. The Guidelines mandated that employers hand out union membership material and forced them to pay their workers well above award wages, without any requirement to demonstrate genuine productivity gains. The Committee's repeated views avoid engaging with and appears difficult to reconcile with my earlier advice that the Guidelines had no impact whatsoever on the more than 99 percent of workers in the industry that don't work in Government offices located in central business district locations. These matters do not give rise to human rights issues. Wage setting in Australia, is and has been for many years, the responsibility of the Fair Work Commission and not the Government of the day. The previous government's decision to issue the Guidelines, to give special arrangements to a tiny subset of workers in the industry, in cooperation with a particular union, undermined that role. The Cleaning Services Award 2010 sets minimum wages and conditions for all cleaners in Australia and, beyond this, higher wages and conditions should rightly be negotiated via enterprise bargaining. To assert otherwise and then suggest racial discrimination has the logical (but I am sure unintended) consequence of accusing the Fair Work Commission of such behaviour.

The existing enterprise bargaining system meant that many cleaners (through at least 65 Government cleaning contracts) were remunerated at the higher levels before the Guidelines commenced in 2012. Agencies continue to have the flexibility to engage cleaning companies that pay above award wage and conditions. Since the revocation of the Guidelines, that is still occurring.

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Our Ref BR14-003602

This exercise would indicate the Committee has seriously lost its way by attempting to conflate matters of government procurement, and the payment of wages above relevant minimum standards, with issues of human rights. Such an approach, if I may say, does not appear to be the most effective use of the Committee's time and serves only to discredit the more serious and worthy issues of human rights.

I trust the matter will rest.

Yours sincerely

ERIC ABETZ

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/18879

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Suite 1.111
Parliament House
CANBERRA ACT 2601

Dear Senator Dean

I refer to the comments of the Parliamentary Joint Committee on Human Rights in its *Eleventh Report of the 44th Parliament* concerning the *Commonwealth Places (Application of Laws) Act 1970* (the Commonwealth Places Act). I note that the Government cannot provide legal advice to the Committee. However, I provide the following general comments for your consideration.

The Committee has sought further information about categories of Commonwealth places to which the Commonwealth Places Act applies. Section 3 of the Commonwealth Places Act defines a 'Commonwealth place' to be a place (not being the seat of government) with respect to which the Commonwealth Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth. Section 52 of the Constitution gives the Commonwealth Parliament exclusive powers to make laws with respect to:

i) the seat of government of the Commonwealth and all places acquired by the Commonwealth for public purposes;
ii) matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth;
iii) other matters declared by the Constitution to be within the exclusive power of the Parliament.

Therefore, the most significant category of Commonwealth places is 'all places acquired by the Commonwealth for public purposes', such as airports, post offices, defence establishments and other Commonwealth places throughout the States.

As the status of a Commonwealth place can at times be a complex question, the Commonwealth Places Act was created to ensure consistency of laws across a state jurisdiction and provide legal certainty consistent with underlying federal considerations. The Commonwealth passed the Act to avoid the potential for unpredictable legal 'vacuums' created in places acquired by the Commonwealth. This followed the High Court decision in *Worthing v Rowell and Muston Pty Ltd (1970) 123 CLR 89* (Worthing), in which the High Court considered whether Mr Worthing could rely on state lifts and scaffolding legislation to support a personal injury claim against his employer. The High Court held (by a 4-3 majority) that state lifts and scaffolding legislation did not apply as the laws were enacted after the place in question had been acquired by the Commonwealth and become a Commonwealth place.

The Committee noted that it considers the Commonwealth Places Act is likely to be incompatible with human rights. It is unclear from the Committee's report on what factual basis the Committee has come to the conclusion that Australia is likely to be in breach of its obligations, nor does it identify which obligations or treaty the Commonwealth Places Act is inconsistent with. In response to these concerns, I wish to clarify that the Act is a facilitative Act which operates to 'pick up' state legislation and apply it in Commonwealth places except in certain circumstances. This is critical to the orderly operation of Australia's legal system. The constitutional position of the Commonwealth within the federation requires such arrangements in certain areas.

The Commonwealth Places Act picks up specific powers and obligations of state law which may have applied to a Commonwealth place in the federal context. In that sense, it is not intended to affect the balance of Australia's human rights obligations.

The Committee has also recommended that newly enacted state laws which would be picked up by the Commonwealth Places Act are subject to an assessment of human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. State laws are made by state parliaments and are subject to relevant state parliamentary processes. It would not be appropriate for the Commonwealth to assess the content of state laws for their human rights compatibility.

The Committee also recommended that the Commonwealth Places Act should be amended to provide that state laws apply only to the extent that they are compatible with Australia's obligations under international human rights law. I do not consider that this would be an appropriate reform. Australia, comprised of the Commonwealth and the States and Territories, has obligations under the international human rights treaties. The Commonwealth does not have responsibility to ensure the consistency of State and Territory laws with these obligations—that is a matter for the relevant Parliaments. As set out above, the purpose of the Commonwealth Places Act is to ensure consistency and certainty of laws across a state.

I trust that this information is of assistance to your Committee.

Yours sincerely

Michael Keenan

02 OCT 2014

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

31 OCT 2014

Our Ref MC14-030430

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

Dear Dean,

Thank you for the opportunity to respond to the Committee's *Twelfth Report of the 44th Parliament* insofar as it relates to the *Higher Education and Research Reform Amendment Bill 2014* (the Reform Bill).

A measure by measure analysis of the Reform Bill, as the Committee requested, is contained in the attached document. In summary, the Australian Government does not consider that the policy measures in the Reform Bill will limit human rights in any way. The Reform Bill is fully compatible with human rights, maintaining both the right to higher education and the right to equality and non-discrimination. Indeed, as outlined in the attachment, the measures expand access to subsidies for students undertaking sub-bachelor courses and those attending private and non-university institutions. The removal of the current FEE-HELP and VET FEE-HELP limits will also actually expand access and support the right to higher education.

In accordance with article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), all persons will be treated equally under this law. Any differential impact individuals comes as a result of their own circumstances depending on the cost of the course of study they choose to undertake, their employment and wage outcomes and when their income reaches the repayment threshold for the income-contingent loan scheme.

The reforms do not limit the right to access higher education or the right to non-discrimination for women or any other population sub-group. The proposed measures will instead increase the choices and pathways available for all students to pursue higher education. Protection for these important human rights is maintained through the Higher Education Loan Programme (HELP). Regardless of the course or institution at which a person is enrolled, they will be able to defer the full cost of their study through HELP. As at present, there will be no requirement to repay any HELP debt until a person's income reaches the minimum repayment threshold, and any repayments will be within moderate and reasonable limits, based on income.

At the same time, access to study and lifelong education will be encouraged through a range of measures, such as the extension of subsidies to additional courses and institutions and the removal of loan fees and loan limits, providing individuals with the opportunity to retrain or gain further qualifications.

In addition, the effect of the package as a whole in driving greater quality and economic prosperity needs to be considered. Currently, Australia's higher education system is not well positioned to meet the challenges of an increasingly competitive global market. Unless we act now, we run the risk of future generations of Australians being left behind. This is a balanced and necessary set of reforms that will help to ensure that in the face of growing costs and competitive pressures, all Australians will continue to be able to access quality higher education in the decades to come.

The attached measure by measure analysis outlines in detail why the Government does not consider the policy measures to limit human rights. It also contains further information on why these measures are being pursued and why they are proportionate to legitimate objectives.

I thank the Committee for its consideration of the Reform Bill.

Yours sincerely

Christopher Pyne MP

Encl. Detailed response to the Parliamentary Joint Committee on Human Rights

THE HIGHER EDUCATION AND RESEARCH REFORM AMENDMENT BILL 2014

Detailed response to the Joint Parliamentary Committee on Human Rights

The Higher Education and Research Reform Amendment Bill 2014 engages the right to education, including access to higher education on the basis of capacity, found in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the right to an adequate standard of living, found in article 11(1) of ICESCR, and the right to equality and non-discrimination, found in articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

A measure by measure analysis of the human rights implications of the Bill is provided below.

Schedule 1 Deregulation, expansion of demand driven system and other measures

Schedule 1 includes the following measures:

- the removal of the cap on the number of Commonwealth funded places in sub-bachelor degree courses, such as diplomas, advanced diplomas and associate degrees
- the introduction of Government subsidies to bachelor and sub-bachelor courses at private universities and non-university higher education providers
- the reduction of subsidies for new Commonwealth supported students at universities by an average of 20 per cent
- the removal of the current maximum student contribution amounts
- the merging of the FEE-HELP and HECS-HELP loan schemes for all higher education students
- the removal of the up-front payment discount for HECS-HELP loans and the voluntary repayment bonus for HELP loans
- the removal of the FEE-HELP lifetime limit and loan fee.

The impact of these measures on the right to education, and the right to equality and non-discrimination, are analysed separately below. The reforms will affect the full range of sub-groups with the student population, including women who make up the majority of the students. In 2013, there were almost a million domestic higher education students, with women comprising around 56 per cent of all students enrolled, as well as of all students commencing in that year. As such, the reforms to higher education clearly have important implications for women, as they do for men, both in terms of their impact on fees and subsidies, and on access and quality.

Does this schedule limit human rights?

Expansion of the demand driven system to include sub-bachelor courses

Right to education

The Government believes that this measure provides for more opportunity and choice in the higher education system, supporting the right to education for around 48 000 additional students each year by 2018. This measure removes the discriminatory treatment of students who wish to enrol in sub-bachelor courses, including those at private and non-university higher education providers. These sub-bachelor courses provide vocational qualifications as well as effective pathways to further

education for disadvantaged students. Expanding Government subsidies to these places will mean that they are more affordable for students, which will in turn increase access to higher education.

Right to equality and non-discrimination

This measure is fully compatible with the right to equality and non-discrimination. The extension of subsidies to include sub-bachelor courses will provide more opportunities for all people to access higher education suitable to their needs and capabilities. In particular, people who take time out of the workforce will have access to more Government support for retraining or updating their qualifications as a result of the extension of subsidies to sub-bachelor courses.

Proportionality to policy objectives

The investment in this measure is proportionate to the need to improve access to sub-bachelor courses at higher education providers, to provide opportunities for vocational training and pathways to higher education, particularly for disadvantaged students.

Extension of subsidies to private and non-university higher education providers

Right to education

The Government believes that this measure is fully compatible with the right to education, providing for an expansion in access to include students undertaking courses at private universities and at non-university higher education providers. The extension of subsidies will create greater competition in the higher education market, expanding the choices and opportunities for students, and creating a downward pressure on course costs.

Private providers have indicated that, as a result of the subsidy, they will be able to decrease their course costs. This will increase the choices available to students and will remove a significant financial barrier to higher education facing many students.

As a result of this measure, the Government expects that by 2018 around 35 000 additional students each year will gain access to Government subsidies for their education.

Right to equality and non-discrimination

This measure will not infringe on the right to equality and non-discrimination. It will remove the discriminatory treatment against students attending private and non-university providers. Currently, students who wish to undertake their undergraduate study at these providers are not eligible to receive any Government subsidy for their education and must pay a loan fee. Private universities and non-university higher education providers may be able to deliver courses more suited to a student's needs and, under this measure, will be eligible to receive Government support, removing this element of discrimination against students attending private and non-university providers. This measure will enable students to have equal access to Government subsidies for higher education, regardless of their choice of provider.

Additionally, more women than men are enrolled in courses at private providers. This means that women are more likely to benefit from the extension of the demand driven system to include private providers. As private providers have indicated they will be able to lower course costs, women will

benefit from the reduced financial burden of undertaking study at the provider of their choice, and will be able to access Government subsidies.

Proportionality to policy objectives

The investment in this measure is proportionate to the need to improve access to higher education, and reduce costs for students wishing to study at private and non-university providers. As well as improving access, this measure will drive greater competition and quality across the sector.

To manage the costs, non-university providers will be funded at a lower rate (70 per cent) which recognises the unique, and often legislated, demands on universities, including those relating to research and community outreach, while still providing a level of funding that will encourage competition.

Reduction of subsidies for new Commonwealth supported students at universities

Right to education

This measure will reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent. Commonwealth Grant Scheme funding tiers will also be simplified and restructured from eight to five funding tiers, providing a more coherent basis for funding different units of study with regard to teaching methods and the infrastructure required to support delivery.

This measure will not of itself increase course costs for students. Private providers receiving Government subsidies for the first time will have the ability to reduce course costs, which will provide benefits for those who choose to enrol at these providers.

There will be no negative impact on the right to education. This right will continue to be assured by the HELP scheme which will ensure that all higher education students at registered providers will be able to defer the full cost of their study. There will not be any requirement to repay any HELP debt until a person's income reaches the minimum repayment threshold of more than $50 000 per year, and any repayments will continue to be within moderate and reasonable limits, based on income.

Right to equality and non-discrimination

This measure will not limit the right to equality and non-discrimination. The reduction of subsidies applies to all new Commonwealth supported students equally, regardless of their course. There is no reason to expect any disproportionate impact on women. In fact the new cluster rates are specifically designed to moderate the impact on important disciplines such as teaching and nursing, in which women are more represented.

Proportionality to policy objectives

This measure will save $1.95 billion over four years. Given it can be achieved without compromising access, it is proportionate to the objective of contributing to the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system.

Removal of the cap on student contribution amounts

Right to education

The introduction of greater competition into the higher education market, in the form of fee deregulation, will result in greater price differentiation among providers. Higher education providers will be able to set their own course fees, and to compete on price and quality to attract students.

Competition between providers will create downward pressure on fees. As indicated above the right to education will continue to be protected by the HELP scheme which will ensure that all eligible higher education students will be able to defer the full cost of their study and will not be required to make any repayments until they are earning sufficient income.

Right to equality and non-discrimination

The Government does not believe that this will limit the right to equality and non-discrimination in any way. It is an explicit aim of these reforms to improve choice and ensure that all people, regardless of gender, will have the opportunity to choose the course that best suits their needs.

Proportionality to policy objectives

This policy is critical to achieve the long-term objective of improving Australia's higher education sector to compete in a global market. It will enable higher education providers to improve the quality and diversity of course offerings, in order to stand out in the higher education market, which will help to promote greater quality and choice across the system.

Merging of the FEE-HELP and HECS-HELP loan schemes

Right to education

This measure will have no impact on the right to education. As the major differences between the HECS-HELP and FEE-HELP loan schemes will be removed in this package of reforms, the two loan schemes will be merged to simplify arrangements for students and providers. The removal of these anomalies for students will support and expand the right to education, as detailed below in the discussion of 'Removal of the loan fee and lifetime limit on FEE-HELP loans'. The eligibility criteria for accessing a HELP loan have not been altered, ensuring ongoing access to higher education for all student groups that previously had access to the HECS-HELP and FEE-HELP schemes.

Right to equality and non-discrimination

This measure will not impact on the right to equality and non-discrimination.

Proportionality to policy objectives

This measure is a logical extension of other measures, providing for a simplification of existing programme arrangements without any impact on access.

Removal of the up-front payment discount and the voluntary repayment bonus for HELP loans

Right to education

This measure is fully compatible with the right to education. It would not prevent a person from accessing higher education. HELP will continue to be available to allow students to defer their tuition costs if they choose not to pay these up-front.

Right to equality and non-discrimination

The removal of the voluntary repayment bonus and the up-front payment discount restores the right of all students to be treated equally. Currently some students obtain a financial benefit because they may have sufficient income to make voluntary repayments, or can afford to pay up-front for their courses.

Proportionality to policy objectives

This measure will contribute to sustainability of the HELP system and repair of the Budget without any negative impact on access.

Removal of the loan fee and lifetime limit on FEE-HELP loans

Right to education

The removal of the lifetime loan limit and the loan fee for FEE-HELP under this schedule also removes barriers to higher education. Under the current HELP scheme, the lifetime limit that a person may borrow is $96 000, or $120 002 for medicine, dentistry and veterinary science courses.

The HELP loan fee and limit can create barriers to access for people who are unable to afford up-front contributions, particularly when they have incurred HELP debts for previous study. If a student's FEE-HELP balance is such that the fees charged by the provider would cause them to go over the limit, and they do not have private resources, the system effectively denies them the opportunity to study at a private provider or in an unfunded sub-bachelor or postgraduate course. In contrast, undergraduate students at public universities are not subject to any limit and can undertake as many courses at this level at public universities as they choose.

This represents a major inequity in the system, discriminating against students attending private providers and undertaking unsubsidised sub-bachelor courses. The lifetime limit is also a potential barrier to access for students in unfunded postgraduate courses. The removal of the loan fee and lifetime limit is critical to addressing the inequities for these various categories of students.

Given the phase out of undergraduate fee-paying places in public universities, the FEE-HELP loan fee now only applies to students at private universities and non-university higher education providers. In addition, FEE-HELP loans tend to be larger on average than those incurred by students in Commonwealth supported places. The limit on loans mean that there may be significant limitations to access to retraining or to further study for an individual who already has a HELP loan, particularly when the burden of the loan fee is added to the existing cost of the course. Abolition of the loan fee and the lifetime limit will increase accessibility to higher education.

Right to equality and non-discrimination

The removal of the loan fee and the loan limit ensures equitable access for students, regardless of the type of course or the provider the student has chosen. Removing the loan fee will reduce costs for students currently studying without any Commonwealth subsidy and it will also remove pricing inequity between public and private providers, discussed above. Based on 2013 data, it is estimated that removing the loan fee will benefit more than 50 000 higher education students per year. The average loan fee in 2013 for such students was around $2600 per year.

Additionally, the removal of the lifetime HELP loan limit and the loan fee will provide more pathway options and opportunities to retrain or to update qualifications if they have taken time out of the workforce. This can be particularly important for women given their tendency to have greater caring responsibilities.

Additionally, there are more women in fee-paying places than men. This indicates that the FEE-HELP loan fee has a greater financial impact on women than men. By removing the punitive FEE-HELP loan fee and lifetime limit there will be fewer financial barriers to access to higher education for women. More women are likely to benefit from these changes than are men.

Proportionality to policy objectives

This measure will ensure that students are not denied access to higher education because they cannot meet the upfront costs, and will ensure the costs of higher education are manageable for all students. It is also a critical element in ensuring consistent treatment of students and providers across the higher education system.

Schedule 2 New Commonwealth Scholarship Scheme

Schedule 2 of the Bill provides for the creation of a Commonwealth Scholarship scheme. This would require providers with 500 or more equivalent full time Commonwealth supported students to set aside 20 per cent of additional revenue raised from the deregulation of student contributions to a scholarship fund to support disadvantaged students.

Does this schedule limit human rights?

The measure will help support an individual's right to education by creating a Commonwealth Scholarship scheme to expand access to higher education for disadvantaged students. This scholarship scheme will be run by providers to provide tailored, individualised support for disadvantaged students enrolled in higher education at that provider. This could take the form of help with costs of living while they study, fee exemptions, relocation expenses, or tutorial and other academic support.

This measure will support the right to education for disadvantaged students by removing barriers to further study. The Commonwealth Scholarship scheme may also promote the right to an adequate standard of living, depending on what type of support a higher education provider offers for its students.

This measure also guards against the possibility of a two-tiered system emerging by ensuring that all providers receiving significant additional revenue, including the largest and most prestigious universities, will need to meet access and equity objectives.

There are more women from disadvantaged backgrounds who study in higher education than disadvantaged men, and as such women are more likely than men to gain the benefits of the new Commonwealth Scholarship scheme.

Are the actions taken proportionate to the policy objective?

This measure promotes equity and access to higher education. Requiring providers to set aside one dollar in every five of additional revenue to support disadvantaged students is reasonable. This will create many thousands of scholarship opportunities for disadvantaged students, and it is proportionate to the policy objective of promoting equity and access to higher education for disadvantaged students.

Schedule 3 Indexation of HELP debts

Schedule 3 changes the indexation of HELP loans from the Consumer Price Index (CPI) to the 10 year Government bond rate, capped at 6 per cent per annum.

Does this schedule limit human rights?

Right to an adequate standard of living

This measure will not limit the right to an adequate standard of living. Replacing CPI indexation with bond rate indexation will not create increased costs for students while they study, and they will still be able to defer the entire cost of their tuition through the HELP scheme. As is currently the case, they will not be required to make any repayments until they are earning a good income. This measure will not lead to any change to the rate of annual repayments or the proportion of annual household income directed towards repaying their HELP debt. Therefore, while graduates may take longer to repay their HELP loans, there will be no reduction in their annual disposable income as a result and no impact on their capacity to maintain an adequate standard of living.

Right to education

This measure will not limit the right of a person to access higher education. It is possible that the application of the bond rate of indexation to HELP debts may create an incentive for some students to pay back their debts earlier or pay their costs upfront, however there will be no requirement for students to pay more before or during their study as a result of this measure. HELP will continue to provide the opportunity for all Australian students to defer their tuition costs.

Furthermore, the measure will ensure the sustainability of HELP for the long term, meaning that future generations of students will also be able to borrow their share of the cost of their tuition.

Right to equality and non-discrimination

Under the current system, the population that tend to earn lower incomes or spend time out of the workforce take longer to repay their debts. On average, women tend to repay their student loans over a longer period of time than men. This is in a large part due to the greater likelihood that women will elect to work part time or exit the workforce, and the greater likelihood of being in lower paid professions. This results in the Government on average providing women with a higher deferral subsidy as a percentage of outstanding debt (refer Table 1 below).

The Government also provides an effective subsidy to students who will never repay some or all of their debt, Debt Not Expected to be Repaid (DNER). On average women benefit more from this subsidy than men, and this will not change under the reforms (refer Table 1).

The reforms may increase the time it will take for part time workers, or those who elected to leave the workforce, to repay their HELP debt. However, this would apply to all such groups, regardless of gender.

Women will not face any limitations to their right to access a HELP loan, and therefore higher education courses, as a result of the change in indexation. They will not have to pay any of their

tuition costs upfront, and will have access to Government subsidies for more courses, including sub-bachelor courses, and courses at private providers, that may be more suitable to their needs.

Are the actions taken proportionate to the policy objective?

This measure will more accurately reflect the cost of borrowing to the Government, recognising the rapidly increasing cost to the Government of borrowing money in order to provide HELP loans. This measure will also effectively remove the indirect subsidy that all taxpayers contribute to higher education students.

The Government 10 year bond rate, with a cap of 6 per cent per annum, is much lower than the rate of a commercial loan. This means that a student would still pay very little interest on their HELP loan compared to an equivalent loan with a bank or a financial institution. This measure will provide certainty for students through the creation of the interest rate 'safety cap', ensuring that HELP loans will not be indexed at a rate higher than 6 per cent per annum.

The proposed change to the bond rate is proportionate to the policy objectives of repairing the Budget, and ensuring that the HELP scheme remains sustainable into the future.

Table 1: Outstanding HELP debt by gender and age as at 30 June 2013

Age on completion	Outstanding debt ($m)	Deferral subsidy as a percentage of debt	DNER as a percentage of debt
Males			
- less than 30	9,778	17.0%	19.5%
- 30 to 55	2,161	11.9%	29.1%
- over 55	114	5.0%	66.1%
All Males	12,053	15.9%	21.7%
Females			
- less than 30	12,503	18.2%	20.7%
- 30 to 55	3,212	13.2%	26.4%
- over 55	174	5.1%	65.7%
All Females	15,889	17.0%	22.4%
All groups	27,942	16.6%	22.1%

Source: Australian Government Actuary

Note: deferral subsidy is the cost to the Government of providing students with concessional loans which have no real interest rate. That is the difference between the Government's cost of borrowing and the Consumer Price Index.

Schedule 4 Minimum repayment income for HELP loans

Schedule 4 of the Bill creates a new repayment threshold for HELP loans. When a person's annual income reaches $50 638 they would be required to repay the HELP debt at a rate of 2 per cent per annum.

Does this schedule limit human rights?

Right to an adequate standard of living

This schedule does not impact on the right to an adequate standard of living. The $50 638 minimum repayment threshold is well above the minimum liveable wage, and will be annually adjusted to take inflation into account.

Additionally, to minimise the impact of the introduction of a lower minimum repayment threshold, graduates who earn more than $50 637 but less than the previous minimum repayment threshold (estimated to be $56 264 in 2016–17) would only be required to pay 2 per cent of their annual income towards the HELP scheme. Taxpayers with incomes in this range would be required to pay back around $1013–$1125 in 2016–17.

Those who have accessed a HELP loan and believe that they are experiencing serious financial hardship will be able to apply to the Australian Taxation Office to defer their payments, or to the Department of Finance to have their debt waived, further safeguarding the right to an adequate standard of living.

For the above reasons, there is no risk that this measure will limit the right to an adequate standard of living.

Right to education

This measure does not limit the right to access higher education. Annual payments will remain within the current reasonable limits, and will continue to be income-contingent, which will ensure this measure does not impact on the right to an adequate standard of living or create a significant deterrent to accessing higher education.

Right to equality and non-discrimination

This measure is fully compatible with the right to equality and non-discrimination on the grounds of gender. The new repayment threshold applies to everyone, regardless of gender and still represents an income substantially above the minimum liveable wage.

Women are more likely than men to work part-time, and to remain under the minimum repayment threshold. This means that women are less likely to be required to make any repayments at all on their HELP loans. Furthermore, when a person's income, regardless of gender, falls below the repayment threshold for any financial year, they would not be required to direct any proportion of their income towards repayments.

Are the actions taken proportionate to the policy objective?

This measure is proportionate to the policy objective of ensuring the long-term sustainability of HELP, while not adversely impacting on the lives of graduates by requiring repayments on a low income level. By reducing the minimum income repayment threshold, the Government will ensure that individuals who have the financial means will begin to repay their HELP debts earlier and will reduce the level of doubtful debt incurred through HELP loans.

Schedule 5 Research funding and research students

Schedule 5 of the Bill will provide funding for the Future Fellowships scheme, and amend the Australian Research Council Act (ARC Act) to apply an efficiency dividend for 2014–15, before applying indexation to existing amounts and adding an additional forward estimate for funding into the 2017–18 financial year.

This schedule will allow Research Training Scheme (RTS) students to be charged a capped student contribution amount, which will allow providers to offset the 10 per cent reduction in funding for the RTS announced in the Budget.

Does this schedule limit human rights?

This measure will not limit the right to education. RTS students that are charged a tuition fee amount will be able to defer the fee through the HELP scheme in the same manner as tuition fees for undergraduate places subject to meeting the eligibility criteria for the HELP scheme. This will ensure that eligible RTS students will not have to pay this contribution amount upfront.

Additionally, the low cap of $3900 per EFTSL for high-cost courses and $1700 per EFTSL for low-cost courses will ensure that this price signal is not a deterrent for students to commence higher degrees by research. This is a small proportion of the total cost of the RTS course, and will not restrict access to tertiary education or higher degrees by research.

Additionally, the amount provided over the forward estimates to the ARC is a substantial increase in funding. This will allow the ARC to fund high-quality research to address the challenges Australia will face in the future, and to improve the quality of people's lives, as well as support the development of new industries to remain competitive in the global knowledge market. The overall increase in funding will expand the capacity of the ARC to support higher degrees by research, and graduate research capabilities.

Are the actions taken proportionate to the policy objective?

The RTS measure will save approximately $174 million over three years, and will help to create a sustainable funding model for research students into the future. Given the significantly better employment and wage outcomes that postgraduates have when compared to bachelor level graduates, it is reasonable to ask RTS students to contribute a small proportion of the total cost of their course.

The application of a one-off efficiency dividend is proportionate to the policy objective of repairing the Budget, while the continuation of funding is reasonable given the importance of research to Australia's continued economic growth into the future.

Schedule 6 VET FEE-HELP loan fees and limits

Schedule 6 provides for the removal of the VET FEE-HELP loan fee and the lifetime loan limit.

Does this schedule limit human rights?

As discussed under Schedule 1, the removal of the loan fee and the lifetime loan limit will remove barriers to higher education and improve access for students. This is fully compatible with the right to education.

Restricting the amount that a student may borrow for their education impedes the ability of people to retrain, change careers or update their qualifications after a period out of the workforce. This measure will create more pathways for students and workers who need to access additional study or training over their lifetimes, without the barrier of a punitive loan fee or up-front costs for their course.

It is estimated that over 80 000 students undertaking vocational education and training will benefit each year from the removal of the loan fee. In 2013, the average VET FEE-HELP loan fee was around $1600 per student.

Most VET FEE-HELP students are women. In 2013, two-thirds of students accessing VET FEE-HELP loans were women (67 100 out of 100 000). Eligible female students were slightly more likely to access a loan (83 per cent) than eligible male students (79 per cent). As a result, removal of the VET FEE-HELP and loan-fee limits will be of significant benefit to women, and can be expected to further improve their access to vocational education and training and therefore opportunities for labour force participation.

Are the actions taken proportionate to the policy objective?

This measure is proportionate to the objective of ensuring equitable treatment and removing elements of discrimination against students studying VET courses in unsubsidised places. This will protect their right to access relevant VET courses regardless of their capacity to pay. The cost of these measures is manageable in the context of the overall balanced package of reforms.

Schedule 7 HECS-HELP benefit

Schedule 7 discontinues the HECS-HELP benefit.

Does this schedule limit human rights?

This will not have adverse effects on higher education access. The Kemp-Norton Review of the Demand Driven System found that the HECS-HELP Benefit has not created any significant incentive for students to choose courses in the targeted areas of maths, science, education or nursing since its inception in 2008 and recommended that it be removed.

Furthermore, the uptake of the programme was low and did not justify the costs of administering the scheme. In 2011–12 only 2500 benefits were granted to graduates, and in 2012–13 only 7220 benefits were granted.

In light of this, the Government has decided to remove this ineffective programme. It will not impede access to higher education, or affect eligibility for HELP loans in any way.

Are the actions taken proportionate to the policy objective?

The removal of the HECS-HELP benefit is reasonable given that it was not successful in creating behavioural change, or providing an incentive for students to choose courses in the targeted areas.

The removal of this programme is expected to save $87 million over three years from 2015–16. The discontinuation of inefficient schemes such as the HECS-HELP benefit will contribute to the repair of the Budget.

Schedule 8 Indexation of amounts

Schedule 8 replaces the Higher Education Grants Index calculation with CPI.

Does this schedule limit human rights?

This schedule is fully compatible with the right to education. The calculation of all higher education grants under the *Higher Education Support Act 2003* at CPI will ensure the continued and sustainable growth of funding.

Are the actions taken proportionate to the policy objective?

It is reasonable to simplify the indexation arrangements for higher education grants. This measure is part of a government-wide initiative to streamline and reduce the complexity of Government programmes.

This measure will also ensure the sustainable growth of Government funding to the higher education sector, including research grants and Australian Postgraduate Awards. It is proportionate to the policy objective of ensuring the continued excellence of Australia's higher education providers, as well as the objective of creating sustainable funding arrangements into the future.

THE HON STEVEN CIOBO MP
Parliamentary Secretary to the Treasurer

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

11 DEC 2014

Dear Senator Smith

Thank you for your letter, originally directed to the Treasurer, regarding the *Minerals Resource Rent Tax Repeal and Other Measures Bill 2014* (the Bill). I am responding on the Treasurer's behalf.

I note the Bill passed both Houses of Parliament on 2 September 2014 and the *Minerals Resource Rent Tax Repeal and Other Measures Act 2014* (the Act) received Royal Assent on 5 September 2014.

Subsequent to the Bill passing, the Parliamentary Joint Committee on Human Rights sought further information as to whether it is compatible with the right to social security and the right to an adequate standard of living.

Given the current fiscal situation, the Act is a necessary and proportionate response to the failure of the Minerals Resource Rent Tax (MRRT) to raise the forecast revenue to fund the associated measures. The objective of the Act is to ensure the measures linked to the revenue expected from the failed MRRT did not result in the Government living beyond its means.

The Act does not result in payments being reduced to below the minimum level necessary for recipients to meet their basic needs in relation to essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education. The Government is advised the Act is therefore compatible with human rights.

I trust this information will be of some assistance to the Committee.

Yours sincerely

Steven Ciobo

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The Hon Kevin Andrews MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
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MN14-001018

22 SEP 2014

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

Dear Senator Smith Dean,

Thank you for your correspondence of 26 August 2014 about the Parliamentary Joint Committee on Human Right's (the Committee's) examination of the Social Security (Administration) (Declared income management area – Ceduna and surrounding region) Determination 2014 (the legislative instrument), for which I have portfolio responsibility.

Thank you also for enclosing the Committee's *Tenth Report of the 44th Parliament* setting out the Committee's comments and request for further advice following its examination of the legislative instrument. Please find enclosed my response as requested.

Should you wish to discuss this matter further please contact Mr Chris Browne in my office on 02 6277 7560.

Yours sincerely

KEVIN ANDREWS MP

Encl.

Response to the Parliamentary Joint Committee on Human Right's examination of the Social Security (Administration) (Declared income management areas – Ceduna and Surrounding Region) Determination 2014 [F2014L00777]

General advice

Income management supports vulnerable individuals and families by helping to ensure that a portion of a person's income support and family payments are spent on essential needs, and limiting expenditure on excluded items such as alcohol, tobacco, pornography and gambling goods and services.

The programme promotes the protection of human rights by ensuring that income support payments are spent in the best interests of welfare payment recipients and their dependents, whilst also helping to improve their budgeting skills so that they can meet priority needs. To the extent that the programme limits human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of the programme [as set out in Part3B of the *Social Security (Administration) Act 1999*], which include:

- reducing immediate hardship and deprivation by directing welfare payments to the priority needs of recipients, their partner, children and any other dependents;
- helping affected welfare payment recipients to budget so that they can meet their priority needs;
- reducing the amount of discretionary income available for alcohol, gambling, tobacco and pornography;
- reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments;
- encouraging socially responsible behaviour, particularly in relation to the care and education of children; and
- improving the level of protection afforded to welfare recipients and their families.

Evaluations of the income management programme to date have found that there are many positive perceptions that income management promotes socially responsible behaviour and improves wellbeing for communities and children. The programme has been found to help direct funds towards people's priority needs and that the BasicsCard has been a useful tool to ensure income managed funds are spent on essential items.

In addition to engagement of the human rights obligations as outlined in the committee's report, *The Tenth Report of the 44th Parliament*, income management also supports a range of other human rights obligations. The right to housing is promoted by helping to ensure that a portion of a person's income support payments is spent on priorities such as housing costs (for example, rent). The programme also promotes the rights of children by ensuring that a portion of income support payments is used to cover essential goods and services, which in turn improves the living conditions for the children of income support recipients. It therefore advances the right of children to benefit from social security, the right of children to the highest attainable standard of health and the right of children to an adequate standard of living (articles 24, 26 and 27 of the Convention on the Rights of the Child, respectively).

The Legislative Instrument in question establishes the Ceduna region as a declared income management area for the purposes of Part 3B, Section 123UCA, and 123UFA of the *Social Security (Administration) Act* (the Vulnerable and Voluntary measures of income management). Due to the nature of the Voluntary measure, it is unlikely to be incompatible with human rights obligations given that individuals choose to be on this measure and any limitation on their rights is not imposed. The State of South Australia has previously been declared a Child Protection Income Management area.

Consultations

The Government funded Ninti One Ltd to conduct a scoping study in August 2013 in Ceduna and the neighbouring communities of Oak Valley, Scotdesco, Koonibba and Yalata to ask people what they thought about income management. Community members, service providers and a range of key stakeholders, particularly the West Coast Alcohol and Substance Misuse Action Group took part in the study to gauge community views on income management and its potential to assist with some of the social issues facing communities in the Ceduna region. A summary of the final project report is available on the Ninti One website http://www.nintione.com.au/news/new-report-ceduna-income-management-report

The Department held consultations about income management in the Ceduna region in South Australia in February 2014. Over 50 meetings were held with community members as well as key stakeholders including health clinics, local councils, Aboriginal corporations, outback stores, local organisations, the police and schools.

Overall, feedback from the consultations was positive with community members acknowledging problems with alcohol and drug abuse and some children not receiving enough food. In addition, participants at various meetings supported voluntary income management and recognised that the BasicsCard, in particular, may assist with reducing substance abuse and provide more food for children.

The final report can be found at http://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/income-management/income-management-ceduna-region-consultations-report

Advice on specific human rights compatibility issues

1. **The rights of equality and non-discrimination**
    a. **Racial discrimination**

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

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

The relevant international treaties define discrimination as 'impermissible differentiation of treatment among persons or groups that result in a person or a group being treated less favourably than others, based on a prohibited ground for discrimination, such as race'. However, the United Nations Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant'.

As discussed above, the introduction of income management to Ceduna and Surrounding Region is aimed at achieving a legitimate objective: to reduce immediate hardship and deprivation by directing welfare payments to the priority needs of recipients, their partner, children and any other dependents, amongst other things.

Income management is not applied based on race or cultural factors. People may go onto income management for a range of reasons. In areas where there is income management, people can be eligible for income management because they:

- receive particular welfare payments, and/or
- have been referred for income management, or
- have volunteered to participate.

The introduction of income management into Ceduna and Surrounding Region does not discriminate on the basis of race. Anyone residing in the prescribed area is eligible for income management, as long as specific eligibility criteria are met. Income management is therefore not targeted at people of a particular race, but to income support recipients who meet particular criteria.

The Ceduna region was chosen as a new site for the operation of income management following strong support from the community and having regard to a range of criteria, including unemployment levels, youth unemployment, skills gaps, the number of people receiving welfare payments, and the length of time people have been on income support payments. These factors are reasonable, objective and non-race based criteria.

To the extent that the income management measures may disproportionately affect Indigenous people, any such limitation is reasonable and proportionate to achieve the

objectives of the programme. As evidenced by the evaluations of income management conducted to date in the locations in which it operates, the programme has led to an increase in funds being directed towards people's priority needs, leading to improvements in wellbeing for individuals, families and children.

There are two distinct pathways through which a person may be determined to be a Vulnerable Welfare Payment Recipient. The first involves a comprehensive assessment by a qualified social worker, and the second involves a person meeting a set of criteria that deems them Vulnerable due to the payment type that they receive, or have received *(see Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*). The cultural background of the individual and his or her family is not relevant to this process. In relation to Child Protection Income Management, which is not yet operating in Ceduna and Surrounding Region, it is expected that the same model operating in Playford will be introduced following finalisation of the bilateral agreement with the South Australian Government. This involves a consent-based approach to referrals by the Department for Education and Child Development to the Department of Human Services. Individuals can also choose to volunteer for income management if they decide that it would be beneficial to themselves and/or their family.

Sufficient regard has been paid to the rights and interests of those affected. Extensive consultations undertaken in the region found that, on the whole, people were in favour of the introduction of income management. Protections to safeguard against error or abuse, via review and appeal rights, are in place under the programme. There are also set criteria which must be followed to assess whether income management would help an individual, preventing any abuse in discretionary application.

b. Gender discrimination

1.350 The committee therefore seeks the advice of the Minister for Social Services as to whether income management measures within the Ceduna and Surrounding Regions are compatible with gender equality under the rights to equality and non-discrimination, and particularly:

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

The income management measures within the Ceduna and Surrounding Regions are compatible with gender equality under the rights to equality and non-discrimination. As discussed above, income management is aimed at achieving a legitimate objective and is targeted to vulnerable people on specified income support payments who meet a certain criteria, as opposed to being targeted to persons who have a particular characteristic, such as gender.

A person who is in receipt of a 'category H' welfare payment may be eligible for the income management measures introduced into Ceduna and Surrounding Region so long as they also meet other criteria. The 'eligibility' payments under this category are not payments which are targeted to women or which are known to be received predominately by women, such as Family Tax Benefit which is not, on its own, an eligibility payment for the purposes of the programme.

To the extent that the income management programme may limit the rights of women to full enjoyment of equality and non-discrimination, as indicated above (see racial discrimination) in the case of the Vulnerable Welfare Payment Recipients measure of income management, an assessment or set of specific criteria is used in the first instance to determine whether income management would help that particular individual or family. This assessment is gender neutral and proportionate to achieving the objectives of income management. Ongoing support is then provided on a case-by-case basis. Women can also choose to volunteer for income management if they decide that it would be beneficial to themselves and/or their family. A significant proportion of people consulted during community consultations were women, and, given the outcomes of the consultations were positive. This suggests that there is strong support for the introduction of the measures from women in the communities. It is worth noting that there was also strong support from women in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands for the introduction of income management in that location.

In other areas where the two measures set out in this Determination already operate, data suggests that women are less likely than men to have income management applied under the Vulnerable measure, with only 43% of participants being female. Additionally, women are more likely than men to volunteer with 58% of all participants in the voluntary measure being women. Evaluations of income management have found that women in particular value being able to volunteer for income management and have found it beneficial in reducing humbugging.

2. Rights to social security and an adequate standard of living

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

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

In relation to engaging the right to social security, the United Nations Committee on Economic, Social and Cultural Rights has stated that implementing this right requires a country to, within its maximum available resources, provide 'a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.

Income management does not limit the right to social security as the programme itself does not detract from the eligibility of a person to receive income support or reduce the amount of a person's social security entitlement. Instead, it provides a mechanism to ensure that certain recipients of social security entitlements who are found to be vulnerable use a proportion of their entitlement to acquire essential goods and services such as rent, utilities and food. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access and maintain benefits 'in cash or in kind'. The programme does not at all detract from the situations in which someone has a right to social security, such as unemployment and workplace injury, and family and child support, it simply supports a person further once they have achieved their right to receive social security.

With regards to the right to an adequate standard of living, income management does not limit this right given that the programme supports individuals to achieve and maintain an adequate standard of living through the purchase of essential goods and services, including food, clothing, water and housing, which are all classified as priority needs under Part 3B of the Act and which income managed funds can be used to purchase. The programme therefore aims to advance this right through ensuring that money is available for priority goods and services such as housing, food and clothing, in situations where individuals need additional support to meet these needs. In turn, this helps stabilise an individual's living circumstances and financial situation, enabling them to focus on caring for children and/or joining or returning to work.

Income management does not restrict the availability, adequacy and accessibility of essential needs required to maintain an adequate standard of living. The availability, adequacy and accessibility of essential needs is maintained through the ability of income managed recipients to purchase goods and services through a range of payment options, including via direct deductions to third parties through the Department of Human Services and a wide footprint of merchants which accept BasicsCard, both within and outside of areas in which income management currently operates. Recipients are not required to pay for replacement BasicsCards. The process is much simpler to access than through mainstream banking services, where non-income managed funds would usually be held, and there is much more tailored and intensive support available.

3. Right to privacy

1.369 The committee therefore seeks the Minister for Social Services' advice as to whether the restrictions on the autonomy of individuals to control their own finances through income management measures is compatible with the right to privacy, and particularly:

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

As discussed above, the income management programme is aimed at achieving a legitimate objective. The programme does not limit the right not to have one's privacy, family and home unlawfully or arbitrarily interfered with. In the case of the Vulnerable Welfare Payment Recipients measure of income management, income management is lawfully targeted and may be triggered via an assessment or set of specific criteria used to determine whether income management would help that particular individual or family – it is not applied in a blanket approach. Individuals can also choose to volunteer for income management if they decide that it would be beneficial to themselves and/or their family, which is not imposed.

It has been noted in evaluations that some people may feel ashamed by having income management applied. However, these evaluations also note that other people have found a sense of pride in being able to better manage their money and meet their basic needs. In all areas where income management is in operation, a Voluntary measure is in operation alongside the compulsory measures to reduce the likelihood of a person being stigmatised by income management.

With the reduced likelihood of a person being stigmatised through the concurrent operation of the Voluntary measure, it is a reasonable and proportionate limitation to the right to privacy in order to promote other rights such as the rights of the child and the right to an adequate standard of living.

The allocation of income managed funds is arranged through consultation with the Department of Human Services to determine where funds should be directed, and an individual may also seek assistance through Financial Wellbeing and Capability services. Referrals to additional support services such as the Financial Wellbeing and Capability services are free and confidential.

4. Right to self-determination

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

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

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

The income management programme does not impinge on the right to self-determination as it does not affect the means of subsistence of political status of any person or group. While income management does to an extent limit a person's ability to freely spend their social security payments on excluded good (alcohol, Gambling products, tobacco and pornography), it does not impact on or interfere with their right to freely pursue their economic, social or cultural development.

This limitation is reasonable and proportionate to achieve a legitimate objective, as discussed above, and is necessary to promote other rights by ensuring that income support payments are used to meet the essential needs of vulnerable people and their dependents, and that these people are protected against risks of homelessness and financial exploitation. Any limitation that may occur is therefore necessary to pursue the legitimate objectives of the programme.

The people in Ceduna and Surrounding Region were also consulted about how income management might support people and what model would work best. These consultations found that people in the region were, on the whole, in favour of income management.

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

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

Communications portfolio response - Parliamentary Joint Committee on Human Rights' sixteenth report of the 44th Parliament

Dear Chair Dean

Thank you for your letter dated 25 November 2014 in which the Parliamentary Joint Committee on Human Rights has sought my response to issues raised in its Sixteenth Report of the 44th Parliament about the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (Broadcasting Bill), and the Telecommunications Legislation Amendment (Deregulation) Bill) 2014.

Telecommunications Legislation Amendment (Deregulation) Bill) 2014

Repeal of Part 9A of the Telecommunications (Consumer Protection and Service Standards) Act 1999

The Committee has sought advice on whether the repeal of Part 9A is compatible with the rights of the child, and whether the deregulation of Part 9A may expose children to a risk or harm.

Part 9A currently has two key regulatory functions:

1. Regulating the prefixes of numbers used by telephone sex services; and
2. Preventing telephone sex services from being bundled with the supply of other goods and services.

Although Part 9A previously contained provisions specifically aimed at protecting children from accessing age restricted content via telephone sex services, these provisions were repealed following the introduction of the *Communications Legislation Amendment (Content Services) Act 2007*, which introduced a new Schedule 7 into the *Broadcasting Services Act 1992* (the BSA) and amalgamated the regulation of all content services delivered via carriage services.

Schedule 7 of the BSA includes a strong range of measures specifically designed to prevent children from accessing R18+ content via a range of platforms, including via telephone sex services by effectively:

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- requiring an application for access to the content;
- requiring proof of age that the applicant is over 18 years of age;
- ensuring a risk analysis of the kind of proof of age submitted;
- verifying the proof of age by applying the risk analysis;
- providing warnings as to the nature of the content;
- providing safety information for parents and guardians on how to control access to the content;
- limiting access to the content by the use of a PIN or some other means;
- including relevant quality assurance measures; and
- requiring age verification records be retained for a period of 2 years after which the records are to be destroyed.

In summary, the proposed repeal of Part 9A is compatible with the rights of the child. The existing protections under the BSA that help ensure children are protected from adult content (delivered by telephone sex services or other means) remain and are not impacted by the proposed repeal of Part 9A.

Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014

Captioning amendments proposed in Schedule 6 - Background

The Committee has sought advice on proposed amendments to captioning obligations, and their compatibility with the right to equality and non-discrimination and the related rights of persons with disabilities under the Convention on the Rights of Persons with Disabilities (CRPD). I note that in particular the Committee is seeking advice on whether the proposed changes are aimed at achieving a legitimate objective.

Captioning supports access to a range of services, including television services, by people who are hearing-impaired. To enhance access to captioning for this audience the *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* introduced Part 9D to the BSA, which mandates targets for captioning of free-to-air and subscription television programs, and sets out a framework for determining captioning quality. Compliance with the Part 9D captioning obligations is a license condition for commercial free-to-air and subscription broadcasters.

Part 9D replaced the previous exemption orders process administered by the Australian Human Rights Commission under the *Disability and Discrimination Act 1992* (DDA). With the introduction of Part 9D (which is prescribed under the DDA), broadcast licensees' are exempt from further action for unlawful discrimination under the DDA. This prescription creates a level of regulatory certainty for broadcasters and viewers as the television captioning obligations are administered by the one body, the Australian Communications and Media Authority (the ACMA).

Consistent with the Government's deregulation agenda, the amendments to Part 9D introduced by the Broadcasting Bill aim to reduce industry compliance costs, increase flexibility for broadcasters in the way they meet their captioning obligations, and achieve greater administrative simplicity.

The proposed amendments will not reduce annual captioning targets, including future legislated increases for subscription television, or the quality of captioning services provided by both free-to-air and subscription television broadcasters.

The Broadcasting Bill also removes or amends a number of spent or redundant provisions in Part 9D, including provisions that relate to captioning targets from previous financial years. Additionally, some aspects of existing legislation are unnecessarily complex as drafted, and the Broadcasting Bill simplifies these.

The amendments proposed by the Broadcasting Bill aim to achieve the legitimate objective of reducing unnecessary and costly regulation. It is important to note that in doing so, the amendments will not have a significant impact on viewers, and will better support the ability of television licensees' to provide captioning services that benefit Australians with a disability.

Averaging of captioning targets across sports channels supplied by the same channel provider

The Committee has expressed a concern that the proposed changes to captioning requirements for sports channels may result in a reduction in the amount of sports content being made available to those who are hearing-impaired.

The Bill repeals existing subsections 130ZV(1) to (4) and replaces these with new subsections 130ZV(1) to (3). The effect of the amendment is to remove spent captioning targets for the 2012 and 2013 financial years, enhance the readability of the provisions and introduce a modified formula in subsection 130ZV(3) for captioning targets for subscription television sports services.

The provisions have been drafted to ensure that:

- the overall number of hours of captioned programming does not change from existing legislative requirements, and
- there is no reduction in the number of sports channels subject to captioning requirements.

The proposed amendment aims to introduce flexibility for subscription television licensees in meeting their obligations, without changing the number of total hours of captioned programming available to viewers. It operates to allow subscription television licensees to redirect one third of each relevant sports channel's captioning target to another sports channel offered by the same channel provider, for example FOX SPORTS.

Hearing-impaired audiences will benefit from broadcasters being better able to provide captioning for services that are of greater interest to those viewers. To ensure continued diversity of captioning across sports programs, licensees will still be required to meet a captioning target of at least two thirds of the existing captioning target on each individual channel, provided the rest of the annual captioning target is met with captioned content screened on one or more of their other sports channels. This ensures that subscription broadcasters will be prevented from directing all of the aggregated captioning target towards a channel devoted to a particular sport.

Removing annual-reporting requirements relating to captioning compliance for free-to-air television broadcasters

The Committee has sought advice on whether the removal of annual reporting requirements is compatible with the rights to equality and non-discrimination such as are

protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and the related rights of persons with disabilities, such as provided for under articles 5, 9 and 13 of the CRPD. The Committee's concern is based on the view that removing annual reporting requirements would result in a reduction in transparency and capacity to monitor compliance with captioning arrangements.

The Bill repeals subsections 130ZZC(1) to (4) of Part 9D, which provide that commercial television broadcasting licensees and national broadcasters must, within 90 days after the end of each financial year, prepare and give to the ACMA a report relating to the licensee's compliance with their captioning obligations. The proposed amendment will have the effect of removing annual report requirements for free-to-air television broadcasters in relation to their compliance with captioning obligations. Compliance arrangements will instead be based on existing mechanisms within the BSA, including sections 147 and 150 of the BSA which enable viewer complaints to the ACMA about alleged breaches of Part 9D, and the ACMA's discretionary powers to investigate broadcasters' compliance with licence conditions along with broadcast content matters generally.

In recent years, captioning requirements on the free-to-air television sector have gradually increased such that it is now required to provide 100 per cent captioning from 6am to midnight on primary channels, and for news or current affairs programs transmitted on primary channels at any time. This means it is now clear to consumers when services do not meet captioning requirements on the primary channel, making it appropriate for compliance to be assessed on the basis of complaints and other existing measures provided for in the BSA, rather than through annual reporting arrangements.

Although to date there has only been one reporting cycle, the ACMA reported a high level of compliance with the annual captioning target requirements for the 2012-13 reporting period. For instance, 100 per cent of commercial free to air broadcasters and 99 per cent of subscription broadcasters achieved their annual captioning target. The limited compliance issues identified by the ACMA for the first reporting cycle were of the kind normally associated with new broadcasting regulations so soon after their introduction.

There are significant compliance incentives for broadcasters to meet their captioning obligations. The ACMA will investigate genuine captioning complaints and where it identifies issues of concern, including where it sees a systemic problem with the performance of a broadcaster, will consider a range of responses to ensure broadcaster compliance. Responses can include requiring broadcasters to implement additional procedures to improve quality, or formal measures such as enforceable undertakings, and remedial directions. In severe cases, section 143 of the BSA provides that the ACMA can cancel a broadcaster's licence.

These compliance incentives, increased consumer transparency and high industry compliance rate strongly indicate that the removal of annual reporting requirements for free-to-air broadcasters will not reduce the effectiveness of the captioning arrangements, and will therefore not represent a limitation on the right to equality and non-discrimination.

Automatic exemption from captioning obligations granted to new subscription television channels

The Committee has also sought advice on whether the minimum 12 month exemption from captioning requirements for new subscription television channels is consistent with the

obligation of State Parties to take appropriate measures to ensure persons with disabilities have equal access to information and communications, as provided for under article 9 of the CRPD.

The Bill adds new subsection 130ZV(6), that will provide that new subscription television services transmitted by a licensee are exempt from the captioning targets established by section 130ZV for a period of one to almost two years, depending on when the new service commences. To qualify for the exemption the subscription television service must predominantly consist of programs not previously transmitted in Australia prior to the commencement of the service. Under the proposed new subsection, the exemption from captioning obligations would apply from service commencement until after the financial year beginning on the first 1 July that is at least one year after the service commenced. For example, if a new subscription television service commenced on 1 September 2015, the applicable exclusion period would be 1 September 2015 to 30 June 2017.

The proposed automatic exemption is designed to encourage subscription television licensees to bring new content and channels to Australian audiences and would only apply to channels that mainly consist of content not previously transmitted in Australia. This requirement will also avoid creating an incentive to do little more than 'rebrand' existing content.

Subscription television licensees can currently apply to the ACMA to temporarily exempt channels from captioning obligations on the grounds that providing captioned services would result in unjustifiable hardship. An exemption order exempts a specified subscription television service provided by the licensee from its annual captioning targets for a specified period (one to five financial years). This hardship is likely to be greater for start-up services that do not have established audiences. In practice the ACMA has approved the significant majority of applications (e.g. in December 2013 the ACMA received 41 applications for exemption orders for 2013-14 and made all 41, or 100 per cent, of these). An automatic exemption process would save both licensees and the ACMA resources in completing and considering applications.

However as it is expected that the automatic exemption will encourage investment in new channels and content the ultimate beneficiaries will be hearing-impaired viewers who will have access to a greater diversity of captioned content over time.

I trust this information addresses the Committee's concerns on the effect of these important proposals and their compatibility with Australia's human rights obligations.

Yours sincerely

Malcolm Turnbull

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

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

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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