Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Nineteenth report of the 44th Parliament

3 March 2015

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights/

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Senator Dean Smith, Chair	Western Australia, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Senator Matthew Canavan	Queensland, NAT
Dr David Gillespie MP	Lyne, New South Wales, NAT
Senator Claire Moore	Queensland, ALP
Ms Michelle Rowland MP	Greenway, New South Wales, ALP
Ms Fiona Scott MP	Lindsay, New South Wales, LP
Senator Penny Wright	South Australia, AG
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

Secretariat

Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Ms Zoe Hutchinson, Principal Research Officer
Ms Anita Coles, Principal Research Officer
Dr Patrick Hodder, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

External Legal Adviser

Professor Simon Rice OAM

Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

Table of contents

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 9 to 12 February 2015 (plus the Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014, which was introduced on 3 December 2014), legislative instruments received from 23 January 2015 to 12 February 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.

- Appropriation (Parliamentary Departments) Bill (No. 2) 2014-2015;
- Australian Centre for Social Cohesion Bill 2015;
- Competition and Consumer Amendment (Australian Country of Origin Food Labelling) Bill 2015; and
- Public Governance and Resources Legislation Amendment Bill (No. 1) 2015.

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*.[1] 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 Autonomous Sanctions Amendment Regulation 2013 (No. 1) [F2013L01447] and Youth Allowance (Satisfactory Study Progress) Guidelines 2014 [F2014L01265] and makes no comment on the instruments.[2]

Deferred bills and instruments

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

- Appropriation Bill (No. 3) 2014-2015;
- Appropriation Bill (No. 4) 2014-2015;
- Criminal Code Amendment (Animal Protection) Bill 2015;
- Extradition (Vietnam) Regulation 2013 [F2013L01473] (deferred 10 December 2013);
- Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696] (deferred 10 February 2015);
- Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460] (deferred 10 February 2015);
- Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461] (deferred 10 February 2015);

1.12 The following instruments have been deferred in connection with the committee's ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime:

---

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

2 See, Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 165 and *Eighteenth Report of the 44th Parliament* (10 February 2015) 3.

- 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 – Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049] (deferred 11 February 2014);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2015 [F2015L00061];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2013 (No. 1) [F2013L01312] (deferred 10 December 2013);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184] (deferred 24 September 2014);
- Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384] (deferred 10 December 2013);
- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701];

1.13 The following instruments have been deferred in connection with the committee's current review of the *Stronger Futures in the Northern Terrority Act 2012* and related legislation:

- Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013 [F2013L02153] (deferred 10 December 2013);
- Social Security (Administration) (Declared income management area - Ceduna and surrounding region) Determination 2014 [F2014L00777] (deferred 10 February 2015);
- Social Security (Administration) (recognised State/Territory Authority - NT Alcohol Mandatory Treatment Tribunal) Determination 2013 [F2013L01949] (deferred 10 December 2013);
- Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission Determination 2013 [F2013L02153] (deferred 11 February 2014); and
- Stronger Futures in the Northern Territory Regulation 2013 [F2013L01442] (deferred 10 December 2013).

Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014

Portfolio: Defence
Introduced: 3 December 2014

Purpose

1.14 The Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014 (the bill) seeks to amend the *Defence Act 1903* to:

- clarify the independence, powers and privileges of the Inspector-General ADF;
- provide a statutory basis to support regulatory change, including the re-allocation of responsibility for investigation of service-related deaths and the management of the Australian Defence Force redress of grievance process to the Inspector-General ADF; and
- require the Inspector-General ADF to prepare an annual report.

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

Inspector-General ADF investigations and inquiries—witness required to answer questions even if it may incriminate themselves

1.16 The bill would enable regulations to be made that, in relation to Inspector-General ADF investigations and inquiries, would require a person to answer questions even if an answer may tend to incriminate that person.

1.17 The bill includes a use and derivative use immunity provision, which provides that any statement or disclosure made by the person in the course of giving evidence (or anything obtained as an indirect consequence of making the statement or disclosure) is not admissible in evidence against the witness. However, there is an exception that would permit the statement or disclosure to be used against the person in a prosecution for giving false testimony.

1.18 The committee considers that requiring a witness to answer questions even if it may incriminate them engages and may limit the right not to incriminate oneself (although this is alleviated by the inclusion of a use and derivative use immunity clause).

Right to a fair trial (right not to incriminate oneself)

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

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

Compatibility of the measure with the right to a fair trial (right not to incriminate oneself)

1.21 The statement of compatibility states that the provision granting use and derivative use immunity promotes the right to a fair trial. In support of its assessment of the measure as compatible with the right it states:

> The Australian Government has a legitimate interest in making regulations that may require a witness to incriminate themselves in order that the true circumstances and events subject to inquiry by Defence may be properly ascertained. Item 11 balances this object by ensuring that witnesses are not as a result penalised in subsequent court proceedings. Any evidence or disclosure made by a witness to an inquiry, including Inspector-General ADF inquiries, is not admissible against that witness in civil or criminal proceedings in any federal, State or Territory court. This protection also extends to the use of such evidence in Australia Defence Force's disciplinary tribunals created in accordance with the *Defence Force Discipline Act 1982*. There is also no power to compel witnesses to incriminate themselves in respect of an offence for which they have already been charged but not yet tried for. The legislative scheme ensures that the right of people to enjoy a fair trial is promoted and enhanced by eliminating the possibility of the unfair use of admissions of wrongdoing.[1]

1.22 Measures which enable regulations to be made requiring a witness to answer a question, even if it may tend to incriminate themselves, limit the right not to incriminate oneself. The right not to incriminate oneself can be limited if it can be demonstrated that the measure supports a legitimate objective, is rationally connected to that objective and is a reasonable and proportionate way to achieve that objective. The statement of compatibility identifies the measure's objective as being the government's legitimate interest in ascertaining 'the true circumstances and events subject to inquiry by Defence'. It provides no information or evidence as to how inquiries are currently conducted and why the existing provisions are insufficient.

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. This conforms with the committee's

1 Explanatory memorandum (EM) 3.

Guidance Note 1,[2] 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'.[3] 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.

1.24 While the inclusion of the use and derivative use immunity alleviates the impact of this measure, the committee is also concerned that the immunity provides an exception to permit a statement or disclosure made by a witness to be used against them in a prosecution for giving false testimony. No information is given in the statement of compatibility as to the need for this exception to the immunity provisions and what effect this has on the right not to incriminate oneself.

1.25 **The committee therefore considers that requiring witnesses to answer questions even if it may incriminate themselves limits the prohibition against self-incrimination. As set out above, the statement of compatibility does not provide sufficient justification of the compatibility of the measure with this right. The committee therefore seeks the advice of the Minister for Defence 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.**

---

2 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.

3 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.

Fair Work Amendment (Bargaining Processes) Bill 2014

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

Purpose

1.26 The Fair Work Amendment (Bargaining Processes) Bill 2014 (the bill) seeks to amend the *Fair Work Act 2009* (FWA) to:

- provide for an additional approval requirement for enterprise agreements that are not greenfields agreements;
- require the Fair Work Commission (FWC) to have regard to a range of non-exhaustive factors to guide its assessment of whether an applicant for a protected action ballot order is genuinely trying to reach an agreement; and
- provide that the FWC must not make a protected action ballot order when it is satisfied that the claims of an applicant are manifestly excessive or would have a significant adverse impact on workplace productivity.

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

Industrial action—protected action ballot order

1.28 Currently, section 443 of the FWA sets out when the FWC must make a protected action ballot order in relation to the negotiation of a proposed enterprise agreement. A protected ballot order allows a ballot to occur so that employees can decide whether to engage in protected industrial action, which is permitted by the *Fair Work Act 2009* if certain requirements are satisfied.[1] The current requirements are that an application must have been made and that the FWC must be satisfied that each applicant has been, and is, genuinely trying to reach an agreement.

1.29 The bill would amend current subsection 443(2) to provide that the FWC must not make a protected action ballot order if it is satisfied that the applicant's claims:

- are manifestly excessive, having regard to the conditions at the workplace or industry; or
- would have a significant adverse impact on productivity at the workplace.[2]

1.30 The committee considers that this measure engages and potentially limits the right to freedom of association and the right to form trade unions (specifically, the right to strike).

---

1 'Protected' industrial action is immune from civil liability (unless the action involves personal injury or damage to property).

2 See item 4 of Schedule 1 to the bill.

Freedom of association

1.31 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests'.

1.32 Limitations on this right are only permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'. Article 22(3) also provides that limitations are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise rights contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

The right to form trade unions (right to strike)

1.33 Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also guarantees the right of everyone to form trade unions and to join the trade union of his or her choice; and sets out the rights of trade unions, including the right to function freely and the right to strike.[3] Limitations on these rights are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'. As with article 22 of the ICCPR, article 8 also provides that limitations on these rights are not permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[4]

1.34 The committee considers that the measure engages and limits the right to freedom of association and the right to form trade unions (right to strike) as it places further limits on when approval to undertake protected industrial action (that is, strike action) may be granted.

---

3 The committee notes that the precise formulation of when the right to strike may be permissibly limited varies according to the terms of the provision in the ICCPR (article 22), ICESCR (article 8) and the ILO conventions.

4 The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the committee must assess the human rights compatibility of legislation. However, the committee's usual practice is to draw on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate. In the current case, ILO Convention No. 87 is also directly relevant to the right to freedom of association (ICCPR) and the right to form trade unions (ICESCR) because those conventions expressly state that measures may not be inconsistent with ILO Convention No. 87.

Compatibility of the measure with the right to freedom of association and the right to form trade unions (right to strike)

1.35 The statement of compatibility acknowledges that the proposed changes to when the FWC must make a protected ballot order engage the right to freedom of association and the right to form trade unions (right to strike), as well as rights under ILO Convention No. 87, and notes that their effect may be to limit access to protected industrial action over certain claims. However, in support of the conclusion that the measure is compatible with these rights it states:

> …[these] restrictions are reasonable, necessary and proportionate to achieving the legitimate objectives of encouraging sensible and realistic bargaining claims. The amendments achieve this objective by ensuring that a bargaining representative cannot obtain a protected action ballot order where its bargaining claims are fanciful, exorbitant or excessive when considering the circumstances of the workplace and the industry in which the employer operates, or which would significantly affect workplace productivity.[5]

1.36 The committee notes, however, that the stated objective of encouraging sensible and realistic bargaining claims actually only applies to the claims of an applicant (being claims made by unions and employees) and not to claims made by employers. The committee notes that Australia already has in place substantial regulation of industrial action. The FWA currently places a number of restrictions on the right to strike, making it an exception to the rule, rather than prescribing a right to strike with restrictions. The committee notes that ILO standards as a specialised body of law may inform the guarantee set out in the ICCPR and the ICESCR. The ILO has previously observed, in relation to Australia and in respect of the action that may impact on the economy:

> The Committee recalls that a broad range of legitimate strike action could be impeded by linking restrictions on strike action to interference with trade and commerce. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service "essential" and thus do not justify restrictions on the right to strike.[6]

5 EM, v.

6 See, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101st ILC session, 2013: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698628 (accessed on 28 January 2015)

1.37 The committee also notes ILO guidance that:

> The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike.[7]

1.38 Accordingly, the committee considers that the statement of compatibility has not demonstrated that the objective of the measure may be considered a legitimate objective for the purpose of international human rights law, having regard to the nature of the rights themselves and the nature of permissible limitations. The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.39 **The committee therefore considers that the proposed additional requirements that must be met before the FWC can make a protected action ballot order is a limitation on the right to freedom of association and the right to strike. 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 Employment 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.**

Enterprise agreement approval process—requirement to discuss workplace productivity

1.40 As noted above, the bill would introduce a requirement that, before approving an enterprise agreement, the FWC must be satisfied that improvements to productivity at the workplace were discussed during the bargaining process.

1.41 Currently, sections 186 and 187 of the FWA provide that an enterprise agreement must be approved by the FWC if certain requirements are met. This requires the FWC to be satisfied that the agreement has been genuinely agreed to, the terms of the agreement generally comply with the National Employment

7 Freedom of Association – *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edition, 2006, [547]-[548].

Standards and the agreement passes the 'better off overall' test.[8] The FWC must also be satisfied that the agreement would not be inconsistent with, or undermine, good faith bargaining and be satisfied of certain procedural matters.

1.42 The committee considers a provision that requires employees and employers to discuss set matters such as improvements to productivity engages and limits the right to freedom of association and the right to form and join trade unions.

Freedom of association (right to organise and bargain collectively)

1.43 The right to organise and bargain collectively is a part of the right to freedom of association and the right to form trade unions as set out in article 22 of the ICCPR and article 8 of the ICESCR: see [1.31] to [1.33] above.

Compatibility of the measure with the right to organise and bargain collectively

1.44 The statement of compatibility acknowledges that the bill engages rights protected by the ILO Convention No. 87, which protects the right to organise, and the ILO *Right to Organise and Collective Bargaining Convention 1949* (No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment. The statement of compatibility goes on to state that the requirement to discuss productivity before an enterprise agreement is approved, 'is intended to put the issue of productivity improvements on the agenda of enterprise agreement negotiations'.[9] It concludes:

> These amendments are intended to enhance collective bargaining by promoting discussions about improving productivity at the workplace level. To the extent that requiring bargaining parties to hold a discussion over productivity improvement is said to limit the right to collectively bargain, the requirement is reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill.[10]

1.45 In line with the discussion above, the committee considers that the measure engages and limits the right to organise and bargain collectively, as it imposes additional requirements on what must be discussed during enterprise agreement bargaining negotiations. The statement of compatibility states that the measure is intended to put productivity improvements on the agenda of negotiations, but does not explain why this is necessary or how this is a legitimate objective for human rights purposes.

---

8 Although, section 189 of the FWA allows the FWC to approve an enterprise agreement that does not pass the better off overall test if satisfied, because of exceptional circumstances, that the approval of the agreement would not be contrary to the public interest. The better off overall test is set out in section 193 of the FWA.

9 EM, iv.

10 EM, iv.

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

1.47 **The committee therefore considers that the proposed requirement that workplace productivity must be discussed before an enterprise agreement can be approved is a limitation on the right to organise and bargain collectively. 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 Employment 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.**

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Portfolio: Immigration
Introduced: House of Representatives, 24 September 2014

Purpose

1.48 The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the bill) made amendments to the *Migration Act 1958* (the Migration Act), including to:

- strengthen existing powers to grant or cancel a visa on character grounds under section 501 of the Migration Act by:
    - adding additional grounds on which a person will be taken to fail the character test;
    - amending the existing definition of 'substantial criminal record' to provide that a person will be taken to have a substantial criminal record (and therefore fail the character test) if they have received two or more sentences of imprisonment that, served concurrently or cumulatively, total 12 months or more (down from the current two years);
    - broadening existing powers to allow refusal to grant or cancellation of a visa where the minister reasonably suspects a person has been, or is involved or associated with, a group, organisation or person that the minister reasonably suspects is involved in criminal conduct;
    - inserting a new power to make cancellation of a visa mandatory where the visa holder is in prison and fails the character test on specified grounds;
    - providing that where a person has been pardoned for a conviction and the effect of the pardon is that the person is taken never to have been convicted of the offence, the person will fail the character test; and
    - providing that a person will be considered to have a substantial criminal record (and fail the character test) if they have been found by a court to be not fit to plead but the court nonetheless found that the person committed the offence, and as a result they have been detained in a facility or institution.

1.49 The bill also added to the existing general cancellation powers in sections 109 and 116 of the Migration Act, including:

- introducing a new ground for visa cancellation if:
    - the minister is not satisfied as to a person's identity; or

- incorrect information was given by, or on behalf of, the visa holder at any time (whether it was in relation to this visa or another visa) to any person involved in the visa grant (incorrect information is not defined);

- strengthening the minister's personal powers to cancel a visa;
- enabling the minister to personally set aside the decision of a review tribunal and substitute his or her own decision to cancel a visa; and
- strengthening provisions to make it clear that if the minister exercises a personal power to cancel a visa, that decision is not merits reviewable.

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

Background

1.51 The bill finally passed both Houses of Parliament on 26 November 2014.

Expansion of visa cancellation powers

1.52 The committee considers that the expansion of visa cancellation powers engages a number of human rights and related obligations including non-refoulement obligations, the right to liberty and the right to freedom of movement.

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

Non-refoulement obligations and the right to an effective remedy

1.54 Australia has non-refoulement obligations under the Refugee Convention and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT).[1] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[2]

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

1.56 Article 2 of the ICCPR requires state parties to ensure access to an effective remedy for violations of human rights. State parties are required to establish

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

2 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law.

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

1.57 The statement of compatibility for the bill states that the objective of the expanded visa cancellation powers was to address certain deficiencies in the character and visa cancellation (and refusal) framework, which had been identified in a review of the character and general visa cancellation framework. In particular, the review had found that a 'small number of non-citizens…were not effectively and objectively being captured for consideration'.[3] The amendments therefore sought:

> …to provide for better identification and coverage of cohorts of non-citizens who had engaged in criminal or fraudulent behaviour, or other behaviour of concern, for consideration of visa cancellation or refusal.[4]

1.58 The statement of compatibility acknowledges that the bill may lead to a lawful non-citizen, to whom Australia owes protection obligations, having their visa cancelled. After setting out relevant provisions of the ICCPR and the CAT the statement concludes:

> …[the] department recognises these *non-refoulement* obligations are absolute and does not seek to resile from or limit Australia's obligations. *Non-refoulement* obligations are considered as part of a decision to cancel a visa under character grounds. Anyone who is found to engage Australia's *non-refoulement* obligations during the cancellation decision or visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations. The amendments outlined in this Bill do not engage Australia's *non-refoulement* obligations.[5]

1.59 However, the committee notes that a consequence of a visa being refused or cancelled is that the person is an unlawful non-citizen and is subject to removal from Australia. A person whose visa is refused or cancelled on character grounds (including under the expanded powers introduced by this bill) is prohibited from applying for another visa.[6] Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as

---

3 Explanatory memorandum (EM), Attachment A, 1.

4 EM, Attachment A, 1.

5 EM, Attachment A, 7.

6 A person may apply for a protection visa or a Removal Pending Bridging Visa. However, the visa is temporary and applies so long as the minister is satisfied that the person's removal is not reasonable practicable. In addition, if the visa that was cancelled was a protection visa, the person will be prevented from applying for another protection visa unless the minister exercises a personable, non-compellable power to do so. A person is also not entitled to apply for a Removal Pending Bridging Visa—the minister may invite the person to apply for the visa and this is a personal, non-compellable power.

reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

1.60 The committee notes that there is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia. Instead, the legislation imposes a duty on officers to remove unlawful non-citizens as soon as is reasonably practicable.

1.61 While the committee welcomes the minister's stated commitment to ensuring no one who is found to engage our non-refoulement obligations will be removed, this will depend solely on the minister's personal non-compellable discretion. Additionally, the committee notes that Australia may have non-refoulement obligations even in circumstances where the visa holder has not made a claim for protection or the person is not covered by the Refugee Convention.[7]

1.62 The obligation of non-refoulement and the right to an effective remedy requires an opportunity for effective, independent and impartial review of the decision to expel or remove.[8] The committee is concerned that the expanded powers to cancel a visa, including a protection visa, leading to a legislative requirement for removal from Australia, regardless of non-refoulement obligations, may breach the prohibition on non-refoulement. Also there is no right to merits review of a decision where that decision was made personally by the minister.

1.63 As the committee has noted previously, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[9] The committee notes that review

---

7 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

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

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

mechanisms are important in guarding against the irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

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

1.65 **To the extent that 'independent, effective and impartial' review including merits review is not provided in relation to non-refoulement decisions, the proposed expansion of visa cancellation powers may be incompatible with Australia's non-refoulement obligations.**

1.66 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the expanded visa cancellation powers or decisions to remove a person once a visa has been cancelled are subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.**

Right to liberty

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

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

Compatibility of the measures with the right to liberty

1.69 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia on character grounds results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation. In cases where it is not possible to remove a person, because, for example, they may be subject to persecution if returned to their home country or no country will accept them, that person may be subject to indefinite detention. On this basis, the expanded visa cancellation powers engage the prohibition against arbitrary detention.

1.70 In assessing the measures as compatible with the right to liberty, the statement of compatibility states that the changes do not limit the right because

they merely 'add to a number of existing laws that are well-established, generally applicable and predictable'.[10] It further notes that detention, including indefinite detention, is not arbitrary per se, with the determining factor being 'whether the grounds of detention are justifiable'.[11]

1.71 The statement of compatibility identifies the objective of the measures as being:

> …[to ensure] the safety of the Australian community and integrity of the migration programme…through new powers to…better identify and target cohorts of people with serious criminality, or unacceptable behaviours or associations, and where deemed necessary for their removal from the Australian community through their detention and subsequent removal from Australia.[12]

1.72 The statement of compatibility states that the measures are proportionate because:

> Any questions of proportionality will be resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a person's visa, or whether to revoke a mandatory cancellation decision.[13]

1.73 With particular reference to the risk that a person may be arbitrarily detained, the statement of compatibility states:

> The Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[14]

1.74 The committee considers that ensuring the safety of Australians and the effectiveness of the immigration system is likely to be considered a legitimate objective for the purposes of international human rights law. However, it is not clear that each of the measures is rationally connected to achieving that aim and whether a number of measures may be regarded as proportionate. In particular, it is unclear whether there are sufficient safeguards to ensure that the detention of persons after the exercise of the visa cancellation powers will not lead to cases of arbitrary detention.

---

10 EM, Attachment A, 6.

11 EM, Attachment A, 5.

12 EM, Attachment A, 6.

13 EM, Attachment A, 6.

14 EM, Attachment A, 6.

1.75 The detention of a non-citizen on cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, the committee notes there may be situations where the detention could become arbitrary under international human rights law.[15] This is most likely to apply in cases where the person cannot be returned to their home country on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). The committee notes that, where a person has their visa cancelled on character grounds (to which many of the changes introduced by the bill relate), the current law provides that such a person is ineligible for a bridging visa and must be detained under the Migration Act. For those who have their visa cancelled on other grounds, access to a bridging visa is discretionary.

1.76 In relation to the administrative and discretionary processes identified in the statement of compatibility as ensuring that the measures will operate in a proportionate way, the committee notes that such processes do not meet the requirement for periodic and substantive judicial review of detention.

1.77 **The committee therefore considers that the expansion of visa cancellation powers, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:**

- **whether there is 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

1.78 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a

15 For example, see *A v Australia* (Human Rights Committee Communication No. 560/1993) and *C v Australia* (Human Rights Committee Communication No. 900/1999). See also *F.K.A.G et al v Australia* (Human Rights Committee Communication No. 2094/2011) and *M.M.M et al v Australia* (Human Rights Committee Communication No. 2136/2012).

country of which you are a citizen. The right may be restricted in certain circumstances.

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

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

Compatibility of the measures with the right to freedom of movement

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

1.82 The statement of compatibility states that freedom of movement is engaged by provisions introducing a requirement that a non-citizen's visa be cancelled without notice if they are in prison and do not pass the character test on substantial criminal record grounds. In relation to this measure, the statement of compatibility states that the measure limits the right to freedom of movement. However, in support of its conclusion that the measure is compatible with the right, it argues that the amendment is compatible because an affected person is already being held in custody. Further:

> If immigration detention continues beyond the criminal sentence, any restrictions this amendment presents would form a legitimate objective towards protecting the Australian community from the risk of serious criminals being released into the community before an assessment on the level of risk they present has been made. This is a proportionate response to reduce this risk, as it provides for the revocation process to take place while the person remains in prison.[16]

1.83 Relevant to the proportionality of the measure, the statement of compatibility notes:

> [A person whose visa is cancelled in such circumstances]…will be notified of the decision after visa cancellation and given the opportunity to seek revocation of the decision. Merits review of decisions made by a delegate not to revoke would be available at the Administrative Appeals Tribunal ('the AAT'). [However, personal]…decisions of the Minister not to revoke

16 EM, Attachment A, 8-9.

would not be merits reviewable, but continue to be subject to judicial review.[17]

1.84 However, the statement of compatibility does not address the broader issue of whether using any of the expanded visa cancellation powers to cancel the visa of a permanent resident, who has lived for many years in Australia and has strong ties with Australia, is consistent with the right to freedom of movement. The committee notes that the UN Human Rights Committee has found that the deportation of a person with strong ties to Australia, following cancellation of their visa on character grounds, may constitute a breach of the right of a permanent resident to remain in their own country.[18]

1.85 The committee notes that the statement of compatibility provides no assessment of whether the expanded visa cancellation powers are compatible with the right to freedom of movement, with particular reference to the cancellation of the visas of permanent residents who have lived for many years in, and have strong ties to, Australia.

1.86 **The committee therefore considers that the expansion of visa cancellation powers may limit the right to freedom of movement and specifically the right of a permanent resident to remain in their 'own country'. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:**

- **whether 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.**

Failure to pass character test on basis of group membership or association

1.87 As noted above, the bill amends section 501 of the Migration Act to provide that a person will not pass the character test if the minister reasonably suspects that the person has been, or is, a member of a group or organisation, or has had an association with a group, organisation or person which has been involved in criminal conduct. A person who fails to pass the character test is ineligible for the grant of a visa or may have their visa cancelled.

17 EM, Attachment A, 8.

18 See *Nystrom v Australia* (Human Rights Committee, Communication No. 1557/07).

1.88 The committee notes the potential for the measure to restrict a person's ability to freely associate, and considers that the measure may limit the right to freedom of association.

Freedom of association

1.89 The right to freedom of association is protected by article 22 of the ICCPR. It provides that all people have the right to freedom of association with others; that is, to join with others in a group to pursue common interests.

1.90 Limitations on this right are permissible only where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.

Compatibility of the measure with the right to freedom of association

1.91 The statement of compatibility provides the following assessment in support of its conclusion that the measure is compatible with the right to freedom of association:

> While the Government supports a person's right to freedom of association it does not support associations that present a risk to the Australian community. These amendments are targeted specifically at criminal motorcycle gangs, terrorist organisations, organised criminal groups, people smuggling, people trafficking, or involvement in war crimes, genocide or human rights abuses for the purpose of protecting the Australian community from the risk that people with these types of associations or memberships may present to national security, public order, public safety, public morals, and the protection of the rights and freedoms of others. While the effect of these amendments effectively prohibits or creates a disincentive for the membership of particular organisations, any restrictions this amendment may present on a person are seen as reasonable, proportionate, and necessary and aimed at achieving a legitimate objective which is to protect the Australian community.[19]

1.92 The explanatory memorandum sets out in more detail the intention of the amendments:

> The intention of this amendment is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a criminal motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking, does not pass the character test. The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no

19 EM, Attachment A, 9-10.

> requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.[20]

1.93 However, the committee notes that the amendment does not, as the statement of compatibility indicates, target specific groups such as gangs or terrorist organisations. Rather, the amendment is broadly framed to apply to any association with a group, organisation or person that has been or is involved in criminal conduct. Further, the term 'criminal conduct' is undefined and could presumably include minor criminal conduct. The committee is concerned that, under this measure, a person could fail the character test on the basis of, for example, having friends or family who have engaged in even relatively minor criminal conduct, without the person themselves having been engaged in such conduct.

1.94 The committee acknowledges the importance of protecting the Australian community from risks associated with organised criminal activity and that this is likely to be a legitimate objective for the purposes of international human rights law. However, the committee is concerned that lowering the threshold to include those who have had an association with a group, organisation or person involved in criminal conduct may not be rationally connected to that objective. A measure is likely to be rationally connected if it can be shown that the measure is likely to be effective in achieving that objective. In this case, targeting those merely associated with someone who may have been involved in any criminal activity may have no impact on protecting the community from organised criminal activity. In addition, taking into account the potential breadth of its application, the committee is concerned that the measure may not be a proportionate way to achieve that objective. In this respect, the committee also notes that the ministerial discretion whether or not to exercise the power is unlikely, in and of itself, to offer sufficient protection such that the measure may be regarded as proportionate to its stated objective.

1.95 **The committee therefore considers that the amendment providing that a person will not pass the character test on the basis of group membership or association limits the right to freedom of association. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:**

- **whether there is 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**

---

20 EM 9.

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

Lower threshold for the character test if there is a risk that a person would incite discord in the community

1.96 Previously, paragraph 501(6)(d) of the Migration Act provided that a person would fail the character test for a visa if there is a 'significant risk' that they may engage in certain conduct, including a significant risk they would 'incite discord in the Australian community or in a segment of that community'. The bill amended this provision to lower the threshold for this test from a 'significant risk' to simply a 'risk'.

1.97 As this lower threshold for the cancellation of a person's visa may be applied in respect of a person's expression, the committee considers that the measure engages and may limit the right to freedom of expression.

Right to freedom of opinion and expression

1.98 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.99 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),[21] or public health or morals.[22]

Compatibility of the measure with the right to freedom of expression

1.100 The ability for a person's visa to be cancelled on the basis of any risk that they would, through their opinions or expressions, incite discord could have a discouraging or 'chilling' effect on their willingness to publicly discuss or otherwise make known their views, particularly in relation to contentious issues.

1.101 However, while the statement of compatibility assesses the bill as being compatible with human rights, it provides no assessment of the measure or of its potential to limit the right to freedom of expression.

---

21 'The expression 'public order (*ordre public*)'…may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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

1.102 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,[23] 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'.[24] 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.

1.103 **The committee therefore considers that the lowering of the threshold for the character test where there is a 'risk' that a person would incite discord in the community limits the right to freedom of expression and opinion. As set out above, the statement of compatibility does not 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 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.**

Requirement to provide personal information for the purposes of the character test

1.104 The bill introduced a new section to the Migration Act that compels the head of a state or territory agency to provide personal information in relation to a specified person relevant to the passing of the character test under section 501 of the Migration Act. Although the bill does not specify the type of information that

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

24 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.

could be required to be made available, the statement of compatibility explains that it would include:

- bio-data of persons entering Australian correctional institutions;
- information on persons who have received suspended sentences;
- information on persons sentenced but released by a court due to 'time served';
- information on persons directed to be held in mental health institutions, or transferred from prison to mental health institutions within the period of their sentence; and
- any information that can be considered relevant to the assessment of a person's character in the ordinary sense.[25]

1.105 The bill specifically provides that the head of a relevant state or territory agency is not excused from complying with a notice on the ground that disclosing the information would contravene a law of the Commonwealth, a state or a territory that (a) primarily relates to the protection of the privacy of individuals and (b) prohibits or regulates the use or disclosure of personal information.[26]

1.106 The committee considers that requiring the mandatory provision of personal information for the purposes of the character test under section 501 of the Migration Act engages and may limit the right to privacy.

Right to privacy

1.107 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

1.108 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

1.109 The statement of compatibility acknowledges that the measure may be seen as limiting a person's right to privacy, but assesses the measure as being compatible with the right.

---

25 EM, Attachment A, 12.

26 See item 25 of the bill (new subsection 501L(5)).

1.110 The statement of compatibility identifies the objective of the new requirement as follows:

> [The measure is intended] to address difficulties in information sharing as some State and Territory legislation did not recognise the Commonwealth's authority to obtain relevant information about non-citizens who may be liable for consideration under section 501. The 2011 ANAO audit report "Administering the Character Requirements of the Migration Act 1958" recommended that a formal basis for obtaining this information was necessary to support the identification and assessment of visa holders of character concern against the character requirements of the Act. Currently, without an explicit power to require States and Territories to provide information, it is either not possible, or not without risk, to attempt to put in place formal arrangements to share information. Further, my department's new enforcement powers under the Australian Privacy Principles may not give my department sufficient coverage without this amendment to the Act.[27]

1.111 In relation to the proportionality of the measure, the statement of compatibility states:

> This amendment is a reasonable response to providing my department with the ability to properly identify and assess the circumstances of persons who may present a risk to public order, public safety, and the protection of the rights and freedoms of others and therefore, it is not arbitrary. Detailed Memoranda of Understanding will be developed to form the terms of the information sharing agreements and will be in accordance with the [Australian Privacy Principles (APPs).[28]

1.112 However, while the committee acknowledges that ensuring the availability of information necessary to support the identification and assessment of visa holders of character concern is likely to be a legitimate objective for the purposes of international human rights law, it is unclear to the committee whether the measure may be regarded as a proportionate way to achieve that objective.

1.113 First, the committee notes that the type of information that might be relevant to an assessment of a person's character is undefined, and therefore could extend to many facets of a person's private life. Further, such information is required to be provided regardless of whether doing so will breach any Commonwealth, state or territory law that protects privacy and regulates the use or disclosure of personal information.

1.114 It is unclear to the committee how this broad and unconstrained requirement to share personal information may be regarded as proportionate to the stated objective of the measure. This is particularly so given the general description

---

27 EM, Attachment A, 12.

28 EM, Attachment A, 12.

of the perceived shortcomings and risks of the previous arrangements. Also, the extent to which the forthcoming Memoranda of Understanding may safeguard the right to privacy is not yet known, and it will not be subject to enforcement or parliamentary scrutiny.

1.115 **The committee therefore considers that the requirement to provide personal information for the purposes of the character test limits the right to privacy. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

Omnibus Repeal Day (Spring 2014) Bill 2014

Portfolio: Prime Minister and Cabinet
Introduced: 22 October 2014

Purpose

1.116 The Omnibus Repeal Day (Spring 2014) Bill 2014 (the bill) seeks to amend or repeal legislation across nine portfolios. It includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements the measures included in the Statute Law Revision Bill (No. 2) 2014 and the Amending Acts 1970-1979 Bill 2014.

1.117 The bill also abolishes the following bodies:

- the Fishing Industry Policy Council;
- the Product Stewardship Advisory Group; and
- the Oil Stewardship Advisory Council.

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

Removal of consultation requirement when changing disability standards

1.119 Item 19 of Schedule 2 seeks to repeal a number of sections in the *Telecommunications Act 1997* which currently require the Australian Communications and Media Authority (ACMA) to consult before making changes to disability standards.

1.120 Currently, ACMA can make a 'disability standard' in relation to equipment used in connection with a standard telephone service where features of the equipment are designed to cater for the special needs of persons with disabilities (for example, an induction loop designed to assist with a hearing aid).[1] Before making a disability standard, ACMA must try to ensure that interested persons have an adequate opportunity (of at least 60 days) to make representations about the proposed standard, and give due consideration to any representations made.[2] By removing these requirements, the committee considers that the measure engages the right to equality and non-discrimination.

Right to equality and non-discrimination

1.121 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.122 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

1 Section 380 of the *Telecommunications Act 1997*.

2 Section 382 of the *Telecommunications Act 1997*.

rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.123 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[3] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[4] 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.[5]

1.124 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.

1.125 Article 4 of the CRPD requires that when legislation and policies are being developed and implemented that relate to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

1.126 Article 9 of the CRPD requires state parties to take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems.

1.127 Article 21 of the CRPD requires state parties to take all appropriate measures to ensure persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others.

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

1.128 The statement of compatibility states that the amendment potentially engages the rights or persons with disabilities to be consulted and actively involved, as required by article 4(3) of the CRPD. However, it concludes that the measure is compatible with the right because any limitation is 'reasonable, necessary and proportionate to the goal of rationalising regulatory requirements with respect to statutory consultation'.[6]

---

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

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

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

6 See Explanatory Memorandum (EM) 70.

1.129 In particular, the statement of compatibility appears to suggest that existing consultation requirements in section 17 of the *Legislative Instruments Act 2003* (LI Act) provide an equivalent consultation mechanism through which persons with an interest in disability standards may comment on those standards.[7]

1.130 However, the committee notes that section 17 of the LI Act does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, there are no equivalent process requirements to those contained in the current provision, which provides for at least 60 days for people to make comments on a proposed standard. In addition, the LI Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[8]

1.131 In light of the above, the committee considers that the consultation requirements under the LI Act are not equivalent to the current consultation requirements in the *Telecommunications Act 1997,* and that repealing the provisions may therefore limit the right of persons with disabilities to be adequately consulted when a disability standard is being amended. The statement of compatibility provides no assessment of this potential limitation of the right to equality and non-discrimination and the rights of persons with disabilities.

1.132 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,[9] 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'.[10] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address

---

7 See EM, 70.

8 LI Act, sections 18 and 19.

9 Appendix 2; See Parliamentary Joint Committee on Human Rights (PJCHR), *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.

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

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.

1.133 **The committee therefore considers that repealing the consultation requirements under the *Telecommunications Act 1997* relating to changes to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities. As set out above, the statement of compatibility provides no assessment of the compatibility of the measure with these rights. The committee therefore seeks the advice of the Parliamentary Secretary to the Prime Minister as to:**

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

Removal of requirement for independent reviews of Stronger Futures measures

1.134 Item 6 in Schedule 6 of the bill seeks to repeal section 114 of the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).

1.135 This section provides that the Minister for Indigenous Affairs 'must cause an independent review to be undertaken of the first seven years of the operation' of Part 10 of the Classification Act. Part 10 of the Classification Act commenced on 16 July 2012 as part of the Stronger Futures package of measures, which applied solely to Indigenous communities.[11] These measures made it an offence to possess or control prohibited material in a prohibited material area or to supply prohibited material in, or to, a prohibited area. Prohibited material includes material that is pornographic or excessively violent.

1.136 Section 114 of the Classification Act requires that the review must be independent and must assess the effectiveness of the special measures (and any other matter specified by the Minister for Indigenous Affairs). A copy of the review must be tabled in Parliament.

1.137 Items 7 to 13 of Schedule 6 of the bill seek to repeal several provisions in the *Stronger Futures in the Northern Territory Act 2012* (SF Act) that currently:

11 See *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*, Schedule 3.

- provide for an independent review of Commonwealth and Northern Territory alcohol laws to assess their effectiveness in reducing harm (to be commenced two years after the SF Act commenced and completed before 15 July 2015);
- provide for an independent review of the first three years of operation of the SF Act (with the report of the review to be tabled in Parliament); and
- enable the minister to request that the Northern Territory appoint an assessor to conduct an assessment in relation to licenced premises.

1.138 The measures in the Classification Act and the SF Act together are described as the 'Stronger Futures measures'.

1.139 The committee considers that removing the legislated requirement for review of these measures may limit a number of human rights and provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

Right to equality and non-discrimination

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

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

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

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

1.143 The statement of compatibility states that the Stronger Futures measures were introduced to 'support Aboriginal people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy'.[12] It asserts that the measures in the Classification Act and the SF Act 'constitute 'special measures' within the meaning of Article 1(4) of the ICERD'.[13]

1.144 Article 1(4) of CERD provides:

12 EM, 72.

13 EM, 71-72.

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that *they shall not be continued after the objectives for which they were taken have been achieved*.[14]

1.145 'Special measures' under international human rights law can be taken if they are for the sole purpose of securing the adequate advancement of racial or ethnic groups or individuals. Such measures cannot be continued after the objectives for which they were taken to have been achieved.[15] They must also be grounded in a 'realistic appraisal of the current situation of the individuals and communities concerned'.[16]

1.146 The committee notes that it has previously conducted an inquiry into the Stronger Futures measures and it does not consider that these measures can properly be characterised as 'special measures' for the purposes of international human rights law.[17] However, if, as the statement of compatibility states, the measures are 'special measures', there must be a process for a full evaluation of whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage.[18]

1.147 The statement of compatibility concludes that repealing the review requirements under the Classification Act and the SF Act is compatible with human rights, stating that the measures are machinery in nature and do not engage any applicable human rights.

1.148 In addition, the statement of compatibility points to other, existing reviews as providing an equivalent level of scrutiny to the independent review required by

---

14 Emphasis added.

15 See article 1(4) of the CERD.

16 UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, (2009), para 16.

17 See PJCHR, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 21-28.

18 Note the Committee on Economic, Social and Cultural Rights, General Comment No. 16, para 36: 'States parties are encouraged to adopt temporary special measures to accelerate the achievement of equality between men and women in the enjoyment of the rights under the Covenant…The results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved'. Note also the comments of Bell J in *Maloney v R* [2013] HCA 28 at [252].

the Classification Act and the SF Act.[19] In particular, it notes that the Australian government is currently conducting a formal review of the National Partnership Agreement on Stronger Futures in the Northern Territory (Stronger Futures NPA). That review is intended to better align the Stronger Futures package with government priorities, and will include an assessment generally of the effectiveness of the Stronger Futures measures.

1.149 The statement of compatibility also notes that the House of Representatives Standing Committee on Indigenous Affairs recently conducted an inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities.

1.150 However, the committee notes that the review provisions in the Classification Act and the SF Act specify that the reviews must be independent, provide timeframes in which the reviews must be completed, provide frameworks for what must be reviewed and require reports of the reviews be tabled in Parliament. In contrast, the review proposed in the statement of compatibility does not have such features, and particularly lacks any requirement that the review actually take place or that it be independent and transparent.

1.151 **The committee is concerned that the removal of a legislated requirement for independent review of the Stronger Futures measures may mean these measures may not be appropriately evaluated. The committee notes that the statement of compatibility relies on these measures being considered 'special measures' under international law.**

1.152 **While the committee does not consider these measures are properly characterised as 'special measures', the committee seeks the advice of the Parliamentary Secretary to the Prime Minister as to how the repeal of the review requirements, if these measures are characterised as 'special measures', is consistent with the obligation to monitor whether the objectives of the special measures have been achieved.**

Multiple rights

1.153 The committee has previously reviewed the Stronger Futures measures and concluded that a number of measures central to the SF Act raise significant human rights concerns,[20] in particular measures to address alcohol abuse, income management and school enrolment and attendance through welfare reform. The rights identified by the committee were:

- right to self-determination;[21]

19 See EM, 71-72.

20 See PJCHR, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013).

21 Article 1 of the ICCPR and Article 1 of the International Covenant of Economic, Social and Cultural Rights (ICESCR).

- right to equality and non-discrimination;[22]
- right to social security;[23]
- right to an adequate standard of living;[24] and
- right to privacy.[25]

Compatibility of the measure with human rights

1.154 In its examination of the Stronger Futures measures the committee considered whether the limitations imposed on rights were justifiable. As part of that examination the committee took into account the provisions requiring a legislated independent review process. For example, the committee examined the measures in the SF Act to address alcohol abuse. It considered that these measures engage and limit a number of rights, particularly the right to privacy and the right to non-discrimination. In making its conclusion on the proportionality of the measures, the committee relied on the then minister's analysis that the measures would not be continued after their objective had been achieved and there was to be an independent review of the operation of the legislation after seven years.[26] The committee noted the importance of continuing close evaluation of such measures.

1.155 The committee also noted that effective and meaningful consultation with affected Indigenous communities is an important and necessary requirement for safeguarding human rights, particularly the right to self-determination.[27] The committee concluded that this requires involving affected communities in decisions about whether to adopt measures and in implementing such measures, and also in their monitoring and evaluation.[28]

1.156 The committee considers that the existence of a legislative requirement for independent review and evaluation of the Stronger Futures measures is important to questions about justifying limitations on rights, particularly considering the proportionality of any such limitations. As the committee has concluded that the SF Act introduces a number of measures that limit multiple human rights, the

22 Article 2(1) and 26 of the ICCPR; article 2(2) of the ICESCR; and the CERD.

23 Article 9 of the ICESCR.

24 Article 11 of the ICESCR.

25 Article 17 of the ICCPR.

26 PJCHR, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 38-39.

27 PJCHR, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 34.

28 PJCHR, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 75.

committee considers that removing the requirement for independent review of these measures may affect the proportionality of the Stronger Futures measures.

1.157 As set out above at paragraph [1.50], the committee does not consider that the proposed review process arising from the Stronger Futures NPA provides an equivalent review process to the reviews currently prescribed by the Classification Act and the SF Act.

1.158 **The committee therefore considers that repealing the legislated requirement for an independent review of the Stronger Futures measures may affect whether the Stronger Futures measures can be considered to justifiably limit human rights. As set out above, the statement of compatibility provides no assessment of the compatibility of the measure with human rights. The committee therefore seeks the advice of the Parliamentary Secretary to the Prime Minister as to whether repealing the requirement for review of the Stronger Futures measures is compatible with the rights identified above.**

1.159 The committee notes the findings of the Senate Community Affairs Legislation Committee, which examined the Stronger Futures measures in 2012. That committee noted 'the importance of the independent review that is planned to occur three years after the commencement of the proposed provisions and takes the view that any policy changes recommended by the independent review should be acted upon'.[29] It also recommended that, 'in addition to the reviews of the legislation already announced, the Commonwealth also ensure that any National Partnership Agreement is the subject of an independent and public review and evaluation after five years'.[30]

1.160 The committee also notes that, following its examination of the Stronger Futures measures in its *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation*, it is currently undertaking a review to consider the latest evidence and test the continuing necessity for the Stronger Futures measures.

1.161 The committee notes that the review of Commonwealth and Northern Territory alcohol law (if it is not repealed by this bill), is to be finalised before 15 July 2015 and subsequently tabled.[31] The committee considers that this review would be helpful to ongoing evaluation of the Stronger Futures measures.

---

29 Senate Community Affairs Legislation Committee, *Report on the Stronger Futures in the Northern Territory Bill 2011 [Provisions]; Stronger Futures in the Northern Territory(Consequential and Transitional Provisions) Bill 2011 [Provisions]; Social Security Legislation Amendment Bill 2011 [Provisions]* (Stronger Futures Report), 14 March 2012, para 3.37.

30 Stronger Futures Report, para 4.25 (recommendation 11).

31 See Division 8 of Part 2 of the SF Act.

1.162 **The committee notes that it intends to report on its *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* in mid-2015.**

Academic Misconduct Rules 2014 [F2014L01785]

Portfolio: Education
Authorising legislation: Academic Misconduct Statute 2014
Last day to disallow: 26 March 2015

Purpose

1.163 The Academic Misconduct Rules 2014 (the rules) govern the academic conduct of all students at the Australian National University (ANU). The rules set out what constitutes academic misconduct and the consequences that flow from an allegation of misconduct.

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

Interim denial of access to university following allegation of misconduct

1.165 Rule 10 of the rules enables the Deputy Vice-Chancellor, by written notice, to deny a student access to all or any of the facilities of the university on an interim basis following an allegation of academic misconduct. The period of exclusion is to be either set out in the notice or continue until the conclusion of the full inquiry into the alleged misconduct, whichever occurs first.

1.166 Under rule 10.2, a student must not be denied access to facilities unless the Deputy Vice-Chancellor considers that the alleged academic misconduct is of a serious nature.

1.167 Under rule 10.4, an affected student must be given a copy of any such notice and a written statement setting out the reasons for the action and advising that the student has a right to apply for review of the decision under the Appeals Rules.

1.168 The rules define 'academic misconduct' as including cheating; engaging in plagiarism; improperly colluding with another person; acting dishonestly or unfairly in relation to an examination; taking a prohibited document into an examination venue; failing to comply with examination or assessment rules or directions; engaging in conduct in order to gain an unfair advantage; submitting work that is not original; or, in relation to research, committing research misconduct.

1.169 The committee considers that rule 10, which allows for the exclusion of a student from university facilities following an allegation of academic misconduct, may engage and limit the right to education.

Right to education

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

1.171 Under article 4 of the ICESCR, economic, social and cultural rights such as the right to education 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 education

1.172 The committee notes that under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the rule is not required to have an accompanying statement of compatibility which provides an assessment of the instrument with Australia's international human rights obligations. However, the terms of that Act require the committee to examine all legislative instruments for compatibility with human rights.

1.173 The committee is concerned that rule 10, by allowing for the exclusion of a student from the university facilities following an allegation of academic misconduct, without an inquiry having taken place, may limit the right of all persons to access education.

1.174 As noted above, the right to education may be limited so long as the measure seeks to achieve a legitimate objective, is rationally connected to, and is a proportionate way of achieving, that objective.[1] 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.

1.175 The committee notes that the objective of the rules is to ensure that academic integrity is respected and observed at the ANU, and that this is likely to be a legitimate objective for the purposes of international human rights law.[2] However, it is unclear how the exclusion of a student until the conclusion of the inquiry into alleged misconduct achieves (is rationally connected to) the objective of ensuring that academic integrity is respected and observed.

1.176 In addition, the committee considers that the measure may not be a proportionate way to achieve the stated objective, particularly as the exclusion of a person from university facilities could presumably significantly disrupt a person's capacity to pursue or complete their education while the allegation of misconduct was investigated. The committee considers that the question of whether less

1 See the committee's Guidance Note 1 for more information: 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.

2 Rule 3.

restrictive approaches are available is relevant to determining whether the measure may be regarded as proportionate.

1.177 **The committee therefore considers that the power to make an interim exclusion order in relation to a student against whom an allegation of academic misconduct has been made engages and may limit the right to education. As set out above, it is not clear to the committee that the measure may be regarded as compatible with that right. The committee therefore seeks the advice of the Vice-Chancellor of the Australian National University as to whether the measure is compatible with the right to education, and particularly:**

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

Customs (Drug and Alcohol Testing) Amendment Regulation 2014 (No. 1) [F2014L01616]

Portfolio: Immigration and Border Protection
Authorising legislation: Customs Administration Act 1985
Last day to disallow: 25 March 2015

Purpose

1.178 The Customs (Drug and Alcohol Testing) Amendment Regulation 2014 (No. 1) (the regulation) amends the Customs (Drug and Alcohol Testing) Regulation 2013 (2013 regulation) to:

- replace provisions setting out how a sample of hair is to be taken from a Customs worker in order to undertake a prohibited drug test; and
- extend retention periods for records relevant to a breath test, blood test or prohibited drug test to provide that a record indicating that alcohol or prohibited drugs were not detected in relation to an individual can be retained so long as the person works for Customs (replacing an existing requirement to destroy the record after 28 days). This will not apply to retention of a body sample, which must continue to be destroyed within 28 days of the test if no prohibited drug or alcohol is found.

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

Background

1.180 The committee commented extensively on the 2013 Regulation in its *Sixth Report of 2013* and *Seventh Report of 2013*.[1] The committee raised a number of concerns in relation to collection of intimate samples and the potential limitation on the right to privacy. A number of changes were subsequently made to the 2013 regulation to address the committee's concerns.

Conduct of tests—taking of hair samples

1.181 The committee considers that the regulation engages the right to privacy.

1.182 The committee considers that the provisions setting out how a sample of hair is to be taken from a Customs worker for the purposes of a prohibited drug test may limit the right to privacy. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

1 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 139-146; and *Seventh Report of 2013* (5 June 2013) 59-66; see also *Tenth Report of 2013* (26 June 2013) 45-51.

Right to privacy

1.183 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including the right to personal autonomy and physical and psychological integrity, and respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing).

1.184 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

1.185 As noted above, the regulation specifies how a sample of hair is to be taken from a Customs worker for the purposes of a prohibited drug test. The amendment allows an authorised person to collect 'the amount of hair necessary for the conduct of the test', and sets out that the authorised person collecting the sample 'must use the least painful technique known and available' to collect the sample, and 'may collect the sample from any part of the Customs worker's body' excluding the genital or anal area or the buttocks.

1.186 The statement of compatibility for the regulation concludes that the measure is reasonable, necessary and proportionate to achieving the legitimate objectives of the Drug and Alcohol Management Program (DAMP) by ensuring hair samples are sufficient for the conduct of a prohibited drug test. It notes

> …if a hair sample is required for a prohibited drug test but the individual presents with a shaved head, the amendments will allow a sample of hair to be collected from other parts of the body. This is consistent with international guidance and practice and provides certainty that authorised persons are not to take hair samples from intimate regions of the body.
>
> To the extent that an individual's right to privacy is affected by the amendments, the impact is not arbitrary. The amendments are reasonable, necessary and proportionate to achieving the legitimate objectives of the DAMP by ensuring hair samples are sufficient for the conduct of a prohibited drug test.[2]

1.187 While the committee considers that the purpose of ensuring that samples are sufficient for the purpose of conducting a test is likely to be a legitimate objective for the purposes of international human rights law, it is concerned that allowing a hair sample to be taken from any part of the person's body, while excluding intimate regions, may not be the least intrusive approach. The collection of hair from, for

2 Statement of compatibility, 3-4.

example, a person's back, stomach or upper thighs in the workplace could be considered highly intrusive. The committee considers that providing a general power for an authorised person to take a hair sample from anywhere on the body (with the exception of intimate areas) may not be fully compatible with a person's right to privacy.

1.188 The committee considers that the impact on the right to privacy could be alleviated by, for example, requiring the authorised person to take into account the worker's views on which part of their body a hair sample will be collected from.

1.189 **The committee recommends that, to avoid the arbitrary interference with the right to privacy that might result from authorising the collection of a hair sample from any part of a Customs worker's body (excluding intimate areas), the regulation be amended to require that an authorised person take into account the worker's views on which part of their body a hair sample will be collected from.**

Customs Act 1901 - CEO Directions No. 1 of 2015 [F2015L00099]

Customs Act 1901 - CEO Directions No. 2 of 2015 [F2015L00101]

Portfolio: Immigration and Border Protection
Authorising legislation: Customs Act 1901
Last day to disallow: 26 March 2015

Purpose

1.190 The Customs Act 1901 — CEO Directions No. 1 of 2015 [F2015L00099] and the Customs Act 1901 — CEO Directions No. 2 of 2015 [F2015L00101] (the 2015 directions) give directions, respectively, to mainland officers of the Australian Customs and Border Protection Service (ACBPS) and Customs officers of the Indian Ocean Territories Customs Service (IOTCS) regarding the deployment of approved firearms and other approved items of personal defence equipment in accordance with Use of Force Order (2015).

1.191 An ACBPS or IOTCS officer may only use force in accordance with the procedures set out in Use of Force Order (2015), including where a Customs officer is exercising powers to:

- restrain;
- detain;
- physically restrain;
- arrest;
- enter or remain on coasts, airports, ports, bays, harbours, lakes and rivers;
- execute a seizure or search warrant;
- remove persons from a restricted area; or
- board, detain vessels or require assistance.

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

Background

1.193 The committee commented on the Customs Act 1901 — CEO Directions No. 1 of 2012 (the 2012 directions) in its *Third Report of 2012* and *First Report of 2013*.[1]

1 Parliamentary Joint Committee on Human Rights, *Third Report of 2012* (19 September 2012) 28–29; and *First Report of 2013* (6 February 2013) 150-151.

1.194 The committee also reviewed the CEO Order 1 (2010) — Use of Force (the 2010 order) in connection with its assessment of the 2012 directions. The committee noted that the 2010 order was not a publicly available document and requested further information from the minister as to how that met the requirement for laws authorising limits on rights to be publicly accessible.

1.195 The minister responded that the 2010 order was not publicly accessible as it was considered to be an exempt document as defined in the *Freedom of Information Act 1982*. The exemption was due to the content of the order relating to operational methodology, in particular lawful methods for dealing with matters arising out of breaches or evasions of the law, the disclosure of which would prejudice the effectiveness of those methods.

1.196 In response to the committee's inquiries, however, the ACBPS undertook to make an edited version of the document available through its website. The committee notes that the redacted version of the 2010 order is publicly accessible in accordance with that undertaking.[2]

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

Use of lethal force

1.198 The 2015 directions permit the use of lethal force 'when reasonably necessary' to protect life in accordance with Use of Force Order (2015).

1.199 The committee considers that the use of lethal force engages and may limit the right to life.

Right to life

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

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

1.201 The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances. For example, the use of force may be proportionate if it is in self-

2 Australian Customs and Border Protection Service, CEO Order 1 (2010) — Use of Force, redacted version, available at http://www.customs.gov.au/webdata/resources/files/CEOOrder12010RedactedVersion.pdf.

defence, for the defence of others or if necessary to effect arrest or prevent escape (but only if necessary and reasonable in the circumstances).

1.202 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 measures with the right to life

1.203 The statement of compatibility states that the directions promote the right to life:

> …as they only direct officers of Customs to use lethal force when reasonably necessary (noting that they must act appropriately and in proportion to the seriousness of the circumstances), when other options are insufficient and only in self-defence from the immediate threat of death or serious injury or in defence of others against who there is an immediate threat of death or serious injury. The Order specifically states that lethal force is an option of last resort, and that an officer of Customs who considers using lethal force must do so with a view to preserving human life.

1.204 The committee notes that the statement of compatibility provides some relevant information as to the contents of the Use of Force Order (2015):

> It covers competency standards, the accreditation of trainers, the qualification and re-qualification of officers of Customs in operational safety, reporting mechanisms, and management structures for the training and monitoring of operational safety in the ACBPS. It also includes the requirement for the safe handling of firearms and other items of PDE. The ACBPS Operational Safety Principles and Use of Force Model is detailed in the Order and guides officers of Customs in the use of appropriate force in the exercise of statutory powers. It provides that the ACBPS policy is for the minimum amount of force to be used that is reasonable and appropriate for the effective exercise of statutory powers. It also emphasises the use of negotiation and conflict de-escalation in any interaction between officers of Customs and members of the public.

1.205 The committee considers that the limitation on the right to life may be justifiable. However, given the directions rely on Use of Force Order (2015), the committee is unable to complete its assessment of the compatibility of the measures with the right to life without reviewing the order itself.

1.206 **The committee therefore requests a copy of the Use of Force Order (2015) to enable a complete assessment of the instrument with the right to life. Noting the likely considerations around the exemption of the document from publication, the committee is willing to receive a copy of the order on an in-confidence basis.**

1.207 **Additionally, the committee notes that an edited version of the previous Use of Force Order is available on the Agency's website. The committee therefore**

recommends that the Use of Force Order (2015) be similarly published (and redacted if necessary).

Use of handcuffs on children

1.208 The directions permit the use of handcuffs on children in a situation where a Customs officer 'believes on reasonable grounds it is essential to safely transport the child to protect the welfare and/or security of the child or any other person'.

1.209 The committee considers that the use of handcuffs on children engages and may limit the rights of the child.

Rights of the child

Obligation to consider the best interests of the child

1.210 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.

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

1.212 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights. The rights of children include: the right to develop to the fullest and the right to protection from harmful influences, abuse and exploitation.

1.213 State parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices.

Compatibility of the measures with the rights of the child

1.214 The statement of compatibility states that the directions promote the rights of the child because a Customs officer 'may only use necessary and reasonable force in the exercise of statutory powers'.

1.215 The statement of compatibility sets out the following criteria that a Customs officer must consider before deciding whether or not to handcuff a child or young person:

- whether the person in custody is violent, or believed to be violent, or his or her demeanour gives rise to the apprehension of violence;
- whether the person in custody has attempted, or is likely to attempt to escape;

- whether the person in custody is required to be escorted with other detainees;
- the necessity to prevent the person in custody from injuring him or herself, or any other person;
- the necessity to restrain the person in custody to prevent the loss, concealment or destruction of evidence; or
- whether the person threatens to expel a bodily fluid or has done so.

1.216 Measures that enable the handcuffing of children limit the rights of the child. The rights of the child may be limited if it can be demonstrated that the measure supports a legitimate objective, is rationally connected to that objective, and is a reasonable and proportionate way to achieve that objective.

1.217 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. This conforms with the committee's Guidance Note 1,[3] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[4] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. 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.

1.218 **The committee is concerned that the use of handcuffs on children may limit the rights of the child. As set out above, the statement of compatibility does not provide sufficient justification of the compatibility of the measure with this right. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

---

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

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

- **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.**

1.219 **The committee therefore requests a copy of the Use of Force Order (2015) to enable a complete assessment of the instrument with the rights of the child. Noting the likely considerations around the exemption of the document from publication, the committee is willing to receive a copy of the order on an in-confidence basis.**

Migration Amendment (Complementary Protection) Regulation 2014 [F2014L01617]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 25 March 2015

Purpose

1.220 The Migration Amendment (Complementary Protection) Regulation 2014 (the regulation) would amend the Migration Regulations 1994 (the 1994 regulations) to reflect the language of a proposed new risk threshold test for meeting Australia's protection obligations under paragraph 36(2)(aa) of the *Migration Act 1958* (Migration Act).

1.221 The proposed new risk threshold test for the Migration Act would be that the minister 'considers that it is more likely than not that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country'. This would replace the current test, which requires the minister to be satisfied that there are 'substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm'.

1.222 The 1994 regulations contain a number of provisions that apply the language of the risk threshold test that is used to assess applications under paragraph 36(2)(aa) of the Migration Act. This regulation would amend provisions in the 1994 regulations relating to certain actions taken by the Refugee Review Tribunal (RRT), in relation to:

- the criteria to be determined by the RRT regarding the waiver or refunding of fees; and
- the criteria for directions by the RRT when making a decision to remit a matter for reconsideration.

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

Background

1.224 The new risk threshold test language to be inserted into the 1994 regulations by the regulation reflects a proposed amendment to the Migration Act by the Migration Amendment (Protection and Other Measures) Bill 2014 (the bill), which is currently before the Parliament.[1] The bill seeks to amend paragraph 36(2)(aa) of the Migration Act to introduce the new risk threshold test to be applied when assessing a protection visa application based on whether a non-citizen engages Australia's

1 The bill was passed by the House of Representatives on 22 September 2014 but is yet to pass in the Senate.

protection obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The committee examined the bill in its *Ninth Report of the 44th Parliament*.[2]

1.225 The regulation provides that the change to the 1994 regulations will not take effect until the bill is passed. The committee notes that the regulation specified that a number of measures (items 4 and 5 of Schedule 1) would not take effect if the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* came into force before the regulation did. As the relevant provisions of that Act commenced on 16 December 2014, those items will not commence. The committee's examination of the regulation has therefore not included those items.

Altering the test for determining Australia's protection obligations—permissible directions when the RRT remits a decision

1.226 Item 3 of Schedule 1 of the regulation would amend the criteria for directions made by the RRT when making a decision to remit a matter for reconsideration. Under section 415 of the Migration Act, the RRT has the power to remit a matter for reconsideration to the minister or delegate in accordance with specific directions (as permitted by the regulations).

1.227 Currently paragraph 4.33(4)(a) of the regulations provide that it is a permissible direction for the RRT to direct the minister that the applicant satisfies the test as to whether the person is owed protection obligations because there are substantial grounds for believing that there is a real risk of harm if the applicant were removed from Australia. The amendments would provide that it will be a permissible direction that the applicant satisfies the test as to whether protection obligations are owed on the basis of the new risk threshold test—that the applicant will 'more likely than not' suffer significant harm if removed from Australia.

1.228 As the committee noted in its consideration of the bill, the proposed changes to the risk threshold test for determining whether a person meet's Australia's protection obligations engage Australia's non-refoulement obligations.

1.229 The change to the regulations will limit how the RRT makes a direction that an applicant meets Australia's protection obligations when remitting a matter for reconsideration. The committee considers that altering the test for determining Australia's protection obligations, requiring a higher threshold of risk, may risk Australia breaching its non-refoulement obligations. The committee therefore provides the following analysis of whether the regulation is compatible with this obligation for the purposes of international human rights law.

---

2 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 35.

Non-refoulement obligations

1.230 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the CAT for people who are found not to be refugees.[3] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm such as the death penalty; arbitrary deprivation of life; and cruel, inhuman or degrading treatment or punishment.[4]

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

1.232 The provision of 'independent, effective and impartial' review of non-refoulement decisions including merits review is integral to complying with non-refoulement obligations.[5]

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

Compatibility of the measure with the obligation of non-refoulement

1.234 In its *Fourth Report of the 44th Parliament*[6] and its *Ninth Report of the 44th Parliament,*[7] the committee set out its consideration of international human rights law in relation to Australia's non-refoulement obligations. Following this analysis the

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

4 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

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

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

7 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (July 2014) 'Migration Amendment (Protection and Other Measures) Bill 2014', 39-43 (paras 1.179-1.193).

committee concluded that the proposed amendments to the risk threshold are incompatible with Australia's non-refoulement obligations.

1.235 The statement of compatibility does not assess the human rights impact of the changes to the risk threshold. Rather, it states that the regulation is consequential to the changes in the 2014 bill and the statement of compatibility for that bill addresses the human rights implications. It then goes on to conclude, without any analysis, that the amendments are compatible with human rights.

1.236 However, as the amendments to what directions the RRT can make when remitting a matter for reconsideration may result in the RRT no longer being able to make a direction that the applicant is owed protection obligations, as they don't meet the new risk threshold, this may result in an applicant who may be owed protection obligations under international human rights laws ultimately being removed from Australia.

1.237 **As the committee has already concluded that the new risk threshold is incompatible with Australia's non-refoulement obligations, it follows that the amendments to what is a permissible direction by the RRT, which incorporates the new risk threshold, is also incompatible with Australia's non-refoulement obligations.**

Social Security (Administration) (Excluded circumstances – Queensland Commission) Specification 2014 [F2015L00002]

Portfolio: Social Services
Authorising legislation: Social Security (Administration) Act 1999
Last day to disallow: 26 March 2015

Purpose

1.238 The Social Security (Administration) (Excluded circumstances – Queensland Commission) Specification 2014 (the instrument) seeks to specify circumstances in which a person will not become subject to income management following a notice given by the Family Responsibilities Commission (FRC). The circumstances are that the notice was given in respect of a person where:

- the person's usual place of residence is an area other than a welfare reform community area;
- the person's usual place of residence was not on 1 July 2008 in a welfare reform community area; and
- the person has not lived for three months or more in a welfare reform community area since 1 July 2008.

1.239 'Welfare reform community area' is defined in the instrument to be the Aurukun area, Coen area, Hope Vale area and Mossman Gorge area.

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

Background

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

Stronger Futures package of legislation

1.242 The Stronger Futures package of legislation engages multiple human rights.

1.243 **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 regulation as part of that broader inquiry.**

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

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

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

Purpose

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

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

1.246 Key amendments proposed in the bill are set out below.

1.247 Schedule 1 of the bill would:

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

- extend the operation of the powers in relation to terrorist acts and terrorism offences for a further 10 years;
- lower the legal threshold for arrest of a person without a warrant for terrorism offences and the new advocating terrorism offence;

- amend the *Criminal Code Act 1995* (Criminal Code Act) to:
  - limit the defence of humanitarian aid for the offence of treason to instances where the person did the act for the sole purpose of providing humanitarian aid;
  - create a new offence of 'advocating terrorism';
  - make various amendments to the terrorist organisation listing provisions;
  - amend the terrorist organisation training offences;
  - extend the control order regime for a further 10 years and make additional amendments to the regime;
  - extend the preventative detention order (PDO) regime for a further 10 years and make additional amendments to the regime;
- make various amendments to the Crimes (Foreign Incursions and Recruitment) Act 1978;
- amend the Foreign Evidence Act 1994 to increase the court's authority to admit material obtained from overseas in terrorism-related proceedings; and
- amend the Foreign Passports (Law Enforcement and Security) Act 2005 to introduce a 14-day foreign travel document seizure mechanism.

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

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

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

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

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

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

Background

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

1.255 The committee notes that legislative responses to issues of national security are generally likely to engage a range of human rights. For example, legislative schemes aimed at the prevention of terrorist acts may seek to achieve this through measures that limit a number of traditional freedoms and protections that are characteristic of Australian society and its system of government.

1.256 The committee notes that human rights principles and norms are not to be understood as inherently opposed to national security objectives or outcomes. Rather, international human rights law allows for the balancing of human rights considerations with responses to national security concerns.

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

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

Referral of certain measures to the PJCIS

1.259 The committee recommended that the extension and amendments to the special powers regime not proceed until such time as the PJCIS has conducted the

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

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

review of the ASIO special powers regime in accordance with current section 29(1)(bb) of the *Intelligence Services Act 2001*.

1.260 The committee recommended that the Attorney-General refer the extension of, and amendments to, the control orders and PDO regimes to the PJCIS for review and report. The committee recommended that the extension and amendments to the control order regime not proceed until the PJCIS has reported.

1.261 The committee recommended that the Attorney-General refer the extension of the stop, question, search and seizure powers to the PJCIS for review and report. The committee recommended that the extension and amendments to the stop, question, search and seizure powers not proceed until the PJCIS has reported.

Attorney-General's response

> I note the Committee recommended a number of the measures contained in the Bill be referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for review and report. I am pleased to advise the Committee that the Bill was referred to the PJCIS and, on 17 October 2014, the PJCIS tabled the report of its inquiry into the Bill. The PJCIS made 37 recommendations in relation to the Bill and the Government accepted all of them. In response to a number of those recommendations, the Government introduced amendments to the Bill, which were subsequently passed by the Parliament.[3]

Committee response

1.262 **The committee thanks the Attorney-General for his constructive engagement with the committee and for his detailed response to the committee's requests for further information in relation to the bill.**

1.263 In its initial examination of the bill the committee recommended that the PJCIS review in detail the necessity of the ASIO special powers regime, the control orders regime, the extension and amendments to the PDO regime and the amendments to the stop, question, search and seizure powers.

1.264 The committee welcomes the Attorney-General's decision to refer the bill to the PJCIS, and recognises that the bill was amended as a result of that committee's inquiry.

1.265 **However, the committee's recommendation was premised on the need for an extensive examination of the four sets of powers and their necessity and proportionality for the purposes of international human rights law. The committee was particularly concerned that the powers were to be extended by 10 years without a preceding and thorough examination of those powers by the PJCIS.**

---

3 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 1.

1.266 **In this respect, the committee regards the expedited timeline for the PJCIS to consider the bill as not having been conducive to a full and thorough examination of the extension and amendments to the specific powers in question.**

1.267 The committee makes further comments below in relation to each of the four sets of powers extended and amended by the bill.

National security law and indirect discrimination

Right to equality and non-discrimination

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

Attorney-General's response

> The Committee has requested further advice as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination. As acknowledged by the Committee, the legislation is not directly discriminatory. The legislation affects people who engage in activities contrary to Australia's national security and to criminal law. The enforcement of counter-terrorism laws is subject to the operations of a number of government agencies, including but not limited to the AFP, ASIO and the Australian Customs and Border Protection Service. These agencies operate and engage with the public in a broad range of environments, including within communities and in more secure environments such as at Australia's borders. Staff within these agencies receive training, including on cultural awareness, which supports the non-discriminatory application of the law within the environments in which they work.[4]

Committee response

1.269 **The committee thanks the Attorney-General for his response.** The committee noted in its initial examination of the bill that it does not have as its purpose discrimination against any person; it would apply to all people in Australia, and is not directly discriminatory. However, the committee noted that the UN Committee on the Elimination of Racial Discrimination has previously raised concerns that counter-terrorism legislation in Australia may disproportionately affect Arab and

4 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 1.

Muslim Australians.[5] In its most recent concluding observation on Australia, that committee emphasised Australia's obligation 'to ensure that measures directed at combating terrorism do not discriminate in purpose *or effect* on grounds of race, colour, descent, or national or ethnic origin'[6] (emphasis added).

1.270 The committee notes that the Attorney-General's identifies the cultural awareness training that law enforcement officers receive as supporting the non-discriminatory application of the law. However, no information is provided as to the specific nature or content of the training, or its effectiveness.

1.271 The committee considers that more information is required to explain how Australia's counter-terrorism laws are enforced in a non-discriminatory manner. Specifically, information as to how the government is addressing the UN concerns that measures directed at combating terrorism do not indirectly discriminate (that is, in effect) on grounds of race, colour, descent, or national or ethnic origin would assist the committee in its assessment of the bill.

1.272 **The committee considers that the counter-terrorism laws could, in practice, impact on particular communities disproportionately. The committee therefore requests the further advice of the Attorney-General as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination. In particular, the committee requests information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded and amended powers.**

Schedule 1 – Extension of powers subject to a sunset provision

1.273 Law enforcement agencies and intelligence and security agencies have special powers to investigate and seek to prevent terrorist acts. The powers are the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, question, search and seizure powers. Given their extraordinary nature, these powers were subject to a sunset clause, and the bill proposed to extend the powers for a further 10 years (this was reduced to four years by amendment).

1.274 The committee notes that the Attorney General's response provided a 'global' response to the committee's separate analysis of each the extraordinary

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

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

powers proposed in the bill. Set out below are the recommendations and requests arising from the committee's initial examination of each of the powers, followed by the Attorney-General's response and then the committee's comment.

The ASIO special powers regime

Multiple rights

1.275 The committee sought the advice of the Attorney-General as to the compatibility of each part of the special powers regime with the right to security of the person and the right to be free from arbitrary detention; the right to freedom of expression; the right to freedom of movement; the right to a fair trial; the right to privacy; and the right of the child to have their best interests a primary consideration, and particularly:

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

Amendment of the ASIO special powers regime

Multiple rights

1.276 The committee sought the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the special powers regime with the right to security of the person and the right to be free from arbitrary detention; the right to freedom of expression; the right to freedom of movement; the right to a fair trial; the right to privacy; and the right of the child to have their best interests a primary consideration, and particularly:

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

Extension of the period for the ASIO special powers regime

Multiple rights

1.277 The committee recommended that the extension and amendments to the special powers regime not proceed until such time as the PJCIS has conducted the review of the ASIO special powers regime in accordance with current section 29(1)(bb) of the *Intelligence Services Act 2001*.

1.278 The committee also recommended that the extension and amendments to the special powers regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the special powers regime and the amendments contained in Schedule 1 to the bill.

1.279 The committee sought the advice of the Attorney-General as to the compatibility of the proposed 10 year extension of the special powers regime with the right to security of the person and the right to be free from arbitrary detention; the right to freedom of expression; the right to freedom of movement; the right to a fair trial; the right to privacy; and the right of the child to have their best interests a primary consideration, and particularly:

- whether the proposed 10 year extension of the special powers regime is aimed at achieving a legitimate objective;
- whether there is a rational connection between the proposed 10 year extension and that objective; and
- whether the proposed 10 year extension is a reasonable and proportionate measure for the achievement of that objective.

The control orders regime

Multiple rights

1.280 The committee sought the advice of the Attorney-General as to the compatibility of the control orders regime with the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work, and particularly:

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

Amendments to the control orders regime

Multiple rights

1.281 The committee sought the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the control orders regime with the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of

movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work, and particularly:

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

Extension of the period of the control orders regime

Multiple rights

1.282 The committee recommended that the Attorney-General refer the extension and amendments to the control orders regime to the PJCIS for review and report. The committee recommended that the extension and amendments to the control order regime not proceed until the PJCIS has reported.

1.283 The committee also recommended that the extension and amendments to the control orders regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the control orders regime and the amendments proposed in Schedule 1 to the bill.

1.284 The committee sought the advice of the Attorney-General as to the compatibility of the proposed 10 year extension of the control orders regime with the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work, and particularly:

- whether the proposed 10 year extension of the control orders regime is aimed at achieving a legitimate objective;
- whether there is a rational connection between the proposed 10 year extension and that objective; and
- whether the proposed 10 year extension is a reasonable and proportionate measure for the achievement of that objective.

The preventative detention orders regime

Multiple rights

1.285 The committee sought the advice of the Attorney-General as to the compatibility of the preventative detention orders regime, with the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right

to privacy; the right to be treated with humanity and dignity; the right to protection of the family; and the rights to equality and non-discrimination, and particularly:

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

Amendments to the preventative detention orders regime

Multiple rights

1.286 The committee sought the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the preventative detention orders regime, with the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to be treated with humanity and dignity; the right to protection of the family; and the rights to equality and non-discrimination, and particularly:

- whether each of the proposed amendments to the preventative detention orders regime are aimed at achieving a legitimate objective;
- whether there is a rational connection between each of the proposed amendments to the preventative detention orders regime and that objective; and
- whether each of the proposed amendments to the preventative detention orders regime are a reasonable and proportionate measure for the achievement of that objective.

Extension of the period of the preventative detention orders regime

Multiple rights

1.287 The committee recommended that the Attorney-General refer the extension and amendments to the PDO regime to the PJCIS for review and report. The committee recommended that the extension and amendments to the PDO regime not proceed until the PJCIS has reported.

1.288 The committee also recommended that the extension and amendments to the PDO regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the PDO regime and the amendments proposed in Schedule 1 to the bill.

1.289 The committee sought the advice of the Attorney-General as to the compatibility of the proposed 10 year extension to the preventative detention orders regime, with the right to security of the person and the right to be free from arbitrary

detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to be treated with humanity and dignity; the right to protection of the family; and the rights to equality and non-discrimination, and particularly:

- whether the proposed 10 year extension to the preventative detention orders regime is aimed at achieving a legitimate objective;
- whether there is a rational connection between the proposed 10 year extension and that objective; and
- whether the proposed 10 year extension is a reasonable and proportionate measure for the achievement of that objective.

Extension of stop, question, search and seizure powers

Multiple rights

1.290 The committee sought the advice of the Attorney-General as to the compatibility of each of the stop, question, search and seizure powers, and their proposed extension, with the right to privacy; the right to security of the person and the right to be free from arbitrary detention; the right to freedom from cruel, inhuman and degrading treatment or punishment; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to be treated with humanity and dignity in detention; and the rights to equality and non-discrimination, and particularly:

- whether each of the stop, question, search and seizure powers, and their proposed extension, are aimed at achieving a legitimate objective;
- whether there is a rational connection between each of the stop, question, search and seizure powers, and their proposed extension, and that objective; and
- whether each of the stop, question, search and seizure powers, and their proposed extension, are a reasonable and proportionate measure for the achievement of that objective.

1.291 The committee recommended that the Attorney-General refer the extension of the stop, question, search and seizure powers to the PJCIS for review and report. The committee recommended that the extension and amendments to the stop, question, search and seizure powers not proceed until the PJCIS has reported.

1.292 The committee also recommended that the extension of the stop, question, search and seizure powers not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the stop, question, search and seizure powers.

Attorney-General's response

Sunset provisions and reviews of counter-terrorism powers

Of particular relevance to the Committee's recommendations in relation to Schedule 1 of the Bill, the Committee may wish to note that, on the recommendation of the PJCIS, the sunset periods for the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers have been reduced from 10 years to approximately 4 years, with all these powers ceasing to have effect on 7 September 2018.

In addition, the Bill was amended to require the Independent National Security Legislation Monitor to review the powers by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. The timing of these reviews will allow for both the Monitor and the PJCIS to consider the operation of the powers as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the powers beyond 2018. In the case of the ASIO special powers regime, these reviews will replace the PJCIS review previously required by 22 January 2016.

Legitimate objectives of the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers

I note the Committee has emphasised the importance of a legitimate objective to justify any proposed limitation on human rights and that this objective 'must address a pressing or substantial concern, and not simply seek to achieve an outcome regarded as desirable or convenient'. I support the Committee's emphasis of this statement and note that the powers provided to ASIO, the AFP and state and territory police by the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers all support the legitimate objective of preventing serious threats to Australia's national security interests and, in particular, preventing terrorist attacks.

That is, the prevention of a terrorist attack, and the resultant loss of human life, financial loss and potential loss of social cohesion, is not merely a 'desirable or convenient' outcome. In the current security environment, where Australians are travelling in greater numbers than ever before to participate in terrorist violence in overseas conflicts, the risk of a successful terrorist attack occurring in Australia is high and mitigating this risk is a paramount priority of Government. In September 2014, the Government raised the National Terrorism Public Alert System to 'high - terrorist attack is likely' on the basis of advice from security agencies. The arrests in Sydney and Brisbane in September 2014 and most recently in Sydney on 10 February 2015 are solemn illustrations that the terrorist threat is real.

> Further, both members of the Government and from our law enforcement and security agencies have advised of the significant numbers of individuals engaging in terrorist activity in support of foreign conflicts. More than 90 Australians are currently engaged in fighting in Syria and northern Iraq and most of them are engaged with the listed terrorist organisations ISIL or Jabhat al-Nusra. More than 20 such people have returned to Australia and over 100 people are known to be supporting the conflict from within Australia. These are significantly higher numbers than have been seen in relation to Australians engaging in overseas conflicts in the past, such as the conflict in the former Yugoslavia, as raised in paragraph 1.36 of the Committee's report, and more relevantly, the conflict in Afghanistan.
>
> The Committee may be interested to note that the Australian Government investigated 30 Australians who travelled to conflict areas (e.g. Pakistan and Afghanistan) between 1990 and 2010 to train or fight with extremists. Of these, 19 engaged in activities of security concern in Australia after their return, and eight were convicted in Australia of terrorism-related offences. Five of these eight are still serving prison sentences of up to 28 years. This past experience with foreign fighters has informed the Government's current approach, however the scale and intensity of the current situation warrants the amended powers provided for in the Act.
>
> Additional information will be provided to the Committee to further address the issues raised about the ASIO special powers regime.[7]

Committee response

1.293 **The committee thanks the Attorney-General for his response.** The committee welcomes the reduction in the extension of the sunsetting of the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers from 10 years to approximately four years; and that each of the powers will be subject to review by the INSLM before any further extension of the powers.

1.294 The committee agrees that the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers all support the legitimate objective of preventing serious threats to Australia's national security interests and, in particular, preventing terrorist attacks.

1.295 Accordingly, as the powers limit human rights, for the measures to be justifiable and therefore compatible with human rights under international law, it must be shown that they are rationally connected to, and a proportionate way to achieve, this legitimate objective.

---

7 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 1-2.

1.296 The committee's initial assessment of the bill highlighted the fact that the powers had never been subject to a human rights assessment or the subject of a statement of compatibility assessment, as they were introduced prior to the establishment of the committee.[8] The committee also noted its concern that the bill would extend the powers for a further 10 years (reduced to four by amendment) without a thorough review by the INSLM or the PJCIS prior to that extension being granted. The committee notes that, while the PJCIS has reviewed the bill as a whole, it did so in an expedited fashion which did not independently review the powers.

1.297 The committee notes that the powers expanded and amended by the bill are highly invasive in nature and significantly limit multiple human rights; and that this was recognised when the powers were initially introduced by the inclusion of a sunset clause to ensure they would not continue unnecessarily or without substantial periodic review.

1.298 The committee remains of the view that a thorough review of the necessity and proportionality of these powers by the INSLM and the PJCIS is required.

1.299 **The committee considers the special powers regime, control order regime, and preventative detention order regime engages and limits a range of human rights. As noted above, these measures have not been sufficiently justified for the purpose of human rights law. The committee therefore reiterates its recommendation that the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers be reviewed by the INSLM and PJCIS to establish that they are necessary and proportionate to achieving the legitimate objective of national security. In the absence of any such review, the committee is unable to conclude that the powers are compatible with human rights.**

1.300 **The committee notes that a proposal to extend powers necessarily involves a foundational assessment of whether the powers, in and of themselves, are compatible with human rights. The committee therefore separately recommends that a statement of compatibility be prepared for the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers noting that they have not previously been subject to a human rights compatibility assessment.**

8 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) para 1.41, 1.66, 1.90 and 1.120.

Schedule 1 – Delayed notification search warrant

Introduction of delayed notification search warrant regime

Right to privacy

1.301 The committee recommended that the proposed delayed notification search (DNS) warrant regime be amended to include, as a threshold requirement for the issue of a DNS warrant, that an applicant must demonstrate that it is not possible to obtain the evidence in another way and that it is not possible to obtain that information by an 'ordinary' search warrant.

1.302 The committee recommended that the proposed power to enter third-party premises under the DNS warrant regime be amended to include, as a threshold requirement for its exercise, that an applicant must demonstrate that it is not possible to obtain the evidence in another way.

1.303 The committee sought the advice of the Attorney-General as to the compatibility of the DNS warrant regime with the right to privacy, and particularly whether the limitation is a necessary and proportionate measure for the achievement of that objective.

Right to a fair trial and fair hearing rights

1.304 The committee sought the advice of the Attorney-General as to the compatibility of the DNS warrant regime with the right to a fair trial, and particularly:

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

Attorney-General's response

> The Committee has recommended that the delayed notification search warrant regime be amended to include, as a threshold requirement, that an application for a delayed notification search warrant must demonstrate that it is not possible to obtain the evidence in another way and that it is not possible to obtain that information by a search warrant under Part IAA of the *Crimes Act 1914*.
>
> An application for a delayed notification search warrant currently requires: (1) that there are reasonable grounds to suspect that one or more eligible offences have been, are being, are about to be or likely to be committed; (2) that entry to and search of the premises will substantially assist in the prevention of, or investigation into, those offences, and (3) that there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of

the premises. I am satisfied that when considering the third limb, the applicant would turn his or her mind to the reasons for the necessity for the warrant to be executed differently from an 'ordinary' search warrant, where the entry and search of the premise would be conducted with the knowledge of the occupier. I also bring the Committee's attention to the additional factors that an eligible issuing officer is required to consider when determining whether the delayed notification search warrant should be issued, which include whether there are alternative means of obtaining the evidence or information sought.

The Committee has similarly recommended that the proposed power to enter third-party premises to execute a delayed notification search warrant be amended to include, as a threshold requirement for its exercise, that an application must demonstrate that it is not possible to obtain the evidence in another way. I am satisfied that the current provisions appropriately limit the use of this power to circumstances where the issuing officer is satisfied that entry to neighbouring premises is reasonably necessary to avoid compromising an investigation. In assessing whether such entry is reasonably necessary the eligible issuing officer would consider whether it is possible to obtain the evidence without entering the third party premise or by undertaking an 'ordinary' search warrant under Part IAA of the *Crimes Act 1914*.

The Committee has requested further advice as to whether the period of delay for notifying an occupier of the execution of a warrant is compatible with the right to privacy. The delayed notification search warrant scheme engages the right to privacy by enabling law enforcement officers to enter a warrant premises, including a suspect's home or place of work, without the knowledge or consent of the occupier. However, the scheme serves the legitimate aim of assisting the AFP to effectively prevent or investigate Commonwealth terrorism offences and protect the community from harm. The AFP have indicated that allowing an occupier to be notified of a search warrant sometime after the warrant was executed or otherwise granted provides the AFP with the opportunity to gather evidence, identify additional suspects and locate further relevant premises and evidence. This will increase the opportunity for successful investigations of terrorism offences and enhance the ability of the AFP to gather information about planned operations with a view to preventing the commission of terrorist acts and, in turn, harm to the community. The Committee may also wish to note that, on the recommendation of the PJCIS, the period of delay permitted without seeking ministerial approval has been reduced from a maximum of 18 months to 12 months.

The Committee has requested further advice on whether the delayed notification search warrant scheme is compliant with the right to a fair trial, particularly due to the initial secrecy surrounding the warrant. Article 14 of the ICCPR provides that all persons shall be entitled to a fair trial and fair hearing rights in the determination of a criminal charge against them. I note the Committee has emphasised the importance of a legitimate

objective to justify any proposed limitation on human rights and that this objective 'must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient'. As explained above, the delayed notification search warrant scheme will serve the legitimate aim of assisting the AFP to prevent or investigate Commonwealth terrorism offences. The initial secrecy surrounding the warrant is critical to the success of certain investigations by the AFP, particularly when carrying out investigations of multiple suspects over an extended period. If a suspect was aware of the execution of the warrant, that suspect could undertake counter-surveillance measures, change their plans to avoid further detection, relocate their operations, or relocate or destroy evidence of their activities. It would also provide a suspect with the opportunity to notify their associates, who may not yet be known to police, allowing the associates to cease their involvement with the known suspect, destroy evidence or avoid detection in other ways. The procedures by which this restriction on fair trial is permitted are authorised by law and are not arbitrary, with a strict two-stage authorisation process and rigorous reporting obligations. Accordingly, to the extent that the delayed notification search warrant scheme limits the right to a fair trial, those limitations are reasonable, necessary and proportionate for the achievement of a legitimate objective.

I also bring the Committee's attention to the requirement for a person to be notified of the execution of a delayed notification search warrant where a person has been charged with an offence and the prosecution is proposing to rely on evidence obtained under the warrant. This notice must be given as soon as practicable after the person is charged with the offence and no later than the time of service of the brief of evidence by the prosecution. This recognises that it is important that any person charged with an offence is notified of the way in which evidence supporting the particular charge or charges has been obtained in order to enable them to challenge the evidence. I am satisfied that this ensures that the defendant is not placed at a substantial disadvantage to the prosecution.[9]

Committee response

1.305 **The committee thanks the Attorney-General for his response.**

1.306 The Attorney-General's response considers both the right to privacy and the right to a fair trial. The committee's consideration of the Attorney-General's response is set out below.

9 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 2-4.

Right to privacy

1.307 Search warrant powers clearly engage the right to privacy as they permit the search of personal and private property without consent. The committee agrees that the DNS warrant regime has the legitimate objective of supporting national security, particularly through combating terrorism. The committee also agrees that the measures are rationally connected to that legitimate objective as the measures can reasonably be seen to provide law enforcement officers with additional information-gathering powers to combat terrorism.

1.308 The remaining issue for consideration is the question of whether the DNS warrant regime may be regarded as a proportionate measure for the achievement of its stated objective. A measure will only be proportionate where it is the least restrictive measure for achieving its objective.

1.309 The committee notes that, while the Attorney-General is satisfied that 'when considering the third limb [of the test for a DNS warrant], the applicant would turn his or her mind to the reasons for the necessity for the warrant to be executed differently from an 'ordinary' search warrant', there is no statutory test requiring a DNS warrant be only issued in circumstances where it is necessary and not possible to obtain the evidence in another way. Accordingly, the DNS warrant may be issued in circumstances where there are other (albeit more difficult) ways to obtain that information. Accordingly, the committee is unable to conclude that the DNS warrant regime is proportionate for the purpose of international human rights law.

1.310 The committee's recommendations with respect to this measure were designed to ensure that the measures were the least limiting of the right to privacy. The committee remains of the view that its previous recommendations with respect to the DNS warrant regime are necessary and appropriate to ensure that the measure is proportionate, as they would provide that DNS warrants are used only as a last resort when information could not otherwise be obtained by an ordinary search warrant.

1.311 **The committee considers that the DNS warrant regime does not provide the least restrictive way to achieve the legitimate objective of supporting national security through combating terrorism. As set out above, the committee therefore considers that the measure is not a proportionate limitation on the right to privacy and, accordingly, concludes that the measure is likely to be incompatible with human rights.**

Right to a fair trial and fair hearing rights

1.312 As set out above in relation to the right to privacy, the committee considers that the delayed notification search warrant regime supports a legitimate objective and that there is a rational connection between the measures and the legitimate objective. The committee's remaining concern in relation to fair trial and fair hearing rights is whether the DNS warrant regime may be regarded as a proportionate measure for the achievement of its stated objective

1.313 The committee's initial analysis noted that the proposed DNS warrant regime may not be a proportionate limitation on the right to a fair trial.[10] This is because the initial secrecy surrounding the warrant, including where a person is not present for a search, is likely to make it more difficult to claim legal professional privilege or to challenge whether a warrant has a proper legal basis. The committee noted these measures may undermine the principle of equality of arms, which is an essential component of the right to a fair trial, and requires that a defendant must not be placed at a substantial disadvantage to the prosecution.[11] This concern is not addressed by the requirement to provide notice of the search at the time a person is charged as this will necessarily be some time after the search has been completed. In particular the committee is concerned that a person may not have sufficient information about searches to enable them to identify, prevent and challenge any abuse.[12] The committee notes that the DNS is a significant departure from the ordinary search warrant scheme. Under the ordinary search warrant scheme a person whose premises are being searched is aware of the basis and the authority for the search, and is therefore in a position to challenge or make a complaint about the issue of the warrant and its method of execution.[13] The DNS regime circumscribes the ability of affected individuals to ensure that execution occurs strictly in accordance with the law and may accordingly have implications for whether particular evidence may be effectively challenged as inadmissible.

1.314 The committee notes that the Attorney-General's response sets out the investigative reasons why law enforcement authorities require a DNS warrant regime, but does not address the question of how the regime may be regarded as a proportionate limitation on the right to a fair trial.

1.315 **The committee considers that it has not been established that the DNS warrant regime may be regarded as a proportionate limitation on the right to a fair trial. Accordingly, the committee considers that the DNS warrant scheme is likely to be incompatible with the right to a fair trial.**

---

10 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) para 1.161.

11 See, *Morael v France* (207/1986), *Human Rights Committee,* 28 July 1989.

12 *Van Rossem v Belgium* ECHR (2004) Application no. 41872/98. See English summary at https://wcd.coe.int/ViewDoc.jsp?id=899269&Site=COE.

13 General search warrant provisions require that the officer executing the warrant provide a copy of the warrant to the occupier and enable them to observe the search.

Schedule 1 – Declared area offence

Introduction of 'declared area' offence provision

Right to a fair trial and fair hearing rights—presumption of innocence

1.316 The committee considered that the declared area offence provision, as currently drafted, is likely to be incompatible with the right to a fair trial and the presumption of innocence.

Right to liberty—prohibition against arbitrary detention

1.317 The committee considered that the declared area offence provision, as currently drafted, is likely to be incompatible with the prohibition against arbitrary detention.

Right to freedom of movement

1.318 The committee considered that the declared area offence provision, as currently drafted, is likely to be incompatible with the right to freedom of movement.

Rights to equality and non-discrimination

1.319 The committee considered that the declared area offence provision, as currently drafted, is likely to be incompatible with the right to equality and non-discrimination.

Attorney-General's response

> I agree with the Committee that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective.
>
> The new 'declared area' offence addresses two pressing and substantial concerns by deterring Australians from travelling to foreign conflict areas where terrorist organisations are engaging in hostile activities. The first concern is that Australians who enter or remain in conflict areas put their own lives at risk. ASIO has advised that over 20 Australians have died in the Syria and Iraq conflicts in the past year. The recently published United Nations Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, provides details of the extreme violence directed against civilians and captured fighters by the terrorist organisation[14].
>
> The second concern is that foreign conflicts provide a significant opportunity for Australians to develop the necessary capability and ambition to undertake terrorist acts. ASIO noted in its submission to the

14 http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/HRC_CRP_ISIS_I4Nov2014.pdf.

PJCIS that it is aware of returnees from Syria and Iraq undertaking attacks in Europe.

The nature of the current terrorist threat is such that it requires a proactive and prevention-focused response. As noted above, it is only in the very recent past that Australia has prosecuted Australians returning from conflict areas desirous of committing terrorist acts on Australian soil. The Government has responded by taking steps to counter this significant threat.

Australia must also assist in the global effort to prevent a flow of fighters to ISIL and other terrorist groups. On 24 September 2014 the United Nations Security Council unanimously passed Resolution 2178 which condemns violent extremism and implores countries to address underlying factors including preventing and suppressing the recruiting, organising, transporting or equipping of individuals who travel to a foreign country for the purpose of participation in terrorist acts.

The elements of the offence are very clear. The conduct that has been criminalised is intentionally entering, or remaining in, a declared area where the person should know that the area has been declared. There are a number of offences in Australia that operate to restrict people from entering areas to either protect those located within the area or to deter a person from risking their own personal safety by entering, such as Indigenous protected areas. The declared area offence has been structured with the aim of achieving the legitimate objective of deterring people from going to an extremely dangerous location.

The Government understands the importance of appropriately designed safeguards, particularly in the development of human rights compatible legislation and practice. The Committee may wish to note that the Government readily included two additional safeguards, upon recommendation of the PJCIS, in the final version of the Bill. The legislation now provides for a PJCIS review of a declaration before the end of the disallowance period and that a declaration must not cover an entire country.

In response to the Committee's concern that the Minister would be able to "declare an area in cases where a terrorist organisation was engaged in only minor or transitory 'hostile activity"' I refer the Committee to the definition of 'engage in a hostile activity' as inserted by new section 117.1 of the Criminal Code. Under that section a person engages in a hostile activity in a foreign country if the person engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):

> (a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);
>
> (b) the engagement, by that or any other person, in action that:

(i) falls within subsection 100.1 (2) but does not fall within subsection 100.1 (3); and

(ii) if engaged in in Australia, would constitute a serious offence;

(c) intimidating the public or a section of the public of that or any other foreign country;

(d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);

(e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

For the purposes of the declared area offence this conduct would be engaged in by a listed terrorist organisation--conduct that I believe could not be classed as 'minor'.

As I noted to the Senate, the Government is aware of the extraordinary nature of the offence and the intention is to use the declaration provisions for declaring areas sparingly, when necessary and in the interests of national security. Consistent with my Department's advice to the PJCIS, a protocol to guide and prioritise the selection of areas in foreign countries for declaration has been developed. Included in that protocol are non-legislative factors to which a Minister may have regard when deciding whether or not to declare an area for the purposes of the offence. One of those factors is the enduring nature of the listed terrorist organisation's hostile activity in the area. I believe that this addresses the Committee's concerns about a declaring an area where the ' hostile activity' is only transitory. I attach a copy of the protocol for the Committee's information.

I also note that the Committee has raised specific concerns that the offence may be incompatible with the right to a fair trial and the presumption of innocence, the presumption against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

With regards to the right to a fair trial and the presumption of innocence, I note that a defendant bears no burden of proof unless they seek to raise facts constituting a defence. Should a defendant choose to rely on the defence, they bear an evidential burden to adduce or point to evidence that suggests a reasonable possibility that their travel was for a sole legitimate purpose or purposes. The prosecution retains the legal burden and must disprove any legitimate purpose defence raised beyond a reasonable doubt, in addition to proving the elements of the offence. It is not unusual in criminal law for the person with a peculiar or unique knowledge of facts to be required to point to evidence of that fact. Bribing a foreign official and forced marriage are further examples of offences that

contain offence specific defences. The Government is firmly of the view that the declared area offence is entirely compatible with the right to a fair trial and the presumption of innocence.

In response to the Committee's concern that the offence may lead to arbitrary detention, I note that imprisonment after conviction by a criminal court is a permissible deprivation of liberty. Prosecution of the offence, as with all offences in Division 119 of the Criminal Code, will be subject to a requirement to obtain the consent of the Attorney-General to prosecute, as well as the public interest consideration of the prosecutorial policy of the Commonwealth Director of Public Prosecutions. It is also appropriate and just for the Parliament to create a criminal offence with an appropriate penalty when the conduct to be criminalised has the potential to cause considerable harm to both individuals and Australia's national security interests.

To the extent that the offence may limit the right to freedom of movement I note that the limitation is lawful and proportionate. A limitation can be justified if it is in the interest of national security. As I have noted above, the risk of a successful terrorist attack occurring in Australia is high. The Government considers this to be a grave threat to the entire nation[15].

With regards to the Committee's comments in relation to the effect of the declared area offence on the right to equality and non-discrimination, I refer to my earlier comments about the legislative criteria including the definition of 'engage in a hostile activity' and the protocol to guide and prioritise the selection of areas in foreign countries for declaration.[16]

Committee response

1.320 **The committee thanks the Attorney-General for the additional information regarding the declared area offence provision. The committee concluded in its initial analysis that the measure was 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. For the reasons set out below, the committee reiterates its view that the declared area offence provisions are incompatible with these rights.**

1.321 The committee's initial examination of the declared area offence provisions provided a specific analysis for each of the human rights engaged. Similarly, set out below is the committee's consideration of the Attorney-General's response in relation to the specific human rights engaged.

15 Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, N P Engel, 1993, page 212, note 2.

16 Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 4-6.

Right to a fair trial and fair hearing rights—presumption of innocence

1.322 The committee's initial analysis raised particular concerns related to the proportionality of the measure with respect to the right to a fair trial and the presumption of innocence.[17] The committee noted that an offence provision requiring the defendant to carry an evidential or legal burden of proof engages the right to be presumed innocent, because the defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.323 The committee acknowledged that the measure in question requires the prosecution to prove each element of the offence beyond reasonable doubt. However, this means that the prosecution must only prove that:

- an individual travelled to a declared area;
- they knew or were reckless as to whether it was a declared area; and
- they were an Australian citizen or held one of the proscribed visas.

1.324 Accordingly, criminal liability will be prima facie established where a person enters or remains in a declared area. The prosecution is not required to prove any intent to engage in terrorist activity or some other illegitimate activity.

1.325 As the mere fact of travel therefore proves the proposed offence, it falls on the defendant to raise as a defence the possibility that they were in the declared area solely for a legitimate purpose. This has the effect of placing the evidentiary burden on the defendant to produce evidence of their purpose for travel. Where a statutory exception, defence or excuse to an offence is provided in this way, this must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent.

1.326 The Attorney-General justifies the limitation on the right to a fair trial and the presumption of innocence on the basis that it is not unusual in criminal law for the person with a peculiar or unique knowledge of facts to be required to point to evidence of that fact. However, the committee notes it is usual is for the prosecution to have a heavy burden to prove each element of the offence including mens rea or the mental element of the offence (which could be said to within the unique knowledge of the accused). The question of whether a reverse evidential or persuasive burden is a permissible limitation on the presumption of innocence depends on whether this reverse burden is justifiable in the circumstances. The response has not shown that in relation to this particular offence the reverse burden is justifiable in light of a contextual assessment of the offence.

17 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) para 1.170.

1.327 The Attorney-General also points out that there are a number of offences in Australia that operate to restrict people from entering areas either to protect those located within the area or to deter a person from risks to their own personal safety; these include, for example, certain Indigenous protected areas. However, the committee notes that those offences are not terrorism related, principally involve criminal trespass and otherwise apply to discrete locations that are usually sparsely populated or unpopulated (such as restrictions on missile defence ranges).They do not apply, as is the case with this offence provision, to whole provinces in which approximately up to a million people reside, meaning that the impact of the current provisions is substantially broader as there is a greater likelihood that a person will seek to enter the region.[18]

Right to liberty—prohibition against arbitrary detention

1.328 The committee noted in its initial analysis that no evidence is required to be put forward by the prosecution that a person had any involvement in, or intention to be involved in, a terrorist act.[19] Accordingly, the committee considered that the conviction and detention of an individual for being in a declared area where no evidence has been provided of a nefarious intent could be arbitrary for the purposes of international human rights law.

1.329 The Attorney-General in his response notes the requirement to obtain the consent of the Attorney-General to prosecute, as well as the public interest consideration of the prosecutorial policy of the Commonwealth Director of Public Prosecutions (DPP), as addressing any concern that detention arising from the measure could be considered arbitrary for the purposes of international human rights law. The committee notes that, while these are important safeguards, they are discretionary in nature and, as such, fall short of statutory protections. These safeguards therefore do not remedy the essential problem, from the perspective of international human rights law, that it may be unjust to imprison someone for a breach of this offence provision where they have no intention to engage in any terrorist act.

1.330 While the committee agrees that it is appropriate and just for the creation of criminal offences with appropriate penalties for conduct that has the potential to cause considerable harm to both individuals and Australia's national security interests, the committee notes that the offence in question has broader application, insofar as it may apply to any individual in a declared area who is unable to provide a defence within the limited exceptions that are available under the bill.

---

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

19 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) para 1.188.

Right to freedom of movement

1.331 The committee considered that the declared area offence provision, as currently drafted, was likely to be incompatible with the right to freedom of movement.

1.332 The Attorney-General's response reiterates the terrorist threat which demonstrates that the measure has a legitimate objective for international human rights law purposes. However, the committee considers that the Attorney-General has not explained how the offence provisions are rationally connected to that objective, and how they may be regarded as a proportionate limitation on the right to freedom of movement.

Rights to equality and non-discrimination

1.333 The committee considered that the declared area offence provision, as currently drafted, was likely to be incompatible with the right to equality and non-discrimination.

1.334 The committee welcomes the explanation of the Attorney-General with respect to the definition of 'engage in a hostile activity', and the development of a protocol to guide the Attorney-General's actions with respect to the measure.

1.335 The committee's initial analysis noted that there are many thousands of Australians with significant personal, family, cultural and business ties to other countries.[20] Criminalising access to certain countries by declaration (and with a narrow range of purposes prescribed for the 'sole legitimate purpose' defence as provided for in the bill) may therefore have a greater effect on certain individuals based on their ethnicity and/or country of birth. Such an impact may amount to indirect discrimination under international human rights law.

1.336 However, under international human rights law:

> …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 [International Covenant on Civil and Political Rights]…[21]

1.337 The committee was concerned that the bill does not have sufficient criteria that must be satisfied before the Minister for Foreign Affairs may list a country or countries as a declared area. While the protocol provides some level of protection, the committee notes that it is not statutory, and simply guides the decision making of the Attorney-General. In addition, it does not bind the Minister for Foreign Affairs,

---

20 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) para 1.209.

21 UN Human Rights Committee, General Comment No. 18: Non-discrimination, adopted at the Thirty-seventh Session of the Human Rights Committee on 10 November 1989, 3.

who is the person that ultimately makes the declaration of an area under the offence provision.

Schedule 1 – Foreign evidence

Allowing foreign material to be adduced in terrorism-related proceedings

Prohibition against torture, cruel, inhuman or degrading treatment

1.338 The committee recommended that the bill be amended to explicitly provide that, in relation to foreign evidence sought to be adduced in terrorism-related proceedings, the prosecution must satisfy the court that the evidence has not been obtained through the use of torture.

1.339 The committee recommended that the bill be amended to remove the word 'directly' from proposed section 27D(2) to clarify that the exception will apply to all evidence obtained directly or indirectly through the use of torture.

1.340 The committee recommended that the bill be amended so that the definition of 'torture' in subsection 27D(3) explicitly references the definition of 'torture' in article 1(1) of the Convention Against Torture (CAT).

Attorney-General's response

> The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* includes a number of safeguards relating to adducing foreign material in terrorism-related proceedings. This includes a broad judicial discretion to prevent material from being adduced if it would have a substantial adverse effect on the right of the defendant to receive a fair hearing; a requirement to exclude material obtained as a result of torture or duress; and a requirement that the court give an appropriate instruction to the jury about the potential unreliability of foreign evidence unless there is a good reason not to do so.
>
> The Government strongly opposes the use of material obtained by torture or duress, by any country in any circumstance. In response to the recommendations in the PJCIS Advisory Report relating to foreign evidence, the Government moved, and Parliament passed, amendments to further strengthen the protections against material obtained by torture or duress. These included:
>
> - ensuring the provision governing the exclusion of foreign evidence obtained by torture or duress applies where any person directly obtained material as a result of torture or duress (as opposed to material obtained by public officials);
> - expanding the definition of 'duress' to include other threats that a reasonable person might respond to; and
> - requiring the court to give an appropriate instruction to the jury about the potential unreliability of foreign evidence.

While noting the Committee's comments on the use of the word 'directly' in relation to material obtained by torture, the Government considers that the provision as passed ensures that any material obtained as a result of torture or duress would not be admissible, given the definition of torture, and the fact that the exception to material obtained through duress will apply in a broad range of circumstances.

The mandatory exclusion of material obtained as a result of torture or duress at subsection 270(2) of the *Foreign Evidence Act 1994* recognises the seriousness with which the Government views acts or threats of torture or duress and the inherent unreliability of material or information obtained in such a manner. The Government considers the provision as drafted adequately addresses these concerns. First, and appropriately, it is ultimately up to the Court to determine whether material was obtained as a result of torture or duress. Second, the provisions enable the defence to object to the admission of material. Finally, while the defence bears an evidentiary burden, if this is met, the prosecution must establish to the court's satisfaction that the material was not obtained as a result of torture or duress.

In response to the Committee's comment on the definition of torture, I can advise that the definition of torture at subsection 27D(3) of the Foreign Evidence Act is consistent with article 1(1) of the Convention Against Torture (CAT). It captures the relevant conduct defined under article 1 of the CAT, and also expands on the definition of torture by including conduct inflicted by any person (rather than only those acting in the capacity of a public official). Given the definition of torture for the purposes of the Foreign Evidence Act is a wider interpretation than that at article 1 of the CAT, the Government considers it is not necessary to explicitly reference the definition of 'torture' in the CAT. The Government considers that the amendments to the Foreign Evidence Act are consistent with, and uphold, Australia's international obligations under Article 15 of the CAT. These amendments operate in addition to the broad judicial discretion to prevent material being adduced that would compromise a fair hearing and the jury instruction, where requested by a party to proceedings, concerning potential unreliability of foreign evidence.[22]

Committee response

1.341 **The committee thanks the Attorney General for his response.** The committee welcomes the government's strong opposition to the use of material obtained by torture. Further, the committee welcomes and acknowledges that the exclusion of foreign evidence obtained as a result of torture applies broadly to all individuals and not just public officials.

22 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 6-7.

1.342 However, while the committee agrees that the definition of torture in subsection 27D(3) of the *Foreign Evidence Act 1994* is broadly consistent with the definition in the CAT, the committee nevertheless maintains the view that it would be preferable if the CAT was explicitly referenced in the provision, thereby directly incorporating the definition into domestic law. This would minimise the risk that definitions of torture could be developed which are not in accordance with Australia's international obligations.

1.343 The committee raised its concern that, in practice, the responsibility would fall on the defendant to produce evidence that material was obtained directly through torture in order to have evidence ruled inadmissible under this provision. The committee noted that the UN Committee Against Torture has interpreted the obligation under article 15 of the CAT as imposing a positive duty on state parties to examine whether statements brought before its courts were made under torture.[23] The committee notes that the Attorney-General has not specifically addressed this concern, beyond noting that it is ultimately up to a court to determine whether material was obtained as a result of torture or duress, and that once evidence is raised by a defendant it is up to the prosecution to establish to the court's satisfaction that the material was not obtained as a result of torture or duress. No information or assessment is provided as to whether this approach may be regarded as consistent with Australia's obligations under article 15.

1.344 The committee also noted that the provision as drafted would only exclude evidence obtained 'directly' as a result of torture. As the word 'directly' does not appear in the text of article 15 of the CAT, all evidence obtained as a result of torture, whether directly or indirectly, is required to be excluded under that article. The committee considered that limiting the exclusion to material obtained 'directly' as a result of torture was therefore inconsistent with Australia's obligations under the CAT, and therefore impermissible as a matter of international human rights law. The committee notes that the Attorney-General does not provide a detailed response to this concern, beyond stating that the government considers that the provision as passed ensures that any material obtained as a result of torture or duress would not be admissible (given the definition of torture in the *Foreign Evidence Act 1994*) and the fact that the exception to material obtained through duress will apply in a broad range of circumstances. No analysis or reasoning is provided to support these claims, or to establish that the measure may be regarded as compatible with article 15 of the CAT.

1.345 **The committee therefore considers that the provisions allowing foreign material to be adduced, including material that may have been indirectly obtained through torture, in terrorism-related proceedings are incompatible with the prohibition on torture, cruel, inhuman or degrading treatment.**

---

23 *PE v France* (193/2001), Human Rights Committee, 24 September 2001 at 150, para. 6.3, 3; *GK v Switzerland* (219/2002), Human Rights Committee, 7 May 2003 at 185.

1.346 **The committee reiterates its previous recommendations that, to ensure the compatibility of the measures with the prohibition on torture, cruel, inhuman or degrading treatment, the legislation be amended:**

- **to explicitly provide that, in relation to foreign evidence sought to be adduced in terrorism-related proceedings, the prosecution must satisfy the court that the evidence has not been obtained through the use of torture;**
- **to remove the word 'directly' from proposed section 27D(2) to clarify that the exception will apply to all evidence obtained directly or indirectly through the use of torture; and**
- **so that the definition of 'torture' in subsection 27D(3) explicitly references the definition of 'torture' in article 1(1) of the Convention Against Torture (CAT).**

Schedule 1 – Passport suspension

Introduction of power to suspend passports

Right to freedom of movement

1.347 The committee sought the advice of the Attorney-General as to whether the proposed introduction of the power to suspend passports for up to 14 days is compatible with the right to freedom of movement, and particularly whether the limitation is reasonable and proportionate to the achievement of its stated objective.

Attorney-General's response

> The Committee has requested further advice on the proportionality of the measure to suspend passports. The purpose of the suspension power is to provide a temporary preventative measure while further information is obtained to determine whether more permanent action should be taken (that is, the cancellation of a person's travel documents). The temporary suspension provision would be used in cases where ASIO has high concerns related to the travel of the individual, but needs more time to further investigate and seek to resolve those concerns. Activities to support this, which take between days and weeks, may include seeking formal release of intelligence from foreign partners to include in the assessment. New intelligence can also put older reporting in a new context (positive or negative), meaning there is a requirement for ASIO to review and re-evaluate its holdings, which takes time. Further, in some cases it may be that an in-depth intelligence investigation may be required, involving a range of activity.
>
> While the suspension period is longer than the maximum 7-day suspension period proposed by the Independent National Security Legislation Monitor (INSLM), it is a reasonable and proportionate period which ensures the practical utility of the suspension period. The fourth annual report of the INSLM noted that the suggested 7 day timeframe was somewhat arbitrary and should be the subject of further discussion. In most circumstances the

> INSLM's proposed timeframe of up to 7 days would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents. In its report on the Bill, the PJCIS considered that the 14-day timeframe appropriately balances the need to allow sufficient time for a full assessment to be made by ASIO with the impact on the individual.[24]

Committee response

1.348 **The committee thanks the Attorney-General for his response. The committee considers that the response demonstrates that the measure is a proportionate limitation on the right to freedom of movement and may therefore be regarded as compatible with human rights.**

Schedule 1 – Advocating terrorism

Right to freedom of opinion and expression

1.349 The committee considered that the advocating terrorism offence provision, as currently drafted, is likely to be incompatible with the right to freedom of opinion and expression.

Attorney-General's response

> The Committee has expressed concern that the new offence of advocating terrorism would likely be incompatible with the right to freedom of opinion and expression, as the Statement of Compatibility does not provide sufficient detail to establish that the new offence is in pursuit of a legitimate purpose. In raising this concern, the Committee has noted the existing incitement offences in the Criminal Code, under which it is an offence for a person to urge the commission of an offence with the intention that the offence will be committed. The Committee has also expressed concern about the proportionality of the offence, contending that the offence could 'apply in respect of a general statement of support for unlawful behaviour'. I draw the Committee's attention to the elements of the offence which may address these concerns.
>
> First, a person only commits the offence if the person advocates the doing of a terrorist act or the commission of a terrorism offence. A terrorist act is defined in section 100.1 of the Criminal Code. The definition specifically excludes action that is advocacy, protest, dissent or industrial action and is not intended:
>
> (i) to cause serious harm that is physical harm to a person; or
>
> (ii) to cause a person's death; or

24 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 7.

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

A terrorism offence is defined in subsection 3(1) of the *Crimes Act 1914*. For the purposes of this offence the Crimes Act definition is limited to offences punishable on conviction by imprisonment for 5 years or more and excludes attempt (section 11.1), incitement (section 11.4) or conspiracy (section 11.5) to the extent that it relates to a terrorism offence or a terrorism offence that a person is taken to have committed because of complicity and common purpose (section 11.2), joint commission (section 11.2A) or commission by proxy (section 11.3).

Second, the offence applies the fault clement of recklessness, which is also clearly defined in the Criminal Code. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. This is different to the incitement offences in the Criminal Code, for which intention is the fault element.

As noted in the Statement of Compatibility, the objective of this new offence is to protect the public from terrorist acts and the terrorism activities that the relevant terrorism offences are designed to deter. The offence captures behaviours that are particularly relevant to the current security environment, where individuals are being radicalised to engage in terrorist acts and commit terrorism offences, including by travelling overseas to participate in foreign conflicts, through a wide range of media. The 'radicalisers' operate both overtly, through broad messaging such as that seen on social media, and covertly, advocating in general that people should engage in terrorist acts and commit terrorism offences for their cause. Such radicalisers may not be satisfied that, following their advocacy, a terrorist act or terrorism offence will occur in the ordinary course of events (as required to prove the fault element of intention) but would be aware of a substantial risk that such a result would occur (required to prove recklessness). In pursuing the legitimate objective of protecting the public from terrorism, it is necessary to limit the freedom of opinion and expression of those whose advocacy of terrorism is likely to radicalise others at great risk to public safety.

In response to the Committee's concerns about proportionality of the offence, the application of clear definitions to the offence will ensure that the offence would be unlikely to 'apply in respect of a general statement of support for unlawful behaviour'. In respect of the example presented by the Committee in paragraph 1.258, advocating regime change in a country perceived as undemocratic or oppressive would not fall within the offence unless the person advocated the doing of a terrorist act or commission of a terrorism offence as the means by which to achieve that regime change *and* was aware of a substantial risk that, as a result of that advocacy, a

person would engage in a terrorist act or commit a terrorism offence. A campaign of civil disobedience or acts of political protest, as cited in the example, would be likely to fall within the excluded action that is advocacy, protest, dissent or industrial action.[25]

Committee response

1.350 **The committee thanks the Attorney-General for this additional information regarding the advocating terrorism offence provision. The committee concluded in its initial examination of the matter that the measure was likely to be incompatible with the right to freedom of opinion and expression. For the reasons set out below, the committee reiterates its view that the advocating terrorism offence provision is likely to be incompatible with the right to freedom of expression and opinion.**

1.351 The Attorney-General's response addresses both the legitimate objective of the provision and its proportionality to the limitation on the right to freedom of expression. The committee agrees that the offence provision has the legitimate objective of protecting national security. However, the committee remains concerned that the offence provision may not be regarded as reasonable and proportionate for the purposes of international human rights law.

1.352 In particular, the committee notes that a person commits the offence solely on the basis of their words and not actions. 'Advocacy' includes the acts of counselling, promoting, encouraging and urging. Further, it is not necessary to prove actual incitement, and it is not necessary to prove that the individual intended that another person would act on those words—it is enough to prove that the person was reckless as to the risk that someone may act on their words. In addition, the prosecution does not need to prove that an individual did in fact commit a terrorist act or a terrorism offence as a result of the advocacy.

1.353 The committee notes that the advocacy offence relates not only to terrorist acts but also to terrorism offences. As a result, the advocacy offence may relate to advocacy of the following offences:

- providing or receiving training connected with terrorist acts;
- possessing things connected with terrorist acts;
- collecting or making documents likely to facilitate terrorist acts;
- other acts done in preparation for, or planning, terrorist acts;
- membership of a terrorist organisation;
- training involving a terrorist organisation;
- getting funds to, from or for a terrorist organisation;

25 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 8-9.

- providing support to a terrorist organisation; and
- allowing use of buildings, vessels and aircraft to commit offences.

1.354 Accordingly, a broad range of speech may be covered that would not on its face be directly related to a terrorist act.

1.355 The committee considers that, while there are legitimate concerns about radicalisation and the need to provide criminal sanctions that apply to those who may seek to radicalise individuals (particularly those who are vulnerable), the committee remains concerned that the offence provision is overly broad.

1.356 In particular, the Attorney-General's response suggests that radicalisers acting covertly may not be covered by existing incitement provisions. However, it is unclear to the committee that the covert nature of a communication is strictly relevant to the intention behind that communication—that is, radicalisers, by definition, are people who intend to radicalise other individuals and, having such an intention, they would fall squarely within the definition of existing incitement provisions. The logic of an analysis which centres on the covert or overt nature of an expression in fact appears to point to difficulties with evidence and law enforcement powers, rather than to providing a justification for this specific advocacy offence.

Schedule 1 – AUSTRAC amendments

Expanding the power of AUSTRAC to disclose information

Right to privacy

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

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

Expanding the information that AUSTRAC may disclose to partner organisations

Right to privacy

1.358 The committee sought the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share information obtained under section 49 of the AML/CTF Act with partner agencies is compatible with the right to privacy, and particularly:

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

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

Committee response

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

1.360 **The committee seeks the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share financial information with the Attorney-General's Department is compatible with the right to privacy, and particularly:**

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

Right to privacy

1.361 **The committee seeks the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share information obtained under section 49 of the AML/CTF Act with partner agencies is compatible with the right to privacy, and particularly:**

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

Schedule 2 – Stopping welfare payments

Cancellation of welfare payments to certain individuals

Right to social security and an adequate standard of living

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

Right to a fair trial and fair hearing rights

1.363 The committee sought the advice of the Attorney-General as to whether the proposed power to cancel welfare payments is compatible with the right to a fair trial and fair hearing, and particularly:

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

Obligation to consider the best interests of the child

1.364 The committee sought the advice of the Attorney-General as to whether the proposed power to cancel welfare payments is compatible with the obligation to consider the best interests of the child, and particularly:

- whether the proposed power to cancel welfare payments is aimed at achieving a legitimate objective;
- whether there is a rational connection between the proposed power to cancel welfare payments and that objective; and
- whether the proposed power to cancel welfare payments is a reasonable and proportionate measure for the achievement of that objective.

Right to equality and non-discrimination

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

Attorney-General's response

> The Committee raised a number of concerns with Schedule 2 of the Bill (stopping welfare payments), particularly with respect to the Bill's compatibility with the right to social security and an adequate standard of living, the right to a fair trial and fair hearing rights, the obligation to consider the best interests of the child and the right to equality and non-

discrimination. While the Committee acknowledged that the prevention of the use of social security to fund terrorism-related activities is likely to be regarded as a legitimate objective for human rights purposes it also sought further advice on whether the measures could be regarded as reasonable and proportionate to achieving this legitimate objective.

The Committee may wish to note that, on the recommendation of the PJCIS, the Bill was amended to include specific factors to which the Attorney-General must have regard when considering whether to issue a Security Notice to cancel an individual's welfare. The Attorney-General must consider the extent (if any) that any welfare payments of the individual who is the subject of the notice, are being, or may be, used for a purpose that might prejudice the security of Australia or a foreign country, and the likely effect of welfare cancellation on the individual's dependants. This amendment clarified the circumstances where the power may be exercised. In this way, the amendments to the Bill ensure the rights and interests of the child (where applicable) are appropriately factored into the decision-making process.

In relation to the Committee's concerns about the limitation on review rights, I note that the Bill was amended to remove the exemption under Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that section 13 of that Act will apply. This means that an individual may seek review of a decision to cancel welfare payments and may be provided with reasons for the decision where disclosure of those reasons would not prejudice Australia's security, defence or international relations. Where the disclosure of information is not possible because of security reasons the Attorney-General can certify that disclosure would be contrary to the public interest under paragraph 14(1)(a) of the ADJR Act. The Committee may also wish to note that, on the recommendation of the PJCIS, the Bill was amended to ensure that any decision to issue a Security Notice must be reviewed every 12 months.[26]

Committee response

1.366 **The committee thanks the Attorney-General for his response**.

1.367 The committee's initial examination of Schedule 2 considered a number of human rights separately. Set out below is the committee's consideration of the Attorney-General's response in relation to the specific human rights engaged.

Right to social security and right to an adequate standard of living

1.368 The committee notes that the Attorney-General's response did not address the committee's concerns in relation to whether cancellation of welfare payments is compatible with the right to social security and the right to an adequate standard of

26 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 9.

living. The committee appreciates that this specific aspect of the request may have been overlooked by the Attorney-General given the significant number of inquiries raised.

1.369 **The committee therefore seeks the Attorney-General's advice as to whether cancelling welfare payments under Schedule 2 is compatible with the right to social security and the right to an adequate standard of living, and particularly:**

- **whether the proposed power to cancel welfare payments is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the proposed power to cancel welfare payments and that objective; and**
- **whether the proposed power to cancel welfare payments is a reasonable and proportionate measure for the achievement of that objective.**

Right to a fair hearing

1.370 The committee welcomes the amendments made to the bill prior to its enactment to remove the exemption under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that an individual seeking review of a decision to cancel welfare payments may be provided with reasons for the decision. This amendment partially addresses the committee's concerns in relation to the right to a fair hearing. However, the committee notes that reasons for the decision to cancel welfare payments will only be given under the ADJR Act if disclosure of those reasons would not prejudice Australia's security. This exemption is potentially very broad and may result, in practice, in an applicant not being given reasons on grounds that are unchallengeable (as it is very difficult for an applicant to challenge whether disclosure of reasons would prejudice Australia's security).

1.371 The committee also notes that the ADJR Act provides for judicial review of decisions, not merits review, and as such it is questionable whether this fully complies with the right to a fair hearing.

1.372 As the committee stated in its initial analysis, the prevention of the use of social security to fund terrorism-related activities is likely to be regarded as a legitimate objective for human rights purposes. However, the committee remains concerned about the proportionality of measures which enable the executive to cancel welfare payments, which is not subject to merits review and where reasons for the decision may not be provided under the ADJR Act on security grounds.

1.373 **On the basis of the information provided, the committee considers that it has not been established that the cancellation of welfare payments is a proportionate limit on the right to a fair hearing. Accordingly, the committee considers that the power to cancel welfare payments may be incompatible with the right to a fair hearing.**

Obligation to consider the best interests of the child

1.374 The committee thanks the Attorney-General for his advice that, prior to its enactment, the bill was amended to include specific factors to which the Attorney-General must have regard when considering whether to issue a security notice to cancel an individual's welfare, including the likely effect of welfare cancellation on the individual's dependants.

1.375 **The committee thanks the Attorney-General for his response. The committee considers that, taking into account the amendments to the bill prior to its enactment, the measures enabling cancellation of welfare payments are likely to be compatible with the obligation to consider the best interests of the child.**

Right to equality and non-discrimination

1.376 The committee notes that the Attorney-General's response did not address the committee's concerns in relation to whether the cancellation of welfare payments is compatible with the right to equality and non-discrimination, and particularly whether the measure constitutes indirect discrimination. The committee appreciates that this specific aspect of the request may have been overlooked by the Attorney-General given the significant number of inquiries raised.

1.377 **The committee therefore seeks the Attorney-General's advice as to whether cancelling welfare payments under Schedule 2 is compatible with the right to equality and non-discrimination, and particularly:**

- **whether the proposed power to cancel welfare payments is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the proposed power to cancel welfare payments and that objective; and**
- **whether the proposed power to cancel welfare payments is a reasonable and proportionate measure for the achievement of that objective.**

Schedule 3 – Customs detention powers

Inadequately defined objective

Multiple rights

1.378 The committee sought the advice of the Attorney-General as to whether the proposed expansion of Customs detention powers is compatible with the right to liberty; the right to freedom of movement; the prohibition on torture, cruel, inhuman or degrading treatment; and the right to humane treatment in detention, and particularly:

- whether the measures are aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and

- whether the proposed expansion of Customs detention powers are reasonable and proportionate to the achievement of that objective.

Attorney-General's response

The new detention power is aimed at achieving the legitimate objectives of protecting Australia's borders and promoting national security. A recent independent review of national security incidents at the border concluded that existing powers and processes were not sufficient to ensure such incidents could be prevented in future. The review recommended the recalibration of risk between law enforcement and protection on the one hand and facilitation on the other.

As the original statement of compatibility stated, a crucial element of the preventative measures undertaken to limit the threat of returning foreign fighters is to prevent Australians leaving Australia to engage in foreign conflicts in the first instance. The detention powers of the Australian Customs and Border Protection Service (Customs) officers constitute an important preventative and disruption mechanism, and amendments in the Bill reflect the identified need for a broader set of circumstances in which a detention power can be exercised in the border environment. Preventing individuals travelling outside of Australia where their intention is to commit acts of violence in a foreign country assists in preventing terrorists acts overseas and prevents these individuals returning to Australia with greater capabilities to carry out terrorist acts on Australian soil. These powers can, of course, also be exercised in respect of foreign nationals arriving in our country who are a threat to national security. The expanded definition of 'serious Commonwealth offence' is also aimed at achieving the legitimate objective of assisting other law enforcement and Commonwealth agencies in the detection and investigation of Commonwealth offences by allowing officers of Customs to detain persons in respect of a wider range of Commonwealth offences relevant to national security, notably travelling on a false passport and failing to report movements of physical currency or bearer negotiable instruments.

As mentioned in the Explanatory Memorandum, the detention power is only a temporary power and its extension is aimed at Customs facilitating other law enforcement agencies to exercise their powers to address national security threats. The exercise of the powers is also subject to several important safeguards, which reinforce the reasonable and proportionate nature of the power and ensure that the human rights of the detainee are appropriately limited to promote national security considerations. Important qualifiers such as 'reasonable grounds to suspect', 'as soon as practicable', 'take all reasonable steps' and ' believes on reasonable grounds' ensure that application of the detention provisions is not arbitrary and are subject to certain thresholds which require Customs officers to consider whether use of the detention powers is appropriate in a given circumstance.

> The detention power is also not indefinite and includes the requirement that a detained person be made available to a police officer as soon as practicable. The power also includes the right, in all but the most extreme situations, to notify a family member or others of their detention, and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody.
>
> These elements in combination ensure that the detention power is a reasonable and proportionate response to the legitimate objectives outlined above.[27]

Committee response

1.379 **The committee thanks the Attorney-General for his response. On the basis of the information provided, the committee concludes that the measure is likely to be compatible with human rights.**

Schedule 4 – Visa cancellation powers

Introduction of emergency visa cancellation power

Multiple rights

1.380 The committee sought the advice of the Attorney-General as to whether the proposed measures in Schedule 4 are compatible with the obligation to consider the best interests of the child; protection of the family; right to liberty; procedural rights in relation to the expulsion of aliens; the prohibition on *non-refoulement*; and freedom of movement, and particularly:

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

Attorney-General's response

> As noted elsewhere in this response, the Australian Government's National Terrorism Public Alert Level was raised from 'Medium' to 'High' on 12 September 2014. This decision was based on advice from security and intelligence agencies that points to the increased likelihood of a terrorist attack in Australia. The enhanced visa cancellation powers introduced by this proposal are part of Australia's response to Australia's current security environment. In particular, the provisions will enable the Minister for Immigration and Border Protection to cancel the visas of any non-citizen who may pose a risk to the security of Australia in order to prevent their

27 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 9-10.

travel to Australia and, relevantly, to strengthen Australia's response to potential terrorist attacks. The measure is therefore necessary and proportionate for addressing Australia's heightened terrorism alert level.

In relation to the Committee's observations about jurisdiction, the Government's view is that its human rights obligations are primarily territorial. However, Australia has accepted that there may be exceptional circumstances where Australia's human rights obligations may apply extraterritorially (Australia's Written Reply to the Human Rights Committee's List of Issues, UN Doc CCPR/C/AUS/5, 19 January 2009). The Australian Government believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad, such as a situation of occupation, or where a State has actual physical control over persons outside of Australia's territory. As such, I do not agree with the Committee's assertion that making a decision to issue or cancel a visa would necessarily involve the Minister or his delegate 'exercising jurisdiction over the affected individual', particularly if the person was outside of Australia's territory.

I also disagree with the Committee's observations with regards to Article 12(4) of the ICCPR and its application to the visa cancellation powers. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country.

With regard to the consequential cancellation of the visas held by family members, as noted in the Statement of Compatibility, that power is discretionary and will consider the individual circumstances of the family members on a case-by-case basis - including Australia's international obligations in circumstances where the visa holder is located in Australia's territorial jurisdiction. Any cancellation decision will therefore be complementary to Australia's international obligations and will be reasonable and proportionate to the circumstances of the individual.[28]

Committee response

1.381 **The committee thanks the Attorney-General for his response**.

1.382 The powers in Schedule 4 have two key parts. First, it provides for mandatory emergency cancellation of a non-citizen's visa where ASIO suspects that the person might, directly or indirectly, be a risk to security (within the meaning of section 4 of the ASIO Act). Second, it includes additional powers to allow for the consequential cancellation of visas for family members of an individual whose visa is cancelled (at the discretion of the Minister for Immigration and Border Protection)

28 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 10-11.

1.383 Set out below is the committee's separate responses in relation to these two powers.

Visa cancellation of individuals suspected by ASIO of being a risk to security

1.384 The committee agrees that, while Schedule 4 of the bill limits multiple rights, it has the legitimate objective of upholding national security. Moreover, the committee agrees that the measures are rationally connected to the legitimate objective as the emergency powers can directly be seen to be able to uphold national security.

1.385 The remaining concern for the committee is whether the powers may be regarded as proportionate for the purposes of international human rights law. However, the Attorney-General's response does address the of this issue, as it is premised on the view that Australia does not have any human rights obligations towards individuals who are non-citizen visa holders and who are currently outside Australia.

1.386 The committee notes that the Attorney-General's statement on this position references Australia's *Written Reply to the Human Rights Committee's List of Issues*, in which Australia comments on the jurisdiction of its international human rights obligations. While noting that the jurisdictional scope of the ICCPR is unsettled as a matter of international law, Australia states that it has 'taken into account' the Human Rights Committee's guidance on jurisdiction, but without saying that it fully accepts that guidance. The committee notes that, accordingly, the Australian government appears to take a narrow view of its jurisdiction with respect to the ICCPR and its international human rights obligations.

1.387 The committee notes that the power to cancel a visa of a person outside Australia could apply to permanent residents who have briefly travelled outside of Australia but who intend to return. The Attorney-General's response states that a person who enters a state under that state's immigration laws cannot regard the state as his or her own country when he or she has not acquired nationality in that country. However, while the committee notes that this is generally accepted as a matter of international law, there is an exception for individuals who can legitimately consider Australia to be their own country, as has been found by the UN Human Rights Committee in proceedings against Australia.[29] The committee notes that the Attorney-General's response does not explicitly address this case or provide any legal argument as to why this case was incorrectly decided under international human rights law.

29 See *Nystrom v Australia*, (1557/07), Human Rights Committee, 18 July 2011.

Consequential visa cancellation

1.388 In respect of the consequential cancellation of visas for family members of an individual whose visa is cancelled, the committee notes the Attorney-General's confirmation that any consequential visa cancellation would be entirely discretionary. Accordingly, there are no statutory protections ensuring that an individual's visa is not cancelled in breach of Australia's international human rights law. This could engage and limit a number of rights for family members in Australia, including the obligation to consider the best interests of the child and the right to respect for the family.

1.389 **The committee therefore considers that the emergency visa cancellation powers may be incompatible with the right to freedom of movement; the obligation to consider the best interests of the child; and protection of the family, particularly for individuals who are able to claim that Australia is their 'own country' and with respect to consequential visa cancellations of family members.**

Schedule 5 – Identifying persons in immigration clearance

Collection of personal identifiers at automated border control eGates

Right to privacy

1.390 The committee sought the further advice of the Attorney-General as to whether the collection of personal identifiers at automated border control eGates is compatible with the right to privacy, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and
- whether the collection of personal identifiers at automated border control eGates is reasonable and proportionate to the achievement of that objective.

Attorney-General's response

> The Committee may wish to note that, on the recommendation of the PJCIS, the lawful ability for an authorised system to collect personal identifiers-other than a photograph of a person's face and shoulders-was removed from the Bill. The final version of the Bill only enabled an authorised system to collect an image of a person's face and shoulders.
>
> The objective of collecting such a photograph is to enhance the government's ability to identify passengers travelling into and out of Australia. With this enhanced identification capability, the government is more able to identify persons who may present a risk to Australia's security. Having identified such risks, the photograph then enables the Government to take appropriate statutory action and address any associated national security risk which may be evident. In this regard, the taking of a photograph which details a person's face and shoulders is

necessary and proportionate to the need to reduce risks to Australia's national security.[30]

Committee response

1.391 **The committee thanks the Attorney-General for his response. The committee considers that, taking into account the amendments to the bill prior to its enactment, the measures relating to the collection of personal identifiers at automated border control eGates are compatible with human rights.**

30 See Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to Senator Dean Smith (dated 17 February 2015) 11.

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.

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

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

Purpose

2.3 The Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the bill) contains a number of amendments to the *Commonwealth Places (Application of Laws) Act 1970*, *Criminal Code Act 1995*, *Customs Act 1901*, *Financial Transaction Reports Act 1988*, *International Transfer of Prisoners Act 1997* and the *Surveillance Devices Act 2004*. These include:

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

Background

2.4 The committee first reported on the bill in its *Tenth Report of the 44th Parliament*.[1] The committee sought further information from the Minister for Justice with regards to the engagement of the bill with the right to a fair trial and fair hearing rights, the prohibition against retrospective criminal laws, the right to security of the person and freedom from arbitrary detention, the right to life, the prohibition on torture, cruel, inhuman and degrading treatment or punishment and the right to an effective remedy. It also considered that Schedule 4 of the bill promoted human rights, including the prohibition against slavery and forced labour and the right to an effective remedy.

2.5 The committee considered the Minister for Justice's response in its *Fifteenth Report of the 44th Parliament*.[2] It considered that certain measures in the bill are compatible with human rights, while others are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial. However, the committee sought further information regarding the new offence of importing 'psychoactive substance' and the validation of conduct by the AFP in airport investigations.

2.6 The bill finally passed both Houses of Parliament on 23 February 2015.

Committee view on compatibility

Schedule 1 - Import ban on psychoactive substances

New offence of importing 'psychoactive substance'

Prohibition against retrospective criminal laws – quality of law

2.7 The committee requested further advice from the Minister for Justice as to:

- whether the term 'psychoactive substance' could be more specifically defined;
- whether more precise terms than 'significant disturbance' could be used in the definition of what constitutes a 'psychoactive effect', and
- whether non-exhaustive terms such as 'including' be could be omitted from the definition of what constitutes a 'psychoactive effect'.

Minister's response

> The Government does not propose to amend the definitions of 'psychoactive substance' or 'psychoactive effect'. The Government considers that the definitions are sufficiently certain for human rights

1 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 9-31.

2 Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 24-43.

standards and meet the standards of the quality of law test for human rights purposes.

As outlined in my letter of 30 September 2014, this measure is designed to capture so-called 'legal highs' or 'new psychoactive substances', which are those substances that are developed specifically to induce the same effect in humans as illicit drugs but are not captured by the existing criminal laws which proscribe substances by chemical structure. The United Nations Office on Drugs and Crime's 2013 World Drug Report noted that, by mid-2012, the number of different new psychoactive substances detected throughout the world had exceeded the 234 substances currently controlled under international conventions. The number of previously undetected new psychoactive substances continues to rise. The Report also noted that there is an almost limitless array of these sorts of chemical combinations.

The Government acknowledges that there are a large number of substances with a legitimate use which could induce the same effect as an illicit drug when consumed by humans. However, these are specifically excluded from the measure. In particular, the measure excludes the following: foods, therapeutic goods, tobacco, plants, fungi, industrial chemicals, agricultural chemicals and veterinary chemicals. In a practical sense, these exclusions mean that the definitions of 'psychoactive substance' and 'psychoactive effect' will apply very narrowly to a small, specific and definite range of substances that do not have a legitimate use. If a person is importing a substance for a legitimate use, he or she will not have to be concerned about the definitions of 'psychoactive substance' or 'psychoactive effect'.

There is no alternative method of achieving the Bill's aims that will not involve similarly broad definitions. It is not possible to narrow or more specifically define the terms 'psychoactive substance' or 'psychoactive effect' without fundamentally undermining the purpose and utility of the legislation. Ireland and New South Wales have taken a similar route and used similar definitions of 'psychoactive substance' and 'psychoactive effect'. New Zealand has set up a mechanism under the Psychoactive Substances Act 2013 that would ultimately allow the importation and sale of authorised psychoactive substances, but it does not define psychoactive effect and leaves it open to a broad interpretation.

The Australian Government has adopted a definition that excludes substances that have only a minor effect on a person's central nervous system- that is, substances that do not result in hallucinations, significant disturbances or significant changes to a person's motor function, thinking, behaviour, perception, awareness or mood. Beyond this, it is not possible to use more specific or precise terms to capture an amorphous and ever-changing set of substances whose only unifying feature is that they are intended to be consumed as alternatives to other illicit drugs.

> Other jurisdictions have chosen different ways to ban psychoactive substances based on their intended use, rather than their effect. While a ban based solely on the presentation of a substance may offer greater certainty for importers, it would be inadequate to deal with the realities at the border. Typically, the Australian Customs and Border Protection Service (ACBPS) and Australian Federal Police (AFP) will encounter new psychoactive substances as unmarked or mislabelled pills, powders or liquids. In such circumstances, it will not be possible for the officer examining the substance to immediately and conclusively determine that it is intended to ultimately be used as an alternative to an illicit drug. An effect-based ban (like that in proposed section 320.2) must accompany a presentation or purpose-based ban (like that in proposed section 320.3) in order for ACBPS and AFP officers to be able to effectively stop, seize, and destroy new psychoactive substances and, if appropriate, prosecute the importers.
>
> A broad definition of 'psychoactive substance' is necessary for the Bill to achieve its aim of preventing largely unknown and untested chemical substances being imported as alternative versions of illicit drugs. When put in the context of the exclusions in subsection 320.2(2), the law is sufficiently specific for individuals who import goods, particularly chemicals, to understand their obligations under it.[3]

Committee response

2.8 **The committee thanks the Minister for Justice for his response. The response has constructively and comprehensively addressed the matters raised by the committee in relation to the new offence of importing psychoactive substances. The committee therefore considers that the new offence of importing psychoactive substances is compatible with the prohibition against retrospective criminal laws and the quality of law test. The committee has concluded its examination of this aspect of the bill.**

Schedule 2 – Firearm Trafficking Offences

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

Right to security of the person and freedom from arbitrary detention, and right to a fair trial and fair hearing rights

2.9 In its *Fifteenth Report of the 44th Parliament* the committee considered that the mandatory minimum sentencing provisions are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

3 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 1-2.

2.10 In the event that the mandatory minimum sentencing provisions are retained, the committee recommended the provision be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

Minister's response

> Consistent with my previous response, the Government considers that mandatory minimum penalties for firearms trafficking are reasonable and necessary to deter people from diverting firearms into the illicit market, where they can be accessed by criminals and used in the commission of serious and violent crimes. As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will be proportionate to the offence they commit and is entirely at the discretion of the sentencing judge.
>
> The introduction of mandatory minimum penalties for these provisions was an election commitment and reflects the seriousness with which the Government takes gun-related crime. The Australian Government is not the only government which has taken this view, with the Queensland and United Kingdom governments also introducing mandatory minimum sentences for firearms trafficking, and a number of other counties establishing mandatory minimums for other firearms-related offences (including illegal possession).
>
> I note that the validity of mandatory minimum penalties for aggravated people smuggling offences in the Migration Act were upheld as constitutionally valid in the High Court matter of *Magaming v The Queen* [2013] HCA 40. The appellant's argument that the imposition of these penalties was 'arbitrary' and 'non-judicial' was not successful.[4]
>
> In response to concerns raised by the Committee in its Tenth Report of the 44th Parliament, I have agreed to amend the Explanatory Memorandum for the Bill to note that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. This further demonstrates the Government's commitment to limiting any encroachment on judicial discretion.[5]

Committee response

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

---

4 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 3.

5 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 3.

2.12 As noted previously, in order for detention not to be arbitrary in international law it must be reasonable, necessary and proportionate in all the circumstances.[6] This is why it is important for human rights purposes to allow courts the discretion to ensure that punishment is proportionate to the seriousness of the offence and individual circumstances. 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.[7]

2.13 The minister has stated in his previous response to the committee that, as the mandatory minimum sentencing provisions do not impose a minimum non-parole period, the provisions preserve a level of judicial discretion.[8] However, mandatory minimum sentences may be seen by courts as a 'sentencing guidepost', which is to say the appropriate sentence for the least serious case.[9] Additionally, courts may feel constrained to impose a non-parole period that is in the usual proportion to the head sentence.[10] As the application of minimum non-parole periods may be interpreted quite strictly, there is the potential for such provisions to seriously constrain judicial discretion even with respect to the minimum non-parole period.

2.14 **In light of these considerations, the committee reiterates its recommendation that the provision be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence. This would ensure that the scope of the discretion available to judges would be clear on the face of the provision itself, and thereby minimise the potential for disproportionate sentences that may be incompatible with the right not to be arbitrarily detained and the right to a fair trial.**

2.15 **The committee welcomes the minister's undertaking to amend the explanatory memorandum (EM) to provide that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ**

---

6 See for example, *Gorji-Dinka v Cameroon* (2005), 1134/2002, UN doc CCPR/C/83/D/1134/2002 [5.1]; *Van Alphen v The Netherlands* (1990) 305/1988, UN doc CCPR/C/39/D/305/1988 [5.8]; *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4].

7 See for example, Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

8 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) 31.

9 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) 31.

10 This is generally two-thirds of the head sentence (or maximum period of the sentence to be served).

significantly from the head sentence'.[11] The committee considers that this step is likely to provide some protection of judicial discretion in sentencing, and thanks the minister for his considered engagement with the committee in relation to this issue and the human rights compatibility of the bill more generally.

Schedule 5 – Validating airport investigations

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

Multiple rights

2.16 In its *Tenth Report of the 44th Parliament*, the committee sought the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to security of the person and freedom from arbitrary detention, the prohibition against retrospective criminal laws, the right to an effective remedy and the right to a fair trial and fair hearing rights. In its *Fifteenth Report of the 44th Parliament* the committee requested the further advice of the Minister for Justice as to:

- whether unauthorised powers were exercised (such that there is a need to retrospectively validate such powers);
- if so, what powers were exercised (to see whether that the general nature of the validation is proportionate); and
- what specific other powers existed at the time under which the conduct was or could have been carried out (to see if there is a need to retrospectively validate such power and if such validation is proportionate).

Minister's response

> As outlined in my previous response, the *Commonwealth Places (Application of Laws) Act 1970* allows the Australian Federal Police (the AFP) to utilise investigative powers available under Part 1AA and 1D of the *Crimes Act 1914* to investigate state offences which occur at Commonwealth places that are designated state airports. As the *Commonwealth Places (Application of Laws) Regulation 1998* (the Regulations) was inadvertently repealed for a period of time, the AFP was unaware of the need to confine itself to alternative powers, which may have been available, for a portion of the repeal period. Statistics are not available to identify the specific powers relied upon during this period.
>
> Alternative powers were available to the AFP to investigate state offences at designated state airports, including under section 9 of the *Australian Federal Police Act 1979*. These alternative powers may give rise to a separate procedure and practice from the *Crimes Act 1914* powers. Since 2011 when the Regulations were amended to allow the AFP to use

11 See Revised Explanatory Memorandum (REM), 15.

investigative powers under the *Crimes Act 1914* in designated state airports, the AFP has used these investigation powers notwithstanding the availability of alternative powers. Retrospective validation of the use of *Crimes Act 1914* powers between 19 March 2014 and 16 May 2014 would eliminate any uncertainty which may arise.

Accordingly, retrospective validation of certain powers for a limited time period under Schedule 5 of the Bill is a reasonable, necessary and proportionate measure to achieve a legitimate objective, so as to ensure consistent application of appropriate security and policing at Commonwealth airports. It is necessary to avoid the potential for inequitable outcomes within the criminal justice system, based on whether a person was arrested within the eight week period when the investigative powers used by the AFP were not in force.[12]

Committee response

2.17 **The committee thanks the Minister for Justice for his response. The committee considers that, to the extent that applied state laws and investigative powers are otherwise compatible with human rights, the retrospective validation of conduct by the Australian Federal Police in airport investigations is likely to be compatible with human rights.**

2.18 **However, as previously noted by the committee, the *Commonwealth Places (Application of Laws) Act 1970* (CP Act) allows state laws to be applied to a 'Commonwealth Place,' such as airports, regardless of whether or not those laws comply with human rights. The committee concluded that the CP Act is likely to be incompatible with human rights, and made a number of recommendations to ensure that it would not operate to apply any state laws that are themselves incompatible with human rights.[13] The committee has concluded its examination of this aspect of the bill.**

12 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith (dated 11 December 2014) 3-4.

13 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* 2-5; Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* 95 – 99.

Federal Courts Legislation Amendment Bill 2014

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

Purpose

2.19 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.

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

Background

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

Conferral of jurisdiction on the Federal Circuit Court for tenancy disputes

Fair hearing rights

2.22 The committee considered 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 sought 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

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 37-39.

- whether the measure is a reasonable and proportionate way to achieve its stated objective.

Minister's response

It is my view that the relevant provisions in the Bill are compatible with the right to a fair hearing. They provide tenants involved in a Commonwealth tenancy dispute with an appropriate forum to have those disputes heard and determined.

Jurisdiction is being conferred on the FCC in order to ensure that tenancy disputes involving the Commonwealth can be resolved in the least time-consuming and expensive way. State and territory law directs residential tenancy matters to state and territory tribunals. However, state and territory tribunals that are not 'courts' within the meaning of Chapter III of the Constitution cannot exercise federal judicial power, which can give rise to jurisdictional arguments when the Commonwealth is a party to a tenancy dispute.

Conferring jurisdiction on the FCC to hear certain Commonwealth tenancy disputes will provide an appropriate forum in a Chapter III court for these matters to be heard. The only current alternative to resolve residential tenancy disputes involving the Commonwealth would be for a tenant to bring action in a superior state court or, in some circumstances, the Federal Court, which is a much more costly and time-consuming endeavour for users, than the FCC.

I understand that concerns have been raised about application of the protections that exist for lessees under state and territory law. It is important to note that state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. This includes protection about unlawful and unjust eviction. This position is intended to be clarified through legislative instruments made under proposed paragraph 10AA(3)(b) of the Bill.

The intention of the Bill is not to remove any of these important protections, but simply to introduce a new option for resolving Commonwealth tenancy disputes in a low-cost and easily accessible forum where jurisdictional arguments would not require consideration.

For these reasons, I am of the view that the provisions in the Bill relating to Commonwealth tenancy disputes are not only compatible with fair hearing rights, but indeed promote these rights in a low-cost, easily accessible trial court which has a national presence and circuits regularly to regional areas.[2]

2 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 11 February 2015) 1-2.

Committee response

2.23 The committee thanks the Attorney-General for his prompt response. The committee notes the importance of fair hearing rights in the context of the right to housing and the importance of procedural safeguards in respect of evictions.[3] Accordingly, the committee welcomes the Attorney-General's advice that these important protections will not be removed and that state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. The committee welcomes the Attorney-General's advice that a legislative instrument will be made under proposed paragraph 10AA(3)(b) of the bill to the effect that state and territory law will continue to apply to tenancy arrangements where the Commonwealth is a lessor. On this basis, the committee is assured that fair hearing rights will be protected. The committee considers that a clearer and more immediate guarantee of the protection could be provided by including it in the bill rather than relying on a future legislative instrument.

2.24 **Accordingly, the committee recommends that the bill be amended to state that the law of the relevant state or territory will apply to tenancy disputes where the Commonwealth is a lessor.**

3 Article 11, International Covenant on Economic, Social and Cultural Rights.

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

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

Purpose

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

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

Background

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

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

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

2.29 The committee commented on this bill in its *Tenth Report of the 44th Parliament*.[4]

---

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

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

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

4 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 36-37.

Effect of repealing measures

Right to an adequate standard of living

2.30 The committee sought the advice of the Treasurer as to whether the bill is compatible with the right to an adequate standard of living.

Minister's response

> The Committee sought further information as to whether the Bill is compatible with the right to an adequate standard of living in article 11(1) of the International Covenant on Economic, Social and Cultural Rights.
>
> The Bill repeals the second round of Carbon Tax-related personal income tax cuts that are due to start on 1 July 2015 because that is what Labor promised prior to the last election as a budget savings measure to help to repair the budget. Since the election Labor have failed to keep their promise to the Australian people so we are introducing legislation to allow the Labor Party to keep its promise to the Australian people to fix the budget.
>
> Given the only consequence of the Bill is to preserve the currently applicable tax arrangements and it is no longer necessary to compensate taxpayers for the Labor's Carbon Tax, the Government is comfortable the proposed changes are compatible with human rights. I note the Government has scrapped Labor's carbon tax, saving the average household $550 a year.[5]

Committee response

2.31 **The committee thanks the Parliamentary Secretary to the Treasurer for his response, and considers that the bill is compatible with the right to an adequate standard of living. However, 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, which provides advice on how and when limitations of rights may be justified.**

Senator Dean Smith
Chair

5 See Appendix 1, Letter from the Hon. Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith (dated 17 December 2014) 1.

Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC14/21486

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

17 FEB 2015

Dear Senator Dean,

Thank you for your letter of 28 October 2014 providing the report of the Parliamentary Joint Committee on Human Rights (the Committee), the *Fourteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill). I apologise for the delay in responding. The Bill was passed by both houses of Parliament in the week of 27 October 2014 and received Royal Assent on 3 November 2014.

I thank the Committee for its robust consideration of the compatibility of the Bill with Australia's human rights obligations and provide the enclosed additional information in response to the Committee's recommendations. This information reflects the measures as passed in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

The Committee may wish to note that both the Bill and the Explanatory Memorandum reviewed by the Committee were amended in response to the report of the Parliamentary Joint Committee on Intelligence and Security. The amendments included in the Act, as passed, and the additional information provided in the Explanatory Memorandum, including the Statement of Compatibility with Human Rights, may address some of the issues raised by the Committee in its report.

Once again, I thank the Committee for its consideration of the Bill and trust this additional information is useful.

Dear -
Once again, thank
you for your
consideration.

Yours faithfully

(George Brandis)

Encl. Response to the Parliamentary Joint Committee on Human Rights' *Fourteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the *Criminal Code*

Response to the Parliamentary Joint Committee on Human Rights' *Fourteenth Report of the 44th Parliament*, concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Parliamentary Joint Committee on Intelligence and Security consideration of the Bill
I note the Committee recommended a number of the measures contained in the Bill be referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for review and report. I am pleased to advise the Committee that the Bill was referred to the PJCIS and, on 17 October 2014, the PJCIS tabled the report of its inquiry into the Bill. The PJCIS made 37 recommendations in relation to the Bill and the Government accepted all of them. In response to a number of those recommendations, the Government introduced amendments to the Bill, which were subsequently passed by the Parliament.

Right to equality and non-discrimination—indirect discrimination
The Committee has requested further advice as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination. As acknowledged by the Committee, the legislation is not directly discriminatory. The legislation affects people who engage in activities contrary to Australia's national security and to criminal law. The enforcement of counter-terrorism laws is subject to the operations of a number of government agencies, including but not limited to the AFP, ASIO and the Australian Customs and Border Protection Service. These agencies operate and engage with the public in a broad range of environments, including within communities and in more secure environments such as at Australia's borders. Staff within these agencies receive training, including on cultural awareness, which supports the non-discriminatory application of the law within the environments in which they work.

Schedule 1
Sunset provisions and reviews of counter-terrorism powers
Of particular relevance to the Committee's recommendations in relation to Schedule 1 of the Bill, the Committee may wish to note that, on the recommendation of the PJCIS, the sunset periods for the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers have been reduced from 10 years to approximately 4 years, with all these powers ceasing to have effect on 7 September 2018.

In addition, the Bill was amended to require the Independent National Security Legislation Monitor to review the powers by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. The timing of these reviews will allow for both the Monitor and the PJCIS to consider the operation of the powers as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the powers beyond 2018. In the case of the ASIO special powers regime, these reviews will replace the PJCIS review previously required by 22 January 2016.

Legitimate objectives of the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers
I note the Committee has emphasised the importance of a legitimate objective to justify any proposed limitation on human rights and that this objective 'must address a pressing or substantial concern, and not simply seek to achieve an outcome regarded as desirable or convenient'. I support the Committee's emphasis of this statement and note that the powers provided to ASIO, the AFP and state and territory police by the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers all support the legitimate objective of preventing serious threats to Australia's national security interests and, in particular, preventing terrorist attacks.

That is, the prevention of a terrorist attack, and the resultant loss of human life, financial loss and potential loss of social cohesion, is not merely a 'desirable or convenient' outcome. In the current security environment, where Australians are travelling in greater numbers than ever before to participate in terrorist violence in overseas conflicts, the risk of a successful terrorist attack occurring in Australia is high and mitigating this risk is a paramount priority of Government. In September 2014, the Government raised the National Terrorism Public Alert System to 'high—terrorist attack is likely' on the basis of advice from security agencies. The arrests in Sydney and Brisbane in September 2014 and most recently in Sydney on 10 February 2015 are solemn illustrations that the terrorist threat is real.

Further, both members of the Government and from our law enforcement and security agencies have advised of the significant numbers of individuals engaging in terrorist activity in support of foreign conflicts. More than 90 Australians are currently engaged in fighting in Syria and northern Iraq and most of them are engaged with the listed terrorist organisations ISIL or Jabhat al-Nusra. More than 20 such people have returned to Australia and over 100 people are known to be supporting the conflict from within Australia. These are significantly higher numbers than have been seen in relation to Australians engaging in overseas conflicts in the past, such as the conflict in the former Yugoslavia, as raised in paragraph 1.36 of the Committee's report, and more relevantly, the conflict in Afghanistan.

The Committee may be interested to note that the Australian Government investigated 30 Australians who travelled to conflict areas (e.g. Pakistan and Afghanistan) between 1990 and 2010 to train or fight with extremists. Of these, 19 engaged in activities of security concern in Australia after their return, and eight were convicted in Australia of terrorism-related offences. Five of these eight are still serving prison sentences of up to 28 years. This past experience with foreign fighters has informed the Government's current approach, however the scale and intensity of the current situation warrants the amended powers provided for in the Act.

Additional information will be provided to the Committee to further address the issues raised about the ASIO special powers regime.

Delayed notification search warrant regime

The Committee has recommended that the delayed notification search warrant regime be amended to include, as a threshold requirement, that an application for a delayed notification search warrant must demonstrate that it is not possible to obtain the evidence in another way and that it is not possible to obtain that information by a search warrant under Part IAA of the *Crimes Act 1914*.

An application for a delayed notification search warrant currently requires: (1) that there are reasonable grounds to suspect that one or more eligible offences have been, are being, are about to be or likely to be committed; (2) that entry to and search of the premises will substantially assist in the prevention of, or investigation into, those offences, and (3) that there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises. I am satisfied that when considering the third limb, the applicant would turn his or her mind to the reasons for the necessity for the warrant to be executed differently from an 'ordinary' search warrant, where the entry and search of the premise would be conducted with the knowledge of the occupier. I also bring the Committee's attention to the additional factors that an eligible issuing officer is required to consider when determining whether the delayed notification search warrant should be issued, which include whether there are alternative means of obtaining the evidence or information sought.

The Committee has similarly recommended that the proposed power to enter third-party premises to execute a delayed notification search warrant be amended to include, as a threshold requirement for its exercise, that an application must demonstrate that it is not possible to obtain the evidence in another way. I am satisfied that the current provisions appropriately limit the use of this power to circumstances where the issuing officer is satisfied that entry to neighbouring premises is reasonably necessary to avoid compromising an investigation. In assessing whether such entry is reasonably necessary the eligible issuing officer would consider whether it is possible to obtain the evidence without entering the third party premise or by undertaking an 'ordinary' search warrant under Part IAA of the *Crimes Act 1914*.

The Committee has requested further advice as to whether the period of delay for notifying an occupier of the execution of a warrant is compatible with the right to privacy. The delayed notification search warrant scheme engages the right to privacy by enabling law enforcement officers to enter a warrant premises, including a suspect's home or place of work, without the knowledge or consent of the occupier. However, the scheme serves the legitimate aim of assisting the AFP to effectively prevent or investigate Commonwealth terrorism offences and protect the community from harm. The AFP have indicated that allowing an occupier to be notified of a search warrant sometime after the warrant was executed or otherwise granted provides the AFP with the opportunity to gather evidence, identify additional suspects and locate further relevant premises and evidence. This will increase the opportunity for successful investigations of terrorism offences and enhance the ability of the AFP to gather information about planned operations with a view to preventing the commission of terrorist acts and, in turn, harm to the community. The Committee may also wish to note that, on the recommendation of the PJCIS, the period of delay permitted without seeking ministerial approval has been reduced from a maximum of 18 months to 12 months.

The Committee has requested further advice on whether the delayed notification search warrant scheme is compliant with the right to a fair trial, particularly due to the initial secrecy surrounding the warrant. Article 14 of the ICCPR provides that all persons shall be entitled to a fair trial and fair hearing rights in the determination of a criminal charge against them. I note the Committee has emphasised the importance of a legitimate objective to justify any proposed limitation on human rights and that this objective 'must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient'. As explained above, the delayed notification search warrant scheme will serve the legitimate aim of assisting the AFP to prevent or investigate Commonwealth terrorism offences. The initial secrecy surrounding the warrant is critical to the success of certain investigations by the AFP, particularly when carrying out investigations of multiple suspects over an extended period. If a suspect was aware of the execution of the warrant, that suspect could undertake counter-surveillance measures, change their plans to avoid further detection, relocate their operations, or relocate or destroy evidence of their activities. It would also provide a suspect with the opportunity to notify their associates, who may not yet be known to police, allowing the associates to cease their involvement with the known suspect, destroy evidence or avoid detection in other ways. The procedures by which this restriction on fair trial is permitted are authorised by law and are not arbitrary, with a strict two-stage authorisation process and rigorous reporting obligations. Accordingly, to the extent that the delayed notification search warrant scheme limits the right to a fair trial, those limitations are reasonable, necessary and proportionate for the achievement of a legitimate objective.

I also bring the Committee's attention to the requirement for a person to be notified of the execution of a delayed notification search warrant where a person has been charged with an offence and the prosecution is proposing to rely on evidence obtained under the warrant. This notice must be given as soon as practicable after the person is charged with the offence and no later than the time of service of the brief of evidence by the prosecution. This

recognises that it is important that any person charged with an offence is notified of the way in which evidence supporting the particular charge or charges has been obtained in order to enable them to challenge the evidence. I am satisfied that this ensures that the defendant is not placed at a substantial disadvantage to the prosecution.

Declared area offence provision

I agree with the Committee that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective.

The new 'declared area' offence addresses two pressing and substantial concerns by deterring Australians from travelling to foreign conflict areas where terrorist organisations are engaging in hostile activities. The first concern is that Australians who enter or remain in conflict areas put their own lives at risk. ASIO has advised that over 20 Australians have died in the Syria and Iraq conflicts in the past year. The recently published United Nations Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, provides details of the extreme violence directed against civilians and captured fighters by the terrorist organisation[1].

The second concern is that foreign conflicts provide a significant opportunity for Australians to develop the necessary capability and ambition to undertake terrorist acts. ASIO noted in its submission to the PJCIS that it is aware of returnees from Syria and Iraq undertaking attacks in Europe.

The nature of the current terrorist threat is such that it requires a proactive and prevention-focused response. As noted above, it is only in the very recent past that Australia has prosecuted Australians returning from conflict areas desirous of committing terrorist acts on Australian soil. The Government has responded by taking steps to counter this significant threat.

Australia must also assist in the global effort to prevent a flow of fighters to ISIL and other terrorist groups. On 24 September 2014 the United Nations Security Council unanimously passed Resolution 2178 which condemns violent extremism and implores countries to address underlying factors including preventing and suppressing the recruiting, organising, transporting or equipping of individuals who travel to a foreign country for the purpose of participation in terrorist acts.

The elements of the offence are very clear. The conduct that has been criminalised is intentionally entering, or remaining in, a declared area where the person should know that the area has been declared. There are a number of offences in Australia that operate to restrict people from entering areas to either protect those located within the area or to deter a person from risking their own personal safety by entering, such as Indigenous protected areas. The declared area offence has been structured with the aim of achieving the legitimate objective of deterring people from going to an extremely dangerous location.

The Government understands the importance of appropriately designed safeguards, particularly in the development of human rights compatible legislation and practice. The Committee may wish to note that the Government readily included two additional safeguards, upon recommendation of the PJCIS, in the final version of the Bill. The legislation now provides for a PJCIS review of a declaration before the end of the disallowance period and that a declaration must not cover an entire country.

<[1] http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.pdf >

In response to the Committee's concern that the Minister would be able to "declare an area in cases where a terrorist organisation was engaged in only minor or transitory 'hostile activity'" I refer the Committee to the definition of 'engage in a hostile activity' as inserted by new section 117.1 of the Criminal Code. Under that section a person engages in a hostile activity in a foreign country if the person engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):

(a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);

(b) the engagement, by that or any other person, in action that:

(i) falls within subsection 100.1(2) but does not fall within subsection 100.1(3); and
(ii) if engaged in in Australia, would constitute a serious offence;

(c) intimidating the public or a section of the public of that or any other foreign country;

(d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);

(e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

For the purposes of the declared area offence this conduct would be engaged in by a listed terrorist organisation—conduct that I believe could not be classed as 'minor'.

As I noted to the Senate, the Government is aware of the extraordinary nature of the offence and the intention is to use the declaration provisions for declaring areas sparingly, when necessary and in the interests of national security. Consistent with my Department's advice to the PJCIS, a protocol to guide and prioritise the selection of areas in foreign countries for declaration has been developed. Included in that protocol are non-legislative factors to which a Minister may have regard when deciding whether or not to declare an area for the purposes of the offence. One of those factors is the enduring nature of the listed terrorist organisation's hostile activity in the area. I believe that this addresses the Committee's concerns about a declaring an area where the 'hostile activity' is only transitory. I attach a copy of the protocol for the Committee's information.

I also note that the Committee has raised specific concerns that the offence may be incompatible with the right to a fair trial and the presumption of innocence, the presumption against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

With regards to the right to a fair trial and the presumption of innocence, I note that a defendant bears no burden of proof unless they seek to raise facts constituting a defence. Should a defendant choose to rely on the defence, they bear an evidential burden to adduce or point to evidence that suggests a reasonable possibility that their travel was for a sole legitimate purpose or purposes. The prosecution retains the legal burden and must disprove any legitimate purpose defence raised beyond a reasonable doubt, in addition to proving the

elements of the offence. It is not unusual in criminal law for the person with a peculiar or unique knowledge of facts to be required to point to evidence of that fact. Bribing a foreign official and forced marriage are further examples of offences that contain offence specific defences. The Government is firmly of the view that the declared area offence is entirely compatible with the right to a fair trial and the presumption of innocence.

In response to the Committee's concern that the offence may lead to arbitrary detention, I note that imprisonment after conviction by a criminal court is a permissible deprivation of liberty. Prosecution of the offence, as with all offences in Division 119 of the Criminal Code, will be subject to a requirement to obtain the consent of the Attorney-General to prosecute, as well as the public interest consideration of the prosecutorial policy of the Commonwealth Director of Public Prosecutions. It is also appropriate and just for the Parliament to create a criminal offence with an appropriate penalty when the conduct to be criminalised has the potential to cause considerable harm to both individuals and Australia's national security interests.

To the extent that the offence may limit the right to freedom of movement I note that the limitation is lawful and proportionate. A limitation can be justified if it is in the interest of national security. As I have noted above, the risk of a successful terrorist attack occurring in Australia is high. The Government considers this to be a grave threat to the entire nation[2].

With regards to the Committee's comments in relation to the effect of the declared area offence on the right to equality and non-discrimination, I refer to my earlier comments about the legislative criteria including the definition of 'engage in a hostile activity' and the protocol to guide and prioritise the selection of areas in foreign countries for declaration.

Allowing foreign material to be adduced in terrorism-related proceedings

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* includes a number of safeguards relating to adducing foreign material in terrorism-related proceedings. This includes a broad judicial discretion to prevent material from being adduced if it would have a substantial adverse effect on the right of the defendant to receive a fair hearing; a requirement to exclude material obtained as a result of torture or duress; and a requirement that the court give an appropriate instruction to the jury about the potential unreliability of foreign evidence unless there is a good reason not to do so.

The Government strongly opposes the use of material obtained by torture or duress, by any country in any circumstance. In response to the recommendations in the PJCIS Advisory Report relating to foreign evidence, the Government moved, and Parliament passed, amendments to further strengthen the protections against material obtained by torture or duress. These included:

- ensuring the provision governing the exclusion of foreign evidence obtained by torture or duress applies where any person directly obtained material as a result of torture or duress (as opposed to material obtained by public officials);
- expanding the definition of 'duress' to include other threats that a reasonable person might respond to; and
- requiring the court to give an appropriate instruction to the jury about the potential unreliability of foreign evidence.

While noting the Committee's comments on the use of the word 'directly' in relation to material obtained by torture, the Government considers that the provision as passed ensures

---

[2] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N P Engel, 1993, page 212, note 2.

that any material obtained as a result of torture or duress would not be admissible, given the definition of torture, and the fact that the exception to material obtained through duress will apply in a broad range of circumstances.

The mandatory exclusion of material obtained as a result of torture or duress at subsection 27D(2) of the *Foreign Evidence Act 1994* recognises the seriousness with which the Government views acts or threats of torture or duress and the inherent unreliability of material or information obtained in such a manner. The Government considers the provision as drafted adequately addresses these concerns. First, and appropriately, it is ultimately up to the Court to determine whether material was obtained as a result of torture or duress. Second, the provisions enable the defence to object to the admission of material. Finally, while the defence bears an evidentiary burden, if this is met, the prosecution must establish to the court's satisfaction that the material was not obtained as a result of torture or duress.

In response to the Committee's comment on the definition of torture, I can advise that the definition of torture at subsection 27D(3) of the Foreign Evidence Act is consistent with article 1(1) of the Convention Against Torture (CAT). It captures the relevant conduct defined under article 1 of the CAT, and also expands on the definition of torture by including conduct inflicted by any person (rather than only those acting in the capacity of a public official). Given the definition of torture for the purposes of the Foreign Evidence Act is a wider interpretation than that at article 1 of the CAT, the Government considers it is not necessary to explicitly reference the definition of 'torture' in the CAT. The Government considers that the amendments to the Foreign Evidence Act are consistent with, and uphold, Australia's international obligations under Article 15 of the CAT. These amendments operate in addition to the broad judicial discretion to prevent material being adduced that would compromise a fair hearing and the jury instruction, where requested by a party to proceedings, concerning potential unreliability of foreign evidence.

Suspension of passports

The Committee has requested further advice on the proportionality of the measure to suspend passports. The purpose of the suspension power is to provide a temporary preventative measure while further information is obtained to determine whether more permanent action should be taken (that is, the cancellation of a person's travel documents). The temporary suspension provision would be used in cases where ASIO has high concerns related to the travel of the individual, but needs more time to further investigate and seek to resolve those concerns. Activities to support this, which take between days and weeks, may include seeking formal release of intelligence from foreign partners to include in the assessment. New intelligence can also put older reporting in a new context (positive or negative), meaning there is a requirement for ASIO to review and re-evaluate its holdings, which takes time. Further, in some cases it may be that an in-depth intelligence investigation may be required, involving a range of activity.

While the suspension period is longer than the maximum 7-day suspension period proposed by the Independent National Security Legislation Monitor (INSLM), it is a reasonable and proportionate period which ensures the practical utility of the suspension period. The fourth annual report of the INSLM noted that the suggested 7 day timeframe was somewhat arbitrary and should be the subject of further discussion. In most circumstances the INSLM's proposed timeframe of up to 7 days would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents. In its report on the Bill, the PJCIS considered that the 14-day timeframe appropriately balances the need to allow sufficient time for a full assessment to be made by ASIO with the impact on the individual.

Introduction of advocating terrorism offence

The Committee has expressed concern that the new offence of advocating terrorism would likely be incompatible with the right to freedom of opinion and expression, as the Statement of Compatibility does not provide sufficient detail to establish that the new offence is in pursuit of a legitimate purpose. In raising this concern, the Committee has noted the existing incitement offences in the Criminal Code, under which it is an offence for a person to urge the commission of an offence with the intention that the offence will be committed. The Committee has also expressed concern about the proportionality of the offence, contending that the offence could 'apply in respect of a general statement of support for unlawful behaviour'. I draw the Committee's attention to the elements of the offence which may address these concerns.

First, a person only commits the offence if the person advocates the doing of a terrorist act or the commission of a terrorism offence. A terrorist act is defined in section 100.1 of the Criminal Code. The definition specifically excludes action that is advocacy, protest, dissent or industrial action and is not intended:

(i) to cause serious harm that is physical harm to a person; or
(ii) to cause a person's death; or
(iii) to endanger the life of a person, other than the person taking the action; or
(iv) to create a serious risk to the health or safety of the public or a section of the public.

A terrorism offence is defined in subsection 3(1) of the *Crimes Act 1914*. For the purposes of this offence the Crimes Act definition is limited to offences punishable on conviction by imprisonment for 5 years or more and excludes attempt (section 11.1), incitement (section 11.4) or conspiracy (section 11.5) to the extent that it relates to a terrorism offence or a terrorism offence that a person is taken to have committed because of complicity and common purpose (section 11.2), joint commission (section 11.2A) or commission by proxy (section 11.3).

Second, the offence applies the fault element of recklessness, which is also clearly defined in the Criminal Code. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. This is different to the incitement offences in the Criminal Code, for which intention is the fault element.

As noted in the Statement of Compatibility, the objective of this new offence is to protect the public from terrorist acts and the terrorism activities that the relevant terrorism offences are designed to deter. The offence captures behaviours that are particularly relevant to the current security environment, where individuals are being radicalised to engage in terrorist acts and commit terrorism offences, including by travelling overseas to participate in foreign conflicts, through a wide range of media. The 'radicalisers' operate both overtly, through broad messaging such as that seen on social media, and covertly, advocating in general that people should engage in terrorist acts and commit terrorism offences for their cause. Such radicalisers may not be satisfied that, following their advocacy, a terrorist act or terrorism offence will occur in the ordinary course of events (as required to prove the fault element of intention) but would be aware of a substantial risk that such a result would occur (required to prove recklessness). In pursuing the legitimate objective of protecting the public from terrorism, it is necessary to limit the freedom of opinion and expression of those whose advocacy of terrorism is likely to radicalise others at great risk to public safety.

In response to the Committee's concerns about proportionality of the offence, the application of clear definitions to the offence will ensure that the offence would be unlikely to 'apply in respect of a general statement of support for unlawful behaviour'. In respect of the example

presented by the Committee in paragraph 1.258, advocating regime change in a country perceived as undemocratic or oppressive would not fall within the offence unless the person advocated the doing of a terrorist act or commission of a terrorism offence as the means by which to achieve that regime change *and* was aware of a substantial risk that, as a result of that advocacy, a person would engage in a terrorist act or commit a terrorism offence. A campaign of civil disobedience or acts of political protest, as cited in the example, would be likely to fall within the excluded action that is advocacy, protest, dissent or industrial action.

Schedule 2—Cancellation of welfare payments

The Committee raised a number of concerns with Schedule 2 of the Bill (stopping welfare payments), particularly with respect to the Bill's compatibility with the right to social security and an adequate standard of living, the right to a fair trial and fair hearing rights, the obligation to consider the best interests of the child and the right to equality and non-discrimination. While the Committee acknowledged that the prevention of the use of social security to fund terrorism-related activities is likely to be regarded as a legitimate objective for human rights purposes it also sought further advice on whether the measures could be regarded as reasonable and proportionate to achieving this legitimate objective.

The Committee may wish to note that, on the recommendation of the PJCIS, the Bill was amended to include specific factors to which the Attorney-General must have regard when considering whether to issue a Security Notice to cancel an individual's welfare. The Attorney-General must consider the extent (if any) that any welfare payments of the individual who is the subject of the notice, are being, or may be, used for a purpose that might prejudice the security of Australia or a foreign country, and the likely effect of welfare cancellation on the individual's dependants. This amendment clarified the circumstances where the power may be exercised. In this way, the amendments to the Bill ensure the rights and interests of the child (where applicable) are appropriately factored into the decision-making process.

In relation to the Committee's concerns about the limitation on review rights, I note that the Bill was amended to remove the exemption under Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that section 13 of that Act will apply. This means that an individual may seek review of a decision to cancel welfare payments and may be provided with reasons for the decision where disclosure of those reasons would not prejudice Australia's security, defence or international relations. Where the disclosure of information is not possible because of security reasons the Attorney-General can certify that disclosure would be contrary to the public interest under paragraph 14(1)(a) of the ADJR Act. The Committee may also wish to note that, on the recommendation of the PJCIS, the Bill was amended to ensure that any decision to issue a Security Notice must be reviewed every 12 months.

Schedules 3, 4 and 5—Border protection measures

Schedule 3—Customs' detention power

The new detention power is aimed at achieving the legitimate objectives of protecting Australia's borders and promoting national security. A recent independent review of national security incidents at the border concluded that existing powers and processes were not sufficient to ensure such incidents could be prevented in future. The review recommended the recalibration of risk between law enforcement and protection on the one hand and facilitation on the other.

As the original statement of compatibility stated, a crucial element of the preventative measures undertaken to limit the threat of returning foreign fighters is to prevent Australians leaving Australia to engage in foreign conflicts in the first instance. The detention powers of the Australian Customs and Border Protection Service (Customs) officers constitute an

important preventative and disruption mechanism, and amendments in the Bill reflect the identified need for a broader set of circumstances in which a detention power can be exercised in the border environment. Preventing individuals travelling outside of Australia where their intention is to commit acts of violence in a foreign country assists in preventing terrorists acts overseas and prevents these individuals returning to Australia with greater capabilities to carry out terrorist acts on Australian soil. These powers can, of course, also be exercised in respect of foreign nationals arriving in our country who are a threat to national security. The expanded definition of 'serious Commonwealth offence' is also aimed at achieving the legitimate objective of assisting other law enforcement and Commonwealth agencies in the detection and investigation of Commonwealth offences by allowing officers of Customs to detain persons in respect of a wider range of Commonwealth offences relevant to national security, notably travelling on a false passport and failing to report movements of physical currency or bearer negotiable instruments.

As mentioned in the Explanatory Memorandum, the detention power is only a temporary power and its extension is aimed at Customs facilitating other law enforcement agencies to exercise their powers to address national security threats. The exercise of the powers is also subject to several important safeguards, which reinforce the reasonable and proportionate nature of the power and ensure that the human rights of the detainee are appropriately limited to promote national security considerations. Important qualifiers such as 'reasonable grounds to suspect', 'as soon as practicable', 'take all reasonable steps' and 'believes on reasonable grounds' ensure that application of the detention provisions is not arbitrary and are subject to certain thresholds which require Customs officers to consider whether use of the detention powers is appropriate in a given circumstance.

The detention power is also not indefinite and includes the requirement that a detained person be made available to a police officer as soon as practicable. The power also includes the right, in all but the most extreme situations, to notify a family member or others of their detention, and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody.

These elements in combination ensure that the detention power is a reasonable and proportionate response to the legitimate objectives outlined above.

Schedule 4—Cancelling visas on security grounds

As noted elsewhere in this response, the Australian Government's National Terrorism Public Alert Level was raised from 'Medium' to 'High' on 12 September 2014. This decision was based on advice from security and intelligence agencies that points to the increased likelihood of a terrorist attack in Australia. The enhanced visa cancellation powers introduced by this proposal are part of Australia's response to Australia's current security environment. In particular, the provisions will enable the Minister for Immigration and Border Protection to cancel the visas of any non-citizen who may pose a risk to the security of Australia in order to prevent their travel to Australia and, relevantly, to strengthen Australia's response to potential terrorist attacks. The measure is therefore necessary and proportionate for addressing Australia's heightened terrorism alert level.

In relation to the Committee's observations about jurisdiction, the Government's view is that its human rights obligations are primarily territorial. However, Australia has accepted that there may be exceptional circumstances where Australia's human rights obligations may apply extraterritorially (Australia's Written Reply to the Human Rights Committee's List of Issues, UN Doc CCPR/C/AUS/5, 19 January 2009). The Australian Government believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad, such as a situation of occupation, or where a State has actual physical control over persons outside of Australia's territory. As such, I do not agree with the

Committee's assertion that making a decision to issue or cancel a visa would necessarily involve the Minister or his delegate 'exercising jurisdiction over the affected individual', particularly if the person was outside of Australia's territory.

I also disagree with the Committee's observations with regards to Article 12(4) of the ICCPR and its application to the visa cancellation powers. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country.

With regard to the consequential cancellation of the visas held by family members, as noted in the Statement of Compatibility, that power is discretionary and will consider the individual circumstances of the family members on a case-by-case basis – including Australia's international obligations in circumstances where the visa holder is located in Australia's territorial jurisdiction. Any cancellation decision will therefore be complementary to Australia's international obligations and will be reasonable and proportionate to the circumstances of the individual.

Schedule 5—Identifying persons in immigration clearance

The Committee may wish to note that, on the recommendation of the PJCIS, the lawful ability for an authorised system to collect personal identifiers—other than a photograph of a person's face and shoulders—was removed from the Bill. The final version of the Bill only enabled an authorised system to collect an image of a person's face and shoulders.

The objective of collecting such a photograph is to enhance the government's ability to identify passengers travelling into and out of Australia. With this enhanced identification capability, the government is more able to identify persons who may present a risk to Australia's security. Having identified such risks, the photograph then enables the Government to take appropriate statutory action and address any associated national security risk which may be evident. In this regard, the taking of a photograph which details a person's face and shoulders is necessary and proportionate to the need to reduce risks to Australia's national security.

Australian Government
Attorney-General's Department

Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the Criminal Code Act 1995

This protocol provides guidance on the process for the declaration of areas for the purposes of section 119.2 of the *Criminal Code Act 1995*. Section 119.2 makes it an offence for a person to enter, or remain in, an area in a foreign country if the area is an area declared by the Minister for Foreign Affairs under section 119.3.

The areas targeted by the 'declared area' provisions are extremely dangerous locations in which listed terrorist organisations are engaging in hostile activities. The declared area offence is designed to act as a deterrent to prevent people from travelling to declared areas. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with listed terrorist organisations present to the community.

It is a defence for a person to enter, or remain in, a declared area solely for a legitimate purpose or purposes. Legitimate purposes for travelling to a declared area are provided at subsection 119.2(3) and are limited to providing humanitarian aid, making a genuine visit to a family member, working in a professional capacity as a journalist, performing official government or United Nations duties, appearing before a court or tribunal, and any other purpose prescribed by the regulations.

Declaration of areas for the purpose of section 119.2

Under section 119.3 of the Criminal Code the Minister for Foreign Affairs may, by legislative instrument, declare an area in a foreign country for the purposes of section 119.2.

Legislative test for deciding to declare an area in a foreign country

Before declaring an area in a foreign country for the purposes of section 119.2, the Minister for Foreign Affairs must be satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country.

Listed terrorist organisations

Section 117.1 of the Criminal Code provides that a listed terrorist organisation has the meaning given by subsection 100.1(1). Subsection 100.1(1) provides that a listed terrorist organisation means an organisation that is specified in regulations for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1.

Listed terrorist organisations are set out in Part 2 of the *Criminal Code Regulations 2002*, available on the ComLaw website www.comlaw.gov.au.

The list of terrorist organisations and the current Statements of Reasons for each organisation are also available on the Australian Government National Security website www.nationalsecurity.gov.au.

Engaging in a hostile activity

Engaging in a hostile activity is defined at subsection 117.1(1) as engaging in conduct with the intention of achieving one or more of the following objectives (whether or not the objective is achieved):

- the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country)
- the engagement, by that or any other person, in action that:
  - falls within subsection 100.1(2) but does not fall within subsection 100.1(3) (see below); and
  - if engaged in in Australia, would constitute a serious offence
- intimidating the public or a section of the public of that or any other foreign country
- causing the death of, or bodily injury to, a person who:
  - is the head of state of that or any other foreign country; or
  - holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country)

- unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

Action that falls within subsection 100.1(2) is conduct that:

- causes serious harm that is physical harm to another person
- causes serious damage to property
- causes another person's death
- endangers another person's life, other than the life of the person taking the action
- creates a serious risk to the health or safety of the public or a section of the public
- seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
  - an information system; or
  - a telecommunications system; or
  - a financial system; or
  - a system used for the delivery of essential government services; or
  - a system used for, or by, an essential public utility; or
  - a system used for, or by, a transport system.

Action that falls within subsection 100.1(3) is conduct that is advocacy, protest, dissent or industrial action; and is not intended to:

- cause serious harm that is physical harm to a person; or
- cause a person's death; or
- endanger the life of a person, other than the person taking the action; or
- create a serious risk to the health or safety of the public or a section of the public

is not conduct of engaging in a hostile activity.

A serious offence is defined at section 117.1 to mean an offence against a law of the Commonwealth, a state or a territory that is punishable by imprisonment for two years or more.

Areas that can and cannot be covered by a declaration

Subsection 119.3(2) provides that a single declaration may cover areas in two or more foreign countries if the Minister for Foreign Affairs is satisfied that one or more listed terrorist organisations are engaging in a hostile activity in each of those areas.

Subsection 119.3(2A) provides that a declaration must not cover an entire country.

Role of Commonwealth agencies

There are a number of Commonwealth agencies that will have a key role in the process of a declaration by the Minister for Foreign Affairs to declare an area in a foreign country.

The Australian Counter-Terrorism Centre (ACTC) is a multi-agency body including members from the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP), the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate, the Department of Defence, the Australian Geospatial—Intelligence Organisation, the Australian Customs and Border Protection Service, the Australian Crime Commission, the Department of Foreign Affairs (DFAT), the Department of Immigration and Border Protection and the Attorney-General's Department (AGD). The ACTC's role is to provide strategic direction to:

- set strategic counter-terrorism priorities
- drive counter-terrorism policy direction and coordination
- inform operational counter-terrorism priorities
- evaluate agencies' performance on priorities
- identify and fix impediments to effective coordination.

The ACTC has a role in identifying areas that may be suitable for declaration and coordinating key agencies (including but not limited to ASIO, ASIS, DFAT and AFP) to collect and provide relevant information and intelligence for inclusion in a Statement of Reasons.

The National Threat Assessment Centre (NTAC) within ASIO has the lead role in coordinating and collecting the relevant information and intelligence from key agencies and generating a Statement of Reasons nominating an area for declaration.

AGD has a lead role in providing support to the Attorney-General as the minister responsible for national security matters and the administration of the Criminal Code. DFAT has a lead role in providing support to the Minister for Foreign Affairs in relation to the declaration of an area, including advice on the foreign policy implications of such a declaration.

Role of the National Threat Assessment Centre

Nomination of an area for declaration

In considering the possible declaration, the NTAC will evaluate an area against the legislative requirements for declaration in subsection 119.3(1) of the Criminal Code.

To guide and prioritise the selection of areas in foreign countries for consideration the NTAC may also have regard to a range of other non-legislative factors. Key non-legislative factors are:

- links to Australia and Australians
- threats to Australian interests including the role of a particular area in the radicalisation of Australians and likely repercussions in Australia
- the enduring nature of the listed terrorist organisation's hostile activity in the area;
- the operational impact / utility of declaring the area
- factors relevant to Australia's international relations, including bilateral relations with countries including those in which an area may be declared, and engagement with international organisations such as the United Nations
- the listed terrorist organisation's ideology
- links to other terrorist groups
- engagement in peace or mediation processes.

Depending on available information, some factors may carry more weight than others in selecting an area for consideration. For example, information indicating links to Australia or threats to Australian interests may tend to prioritise consideration of declaring a particular area in a foreign country as a 'declared area'. However, a lack of information with respect to one or more factors will not preclude an area from being considered for declaration. In its nomination, NTAC will define the area within which the terrorist organisation is engaged in hostile activity as narrowly as possible.

Form of advice including description of the 'declared area'

The NTAC will consider and provide advice in the form of a Statement of Reasons that outlines that a listed terrorist organisation is engaging in a hostile activity in an area of a foreign country to AGD. AGD will provide the advice to the Attorney-General to consider. The Attorney-General will then provide it to the Minister for Foreign Affairs to consider.

The Statement of Reasons will outline why, in the NTAC's view, the area meets the legislative test for declaration as a 'declared area'. The Statement of Reasons may also include information that relates to any of the non-legislative factors outlined above. The inclusion of information relevant to the non-legislative factors is not required for the Minister for Foreign Affairs to be satisfied whether or not the area meets the legislative test for declaration. However, it may provide useful contextual information about the hostile activity the listed terrorist organisation is engaging in in that area of the foreign country for the Minister for Foreign Affairs and for the general public.

Whenever possible, the Statement of Reasons will be prepared as a stand-alone document, based on unclassified information about the hostile activity that a listed terrorist organisation is engaging in in

that area of the foreign country, which is corroborated by classified information. This enables the Statement of Reasons to be made available to the public, and provides transparency as to the basis on which the Minister for Foreign Affairs decision is made.

Key agencies may also provide a classified briefing to the Minister for Foreign Affairs.

The Statement of Reasons will include a description of the area recommended for declaration as a 'declared area'. Wherever possible the description will include a map showing the proposed 'declared area' and/or a detailed description that indicates clearly the area proposed to be declared. The area will be described in sufficient detail to ensure it is readily understood by members of the public.

Role of the Attorney-General's Department

The role of AGD is to provide support to the Attorney-General. AGD scrutinises the draft Statement of Reasons provided to it by the NTAC before it is provided to the Attorney-General. AGD also prepares the draft legislative instrument for the Minister for Foreign Affairs' declaration.

AGD prepares a submission to the Attorney-General asking that they consider and if appropriate, provide the Statement of Reasons and the draft legislative instrument under cover of a letter to the Minister for Foreign Affairs requesting that they consider declaring an area for the purposes of section 119.2 of the Criminal Code.

If the Minister for Foreign Affairs decides to declare an area and signs the legislative instrument, the legislative instrument is provided back to AGD which will lodge the instrument and its explanatory statement for registration on the Federal Register of Legislative Instruments (FRLI) as soon as practicable after it is signed.

Role of the Department of Foreign Affairs and Trade

The role of DFAT is to provide support to the Minister for Foreign Affairs. DFAT will facilitate the declaration process including providing advice to the Minister for Foreign Affairs on factors relevant to international relations and the foreign policy implications of a declaration, drawing on its network of overseas posts. DFAT also assists in ensuring the requirement to brief the Leader of the Opposition ahead of any declaration is met.

Once the Minister for Foreign Affairs has decided that an area in a foreign country meets the legislative criteria for declaration, DFAT will provide the legislative instrument to AGD for registration on the FRLI.

Monitoring and re-declaring declared areas and revocation of declaration

Monitoring declared areas

Intelligence and law enforcement agencies maintain a continuing focus on areas of high security concern. If circumstances arise which cause agencies to form a view that a declared area no longer meets the legislative test for declaration, advice from the NTAC, prepared in consultation with key agencies, will be provided to the Attorney-General who will subsequently advise the Minister for Foreign Affairs.

The Attorney-General or the Minister for Foreign Affairs may also ask the ACTC to task key agencies to provide them with a review of a 'declared area' including consideration of whether a declared area continues to meet the legislative test for declaration.

Re-declaring areas

Legislative instruments declaring an area cease to have effect three years after they take effect. This ensures that there is regular review and re-evaluation as to whether the area continues to meet the legislative criteria for declaration.

Before a declaration expires, the ACTC will coordinate key agencies to provide relevant information about the area to the NTAC for consolidation and evaluation. If the NTAC considers the area continues to meet the legislative criteria, the NTAC will prepare a new Statement of Reasons for the Attorney-General's and Minister for Foreign Affairs' consideration.

Revocation of declaration

If the Minister for Foreign Affairs ceases to be satisfied that a declared area meets the legislative criteria to remain declared, they must make a written declaration to this effect. The legislative instrument declaring that area will cease to have effect when that declaration is made.

Notification of decision to declare, re-declare or revoke declaration

When an area is declared, re-declared or a declaration is revoked the Attorney-General and/or the Minister for Foreign Affairs will issue a media release advising of this fact. The media release will

include a Statement of Reasons for the decision.

The declared area and the Statement of Reasons will also be available on the Australian Government National Security website www.nationalsecurity.gov.au.

The legislative instrument declaring an area will be available on the ComLaw website www.comlaw.gov.au.

Information about the declared area will also be available on the Australian Government Living Safe Together website www.livingsafetogether.gov.au and Smartraveller website www.smartraveller.gov.au.

Review and oversight

Disallowable instrument

Any legislative instrument declaring an area will be tabled in the Parliament and will also be subject to disallowance (veto) in full or in part by the Parliament for a period of 15 sitting days after they are tabled, and sunsetting, that is, automatic repeal three years after they commence, unless the Parliament or First Parliamentary Counsel acts to change the sunsetting date.

Reviews by the Parliamentary Joint Committee on Intelligence and Security (PJCIS)

After an area has been declared, the PJCIS may review the declaration, and report comments and recommendations to Parliament before the end of the parliamentary disallowance period. Should the PJCIS consider that there are insufficient grounds for an area to be declared or have other concerns with the declaration, it is open to the PJCIS to recommend that Parliament disallow the legislative instrument so that it ceases to have effect.

Review by the PJCIS provides openness, transparency and accountability in the declaration process. The PJCIS has expertise in reviewing security and intelligence matters and is well-placed to consider listing decisions, including where classified information may need to be examined.

Review by the PJCIS also provides an avenue for members of the public to raise any concerns and provide information to the PJCIS with respect to the declaring of particular areas. The manner in which inquiries are undertaken and advertised is a matter for the PJCIS.

Further information about the PJCIS is available on the Parliament of Australia website www.aph.gov.au/pjcis.

Judicial review by the courts

Judicial review of the legality of a decision to declare an area is available in the courts under the *Administrative Decisions (Judicial Review) Act 1977*, section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. The general principles of administrative law require that the minister's decision be made on the basis of logically probative evidence. The decision must also be a proper exercise of power, not flawed by irrelevant considerations, improper purpose or exercised in bad faith.

Oversight by the Inspector-General of Intelligence and Security (IGIS)

The IGIS is an independent statutory office holder who monitors and reviews the legality and propriety of the activities of Australia's intelligence and security agencies.

The IGIS has own motion inquiry powers and can also conduct inquiries in response to complaints from any person or requests from ministers. Should the IGIS decide to conduct an inquiry into an intelligence or security agency's role in the declaration of an area, the IGIS would consider whether the agency had followed appropriate processes when considering the area for declaration and when providing advice to the ACTC, the Joint Counter-Terrorism Board, the Attorney-General and Minister for Foreign Affairs.

Further information about the IGIS is available at: www.igis.gov.au.

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/22728

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
CANBERRA ACT 2600

Dear Senator Dean

Thank you for your letter regarding the Parliamentary Joint Committee on Human Rights' *Fifteenth Report of the 44th Parliament* on the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

The Committee raised a number of concerns about measures contained in the Bill. My advice in relation to these concerns is set out below.

Schedule 1 – New Psychoactive Substances

1.90 The committee requests the further advice from the Minister for Justice as to:

- *whether the term 'psychoactive substance' could be more specifically defined;*
- *whether more precise terms than 'significant disturbance' could be used in the definition of what constitutes a 'psychoactive effect', and*
- *whether non-exhaustive terms such as 'including' be could be omitted from the definition of what constitutes a 'psychoactive effect'.*

The Government does not propose to amend the definitions of 'psychoactive substance' or 'psychoactive effect'. The Government considers that the definitions are sufficiently certain for human rights standards and meet the standards of the quality of law test for human rights purposes.

As outlined in my letter of 30 September 2014, this measure is designed to capture so-called 'legal highs' or 'new psychoactive substances', which are those substances that are developed specifically to induce the same effect in humans as illicit drugs but are not captured by the existing criminal laws which proscribe substances by chemical structure. The United Nations Office on Drugs and Crime's *2013 World Drug Report* noted that, by mid-2012, the number of different new psychoactive substances detected throughout the world had exceeded the 234 substances currently controlled under international conventions. The number of previously undetected new psychoactive substances continues to rise. The Report also noted that there is an almost limitless array of these sorts of chemical combinations.

The Government acknowledges that there are a large number of substances with a legitimate use which could induce the same effect as an illicit drug when consumed by humans. However, these are specifically excluded from the measure. In particular, the measure excludes the following: foods, therapeutic goods, tobacco, plants, fungi, industrial chemicals, agricultural chemicals and veterinary chemicals. In a practical sense, these exclusions mean that the definitions of 'psychoactive substance' and 'psychoactive effect' will apply very narrowly to a small, specific and definite range of substances that do not have a legitimate use. If a person is importing a substance for a legitimate use, he or she will not have to be concerned about the definitions of 'psychoactive substance' or 'psychoactive effect'.

There is no alternative method of achieving the Bill's aims that will not involve similarly broad definitions. It is not possible to narrow or more specifically define the terms 'psychoactive substance' or 'psychoactive effect' without fundamentally undermining the purpose and utility of the legislation. Ireland and New South Wales have taken a similar route and used similar definitions of 'psychoactive substance' and 'psychoactive effect'. New Zealand has set up a mechanism under the *Psychoactive Substances Act 2013* that would ultimately allow the importation and sale of authorised psychoactive substances, but it does not define psychoactive effect and leaves it open to a broad interpretation.

The Australian Government has adopted a definition that excludes substances that have only a minor effect on a person's central nervous system—that is, substances that do not result in hallucinations, significant disturbances or significant changes to a person's motor function, thinking, behaviour, perception, awareness or mood. Beyond this, it is not possible to use more specific or precise terms to capture an amorphous and ever-changing set of substances whose only unifying feature is that they are intended to be consumed as alternatives to other illicit drugs.

Other jurisdictions have chosen different ways to ban psychoactive substances based on their intended use, rather than their effect. While a ban based solely on the presentation of a substance may offer greater certainty for importers, it would be inadequate to deal with the realities at the border. Typically, the Australian Customs and Border Protection Service (ACBPS) and Australian Federal Police (AFP) will encounter new psychoactive substances as unmarked or mislabelled pills, powders or liquids. In such circumstances, it will not be possible for the officer examining the substance to immediately and conclusively determine that it is intended to ultimately be used as an alternative to an illicit drug. An effect-based ban (like that in proposed section 320.2) must accompany a presentation or purpose-based ban (like that in proposed section 320.3) in order for ACBPS and AFP officers to be able to effectively stop, seize, and destroy new psychoactive substances and, if appropriate, prosecute the importers.

A broad definition of 'psychoactive substance' is necessary for the Bill to achieve its aim of preventing largely unknown and untested chemical substances being imported as alternative versions of illicit drugs. When put in the context of the exclusions in subsection 320.2(2), the law is sufficiently specific for individuals who import goods, particularly chemicals, to understand their obligations under it.

Schedule 2 – Firearm Trafficking Offences

1.98 The committee considers that the mandatory minimum sentencing provisions are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

Consistent with my previous response, the Government considers that mandatory minimum penalties for firearms trafficking are reasonable and necessary to deter people from diverting firearms into the illicit market, where they can be accessed by criminals and used in the commission of serious and violent crimes. As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will be proportionate to the offence they commit and is entirely at the discretion of the sentencing judge.

The introduction of mandatory minimum penalties for these provisions was an election commitment and reflects the seriousness with which the Government takes gun-related crime. The Australian Government is not the only government which has taken this view, with the Queensland and United Kingdom governments also introducing mandatory minimum sentences for firearms trafficking, and a number of other counties establishing mandatory minimums for other firearms-related offences (including illegal possession).

I note that the validity of mandatory minimum penalties for aggravated people smuggling offences in the Migration Act were upheld as constitutionally valid in the High Court matter of *Magaming v The Queen [2013] HCA 40*. The appellant's argument that the imposition of these penalties was 'arbitrary' and 'non-judicial' was not successful.

1.99 In the event that the mandatory minimum sentencing provisions are retained, the committee recommends the provision be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

In response to concerns raised by the Committee in its *Tenth Report of the 44th Parliament*, I have agreed to amend the Explanatory Memorandum for the Bill to note that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. This further demonstrates the Government's commitment to limiting any encroachment on judicial discretion.

Schedule 5 – Validating Airport Investigations

1.111 The committee requests the further advice of the Minister for Justice as to:

- *whether unauthorised powers were exercised (such that there is a need to retrospectively validate such powers);*
- *if so, what powers were exercised (to see whether that the general nature of the validation is proportionate); and*
- *what specific other powers existed at the time under which the conduct was or could have been carried out (to see if there is a need to retrospectively validate such power and if such validation is proportionate).*

.As outlined in my previous response, the *Commonwealth Places (Application of Laws) Act 1970* allows the Australian Federal Police (the AFP) to utilise investigative powers available under Part 1AA and 1D of the *Crimes Act 1914* to investigate state offences which occur at Commonwealth places that are designated state airports. As the *Commonwealth Places (Application of Laws) Regulation 1998* (the Regulations) was inadvertently repealed for a period of time, the AFP was unaware of the need to confine itself to alternative powers,

which may have been available, for a portion of the repeal period. Statistics are not available to identify the specific powers relied upon during this period.

Alternative powers were available to the AFP to investigate state offences at designated state airports, including under section 9 of the *Australian Federal Police Act 1979*. These alternative powers may give rise to a separate procedure and practice from the *Crimes Act 1914* powers. Since 2011 when the Regulations were amended to allow the AFP to use investigative powers under the *Crimes Act 1914* in designated state airports, the AFP has used these investigation powers notwithstanding the availability of alternative powers. Retrospective validation of the use of *Crimes Act 1914* powers between 19 March 2014 and 16 May 2014 would eliminate any uncertainty which may arise.

Accordingly, retrospective validation of certain powers for a limited time period under Schedule 5 of the Bill is a reasonable, necessary and proportionate measure to achieve a legitimate objective, so as to ensure consistent application of appropriate security and policing at Commonwealth airports. It is necessary to avoid the potential for inequitable outcomes within the criminal justice system, based on whether a person was arrested within the eight week period when the investigative powers used by the AFP were not in force.

I trust this information will assist the Committee in its inquiries.

Should you require any further information, the responsible adviser for this matter in my office is Tim Wellington, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

11 DEC 2014

ATTORNEY-GENERAL

CANBERRA

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Dean

The Parliamentary Joint Committee on Human Rights has sought information about the Federal Courts Legislation Amendment Bill 2014 (the Bill).

Specifically, the Committee has sought my advice about whether the conferral of jurisdiction on the Federal Circuit Court of Australia (the FCC) for tenancy disputes is compatible with fair hearing rights.

It is my view that the relevant provisions in the Bill are compatible with the right to a fair hearing. They provide tenants involved in a Commonwealth tenancy dispute with an appropriate forum to have those disputes heard and determined.

Jurisdiction is being conferred on the FCC in order to ensure that tenancy disputes involving the Commonwealth can be resolved in the least time-consuming and expensive way. State and territory law directs residential tenancy matters to state and territory tribunals. However, state and territory tribunals that are not 'courts' within the meaning of Chapter III of the Constitution cannot exercise federal judicial power, which can give rise to jurisdictional arguments when the Commonwealth is a party to a tenancy dispute.

Conferring jurisdiction on the FCC to hear certain Commonwealth tenancy disputes will provide an appropriate forum in a Chapter III court for these matters to be heard. The only current alternative to resolve residential tenancy disputes involving the Commonwealth would be for a tenant to bring action in a superior state court or, in some circumstances, the Federal Court, which is a much more costly and time-consuming endeavour for users, than the FCC.

I understand that concerns have been raised about application of the protections that exist for lessees under state and territory law. It is important to note that state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. This includes protection about unlawful and unjust eviction. This position is intended to be clarified through legislative instruments made under proposed paragraph 10AA(3)(b) of the Bill.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

The intention of the Bill is not to remove any of these important protections, but simply to introduce a new option for resolving Commonwealth tenancy disputes in a low-cost and easily accessible forum where jurisdictional arguments would not require consideration.

For these reasons, I am of the view that the provisions in the Bill relating to Commonwealth tenancy disputes are not only compatible with fair hearing rights, but indeed promote these rights in a low-cost, easily accessible trial court which has a national presence and circuits regularly to regional areas.

I thank you for seeking my advice in relation to this Bill and hope that this information assists the Committee.

Yours faithfully

(George Brandis)

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

17 DEC 2014

Dear Senator Dean Smith

Thank you for your letter, originally directed to the Treasurer, on behalf of the Parliamentary Joint Committee on Human Rights (Committee) regarding the Labor 2013-14 Budget Savings (Measures No. 1) Bill 2014 (Bill). I am responding on the Treasurer's behalf and apologise for the delay in doing so.

The Committee sought further information as to whether the Bill is compatible with the right to an adequate standard of living in article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

The Bill repeals the second round of Carbon Tax-related personal income tax cuts that are due to start on 1 July 2015 because that is what Labor promised prior to the last election as a budget savings measure to help to repair the budget. Since the election Labor have failed to keep their promise to the Australian people so we are introducing legislation to allow the Labor Party to keep its promise to the Australian people to fix the budget.

Given the only consequence of the Bill is to preserve the currently applicable tax arrangements and it is no longer necessary to compensate taxpayers for the Labor's Carbon Tax, the Government is comfortable the proposed changes are compatible with human rights. I note the Government has scrapped Labor's carbon tax, saving the average household $550 a year.

I trust this information will be of some assistance to the Committee.

Yours sincerely

Steven Ciobo

Parliament House Canberra ACT 2600 Australia
Telephone (02) 6277 2330 Facsimile (02) 6277 8452

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;

---

[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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

---

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.

---

5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights