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 16 to 19 March 2015, legislative instruments received from 27 February to 5 March 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. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Amending Acts 1980 to 1989 Repeal Bill 2015;
- Charter of Budget Honesty Amendment (Intergenerational Report) Bill 2015;
- Food Standards Australia New Zealand Amendment Bill 2015;
- Governance of Australian Government Superannuation Schemes Legislation Amendment Bill 2015; and
- Statute Law Revision Bill (No. 2) 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human

rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015.

Instruments not raising human rights concerns

1.9 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.

1.10 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.

Deferred bills and instruments

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

- Australian Border Force Bill 2015 (deferred 18 March 2015);
- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015;
- Criminal Code Amendment (Animal Protection) Bill 2015 (deferred 3 March 2015);
- Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 (deferred 18 March 2015);
- Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2];
- Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (deferred 18 March 2015);
- Criminal Code (Terrorist Organisation—Ansar al-Islam) Regulation 2015 [F2015L00234];
- Criminal Code (Terrorist Organisation—Islamic Movement of Uzbekistan) Regulation 2015 [F2015L00235];
- Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015 [F2015L00233];
- Criminal Code (Terrorist Organisation—Lashkar-e Jhangvi) Regulation 2015 [F2015L00236];

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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.

- Extradition (Vietnam) Regulation 2013 [F2013L01473] (deferred 10 December 2013); and
- 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:

- Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970] (deferred 2 September 2014);
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2015 (No. 1) [F2015L00224];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2015 (No. 2) [F2015L00216];
- 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] (deferred 3 March 2015);
- 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 – Iran) Amendment List 2015 (No. 1) [F2015L00227];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Amendment List 2015 (No. 1) [F2015L00215];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2015 (No. 1) [F2015L00217];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184] (deferred 24 September 2014);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2015 (No. 1) [F2015L00218];
- Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384] (deferred 10 December 2013); and

- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701] (deferred 3 March 2015).

1.13 The following instruments have been deferred in connection with the committee's current review of the *Stronger Futures in the Northern Territory 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) (Excluded circumstances – Queensland Commission) Specification 2014 [F2015L00002] (deferred 3 March 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).

Omnibus Repeal Day (Autumn 2015) Bill 2015

Portfolio: Prime Minister and Cabinet
Introduced: 18 March 2015

1.14 The Omnibus Repeal Day (Autumn 2015) Bill 2015 (the bill) seeks to amend or repeal legislation across seven portfolios.

1.15 The bill also includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements measures included in the Statute Law Revision Bill (No.1) 2015 and the Amending Acts 1980 to 1989 Repeal Bill 2015.

1.16 One of the Acts which would be repealed is the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*.

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

Repeal of *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*

1.18 As noted above, the bill seeks to repeal the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (the Act).

1.19 The Act contains a range of protections against discriminatory treatment of Aboriginal people. The purpose of the Act is stated to be 'preventing Discrimination in certain respects against those Peoples under laws of Queensland'.[1]

1.20 Accordingly, the committee considers that the repeal of the Act engages the right to equality and non-discrimination.

Right to equality and non-discrimination

1.21 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).

1.22 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides 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.

1.23 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[2] which has either the purpose (called

1 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975,* section 1.

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

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[3] 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.[4]

1.24 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) further describe the content of this right 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

1.25 The statement of compatibility states that the proposed repeal of the Act*:*

> …does not engage any applicable human rights because the Act does not have any ongoing practical effect. The Act was enacted for the purpose of superseding certain provisions of the laws of Queensland that discriminated against Aborigines and Torres Strait Islanders. The Queensland laws targeted by the Act have since been repealed.[5]

1.26 However, as noted above, the Act contains a number of substantive provisions which may further Australia's obligations under the ICCPR and CERD in relation to the right to equality and non-discrimination. This includes, for example, section 11 which provides:

> A person shall not employ an Aboriginal or Islander in Queensland (whether on a Reserve or elsewhere) unless the terms and conditions of employment are not less favourable than they would be required to be if the employee were not an Aboriginal or Islander, and, in particular, the employee shall be entitled to be paid wages at a rate not less than the rate at which wages would be payable to him if he were not an Aboriginal or an Islander.[6]

1.27 The repeal of the Act therefore engages the right to equality and non-discrimination. While the statement of compatibility states that repealing the Act will have no substantive effect, the committee would appreciate further information to help it understand whether repealing the Act could limit any rights to equality and non-discrimination. No details have been provided in the statement of compatibility about the particular Queensland laws which the Act was designed to override.[7] In

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

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

5 Explanatory memorandum (EM) 37.

6 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975,* section 11.

7 EM 37.

particular, no details have been provided as to whether the *Racial Discrimination Act 1975* provides equivalent and sufficient protection of the right to equality and non-discrimination as is provided by the Act to be repealed.

1.28 **The committee therefore seeks the advice of the Parliamentary Secretary to the Prime Minister as to whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*.**

1.29 **The committee also seeks the advice of the Parliamentary Secretary to the Prime Minister as to whether there are any Queensland laws which continue to apply such that the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* may not be redundant.**

Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq [F2015L00245]

Portfolio: Attorney-General
Authorising legislation: Criminal Code Act 1995
Last day to disallow: 18 June 2015

Purpose

1.30 The Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq [F2015L00245] (the regulation) makes it an offence under section 119.2 of the *Criminal Code Act 1995* (the Criminal Code) to enter, or remain in, the Mosul district in Ninewa province, Iraq.

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

Background

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

1.33 The committee considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) in its *Fourteenth Report of the 44th Parliament*,[1] and then subsequently the Attorney-General's response to the committee's requests for further information in its *Nineteenth Report of the 44th Parliament*.[2] The bill was passed by both Houses of Parliament and received Royal Assent on 3 November 2014. The committee also considered declared area offence provisions in its examination of the Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al‑Raqqa Province, Syria [F2014L01634] in its *Eighteenth Report of the 44th Parliament*.[3]

1.34 The committee considered that the declared area offence provisions introduced by the bill were likely to be incompatible with the right to a fair trial and

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

2 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 56-100.

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 71-73.

the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

Determination of Mosul district as a declared area

1.35 As a result of the regulation, it is a criminal offence under section 119.2 of the Criminal Code for a person to enter, or remain in, Mosul district in the Ninewa Province, Iraq. The committee notes that the Mosul district includes the city of Mosul, one of the largest cities in Iraq, which prior to the war was home to over 1 800 000 residents.[4]

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

Multiple rights

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

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and
- the right to equality and non-discrimination.[5]

Compatibility of the determination with multiple rights

1.38 In light of the committee's previous conclusion that the declared area offence provisions in the Criminal Code are incompatible with human rights, it follows as a matter of law that the declaration of Mosul district in Iraq for the purposes of the declared area offence provision is also likely to be incompatible with human rights.

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4 Office of the High Commissioner for Human Rights (OHCHR) and United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Office Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014*, at http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf.

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

1.39 While the committee acknowledges that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective for the purposes of international human rights law, the committee considers that the statement of compatibility does not provide a sufficiently detailed or evidence-based analysis to establish that the regulation pursues a legitimate objective. For example, the statement of compatibility simply states:

> The declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia's national security.
>
> …The risk of a successful terrorist attack occurring in Australia is high and the limitation imposed by the declaration is necessary to assist in the prevention of an attack on Australian soil by individuals who have gained terrorist capabilities by engaging in hostile activities with a listed terrorist organisation. This is particularly so given that ISIL is using Mosul district, Ninewa province, Iraq as a base of operations and Australians have travelled to Iraq and Syria to participate in the foreign conflict.[6]

1.40 The committee notes that proponents of legislation must provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In this respect, the committee considers that the statement of compatibility does not provide sufficient information as to the specific need for the declaration of the Mosul district as a declared area for the purposes of section 119.2 of the Criminal Code. In particular, the statement of compatibility provides no analysis of the particular threat to Australia's national security, or how any such threat is addressed by declaring the area of Mosul. Further, the statement does not say why it is not possible to rely on measures that are less restrictive of human rights, such as the existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries.

1.41 **As the committee has already concluded that the declared area offence provisions is incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement, and the rights to equality and non-discrimination, it follows that the declaration of the Mosul district in the Ninewa province of Iraq under that offence provision is also incompatible with those human rights.**

6 Explanatory statement 2-3.

1.42 **Notwithstanding this conclusion, the committee agrees that there is a public interest argument in declaring areas under the Criminal Code to pursue the legitimate objective of national security.**

Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696]

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

Purpose

1.43 The Migration Amendment (2014 Measures No. 2) Regulation 2014 (the regulation) amends the Migration Regulations 1994 to:

- remove the prescribed period of time that an applicant outside Australia must be given to respond to a request for information or to an invitation to comment, so that the 'reasonable time' period set out in the *Migration Act 1958* (Migration Act) will apply instead;
- broaden the definition of 'managed fund' to allow the minister to specify investment products as eligible investment products for visa applicants seeking a business visa;
- make changes to the character and general visa cancellation provisions in the Migration Regulations 1994, as a consequence of the introduction of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

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

Background

1.45 The committee commented on the *Migration Amendment (Character and General Visa Cancellation) Act 2014* in its *Nineteenth Report of the 44th Parliament*.[1]

Criteria for grant of visa requires a statement from appropriate authority

1.46 Item 3 of Schedule 3 of the regulation prescribes additional criteria for the grant of a visa. For those visa applicants that are required to satisfy public interest criteria 4001 or 4002, if the minister requests it, an applicant must provide a statement from an appropriate authority in a country where the person resides, or used to reside, that provides evidence about whether the person has a criminal history.

1.47 The committee considers that this measure engages and may limit Australia's non-refoulement obligations and the right to liberty.

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 13-28.

Non-refoulement obligations

1.48 Australia has non-refoulement obligations under the Refugee Convention, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2] This means that Australia must not return 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.[3]

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

1.50 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review, is integral to complying with non-refoulement obligations.[4]

1.51 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 non-refoulement obligations

1.52 Under the Migration Regulations, applicants for all visas, including protection visas,[5] are required to pass the character test (criteria 4001) and to not be assessed as a security risk by the Australian Security Intelligence Organisation (criteria 4002). This means that, while a person may engage Australia's protection obligations under the Refugee Convention, the ICCPR and CAT, they might nonetheless be denied a visa on character grounds. This regulation introduces an additional criterion, which is that the person provide evidence about whether they have a criminal history from an

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

3 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.

4 International Covenant on Civil and Political Rights, 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 2013, 513.

5 See clause 866.225 of the Migration Regulations 1994.

appropriate authority in a country where the person resides or has resided.[6] The minister can exercise his or her personal non-compellable discretion to waive this requirement if satisfied it is not reasonable to require the applicant to provide the statement.

1.53 The statement of compatibility acknowledges that this provision 'may result in a greater number of visa refusal decisions for non-citizens who are in Australia'.[7] It states that the amendments do not engage Australia's non-refoulement obligations. However, it goes on to note:

> Anyone found to engage Australia's non-refoulement obligations during the cancellation decision or visa refusal decision or Ministerial Intervention processes prior to removal from Australia, will not be removed in breach of those obligations.[8]

1.54 The committee considers that the measure engages and limits the obligation of non-refoulement, as it imposes an additional condition which must be met before a visa can be granted, including a protection visa. A person may be found to be one to whom Australia owes protection obligations but, because they cannot provide evidence of whether they have a criminal history from an appropriate authority, they may not be granted a protection visa.

1.55 First, the consequence of a visa being refused is that the person is an unlawful non-citizen subject to removal from Australia. 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.

1.56 While the committee acknowledges the minister's commitment to ensuring no one who is found to engage our non-refoulement obligations will be removed in breach of that obligation, 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 applicant has not made a claim for protection or the person is not covered by the Refugee Convention.[9]

1.57 Second, the requirement that a person provide evidence about whether they have a criminal history from an appropriate authority in a country they may have fled could effectively provide notice to that country that the person is seeking asylum in Australia. If the person is not granted a protection visa and is returned to that

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6 See item 3 of Schedule 3, proposed new regulation 2.03AA.

7 Explanatory statement (ES), Attachment A, 6.

8 ES, Attachment A, 10.

9 See footnote 3.

country, this could itself become a basis for persecution in that country. The committee notes that in such cases the minister may exercise a personal, non-compellable discretion to waive the requirement to provide evidence about their previous criminal history. However, the committee has previously noted that administrative and discretionary safeguards are likely to be less stringent than the statutory protections in guarding against human rights breaches.

1.58 The committee considers that imposing additional criteria for the grant of a protection visa (unrelated to establishing whether the person is owed protection obligations) may limit the obligation of non-refoulement, particularly to the extent that 'independent, effective and impartial' review, including merits review, is not provided in relation to non-refoulement decisions.

1.59 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether imposing additional criteria to be satisfied before a visa can be granted, including a protection visa, complies with Australia's non-refoulement obligations under the ICCPR and the CAT.**

Right to liberty

1.60 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.

1.61 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.

1.62 The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

Compatibility of the measure with the right to liberty

1.63 The statement of compatibility states that the new powers enable the Department of Immigration and Border Protection to better target those who do not cooperate with a reasonable request to provide documentation or information, through their detention and subsequent removal from Australia. It states that the amendments do not limit the right to freedom from arbitrary detention, and that they present 'a reasonable response to achieving a legitimate purpose under the ICCPR—the safety of the Australian community and integrity of the migration

programme'. It goes on to say that any questions of proportionality will be resolved by way of comprehensive policy guidelines.[10]

1.64 However, the committee considers that, imposing additional criteria for the grant of a visa such that a person recognised as a refugee may still not be granted a visa, engages and limits the prohibition against arbitrary detention. This is because a person whose visa is refused if they have not been able to provide evidence of whether they have a criminal history from an appropriate authority in their home country will be subject to mandatory immigration detention pending their removal or deportation. 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.

1.65 While the committee considers that ensuring the safety of the Australian community and the integrity of the migration program is likely to be considered a legitimate objective for the purposes of international human rights law, 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. The committee considers that administrative and discretionary processes, such as policy guidelines, are likely to be less stringent than the protection of statutory processes.

1.66 **The committee therefore considers that imposing additional criteria to be satisfied before a visa can be granted, 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.**

10 ES, Attachment A, 9.

Imposition of special return criteria—visa cannot be granted if had previously held a visa that was cancelled on character grounds

1.67 Special Return Criterion (SRC) 5001 of Schedule 5 to the Migration Regulations currently provides that a person cannot be granted a visa if they were deported from Australia or held a visa that was cancelled on certain character grounds. The regulation amends this to refer to new grounds on which a visa has been cancelled, to reflect the amendments introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*. The provision provides that such exclusion will continue to apply unless the minister personally grants a permanent visa to the person.

1.68 As this amendment expands the basis on which a person can be permanently excluded from Australia, the committee considers that this engages and limits the right to freedom of movement (own country) and the obligation to consider the best interests of the child.

Right to freedom of movement (right to return to Australia)

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

1.70 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.

1.71 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 (right to return to Australia)

1.72 The statement of compatibility does not address the compatibility of the measure with the right to freedom of movement.

1.73 The committee notes that the expanded basis on which a person is excluded from the grant of a further visa may lead to a permanent resident whose visa is cancelled being excluded from ever returning to Australia unless the minister exercises a personal, non-compellable discretion to grant a permanent visa to the person.

1.74 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.[11] The committee notes that the statement of compatibility provides no assessment of whether the expanded exclusion criteria 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.

1.75 **The committee therefore considers that the expansion of the exclusion criteria may limit the right to freedom of movement and specifically the right of a permanent resident to return to 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.**

Obligation to consider the best interests of the child

1.76 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 are a primary consideration.

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

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

1.78 The statement of compatibility notes that various measures in the regulation:

> …could result in the separation of the family unit. However, the Government's position is that the application of migration laws which consider the individual circumstances of visa applicants or visa holders and

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

> their relationships with family members is consistent with the rights outlined above.
>
> Where a non-citizen's visa is being considered for cancellation, the rights relating to families and children will be taken into account as part of the decision and will be weighed against factors such as the risk the person presents to the Australian community.[12]

1.79 However, the statement of compatibility does not explain whether the best interests of the child, who may have had their visa cancelled as a minor and thus never able to be granted another visa to Australia, will be considered. This is a blanket exclusion which will apply unless the minister personally determines to grant a permanent visa to the person.

1.80 The decision to waive the exception and grant a permanent visa is a personal, non-compellable discretion of the minister. As the committee has previously noted, administrative and discretionary processes are less stringent than the protection of statutory processes. In the absence of a statutory requirement to consider the best interests of a child when deciding whether or not the child will be excluded from the grant of another visa, it is unclear whether the regulation may be considered as being compatible with the obligation to consider the best interests of the child.

1.81 **The committee considers that the regulation engages and limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.**

12 ES, Attachment A, 7.

Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 2 March 2015

Purpose

1.82 The Migration Amendment (Subclass 050 Visas) Regulation 2014 (the regulation) amends the Migration Regulations 1994 to provide the Minister for Immigration and Border Protection (the minister) with a discretion to apply a 'no work' condition (condition 8101) on a Bridging Visa E (BVE) granted by the minister. Previously, a 'no work' condition was mandatorily imposed on some BVEs granted by the minister and could not be imposed on others.

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

Discretion to apply the 'no work' condition on the grant of a BVE

1.84 The discretion to apply a no work condition on the grant of a BVE engages the right to work and the right to an adequate standard of living as well as the rights of the child. Australia's obligation under international human rights treaties applies to all individuals lawfully in Australia and not just to citizens.

Right to work

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

1.86 The UN Committee on Economic Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;

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

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

1.88 The right to work may be subject only to such limitations as are determined by law and that are compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to work

1.89 The committee considers that the regulation in part advances the right to work as compared with the situation prior to the making of the regulation. The regulation creates the possibility that some BVE visa holders will have the right to work in Australia where previously they did not have that right. Nevertheless, the committee notes that the right to work will not be afforded to all BVE holders and that a BVE holder's right to work will be at the discretion of the minister. Accordingly, the committee considers that the regulation limits the right to work.

1.90 The statement of compatibility states that the regulation:

> is a necessary measure for the welfare of democratic society as it protects the integrity of the migration programme, including by ensuring the policy intent of the programme is reflected in the behaviour of visa holders.[2]

1.91 While the committee notes that protecting the integrity of the migration programme may be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, the least rights restrictive alternative to achieve this result).

1.92 The decision to allow a BVE holder to work will be at the discretion of the minister when granting the BVE. As the committee has previously noted, administrative and discretionary processes are likely to be less stringent than the protection of statutory processes. The statement of compatibility sets out that:

> Condition 8101[the no work condition] would also generally be imposed on a BVE granted to a non-citizen who has no lawful basis to remain in Australia.

1.93 Whilst it may be reasonable to impose a no work condition on an individual who, other than for the grant of the BVE (and in the absence of any protection claims), has no lawful basis for being in Australia, the discretion granted to the minister is much broader and would apply to all classes of BVEs.

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2 Explanatory statement (ES) 3.

1.94 **The committee considers that the regulation engages and limits the right to work. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to work.**

Right to an adequate standard of living

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

1.96 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

1.97 Working for wages is one of the primary means through which individuals in Australia are able to obtain an adequate standard of living for themselves and their family. The committee notes that no work conditions on BVEs limit an individual's ability to ensure an adequate standard of living through employment.

1.98 The statement of compatibility acknowledges that the regulation engages the right to an adequate standard of living. The statement of compatibility explains that BVE holders who are not granted the right to work 'may nonetheless have access to financial support' such as the Community Assistance Support (CAS) programme and the Asylum Seeker Assistance Scheme (ASAS) for eligible Protection visa applicants.

1.99 The statement of compatibility states that:

> support may not be available because the person has not been assessed to have a prescribed vulnerability or (for non-citizens who have made an application for a substantive visa which has been finally determined) they are not engaging with the department to resolve their immigration status.[3]

1.100 The statement of compatibility explains that the limitation on the right to an adequate standard of living is lawful and for the general welfare of democratic society. The measure has the legitimate objective of ensuring that non-citizens are

3 ES 7.

engaging with the immigration department to resolve their visa status and that this maintains the integrity of Australia's immigration framework.

1.101 While the committee notes that protecting the integrity of the migration programme may be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, the least rights restrictive alternative to achieve this result).

1.102 The decision to allow a BVE holder to work and provide themselves with an adequate standard of living will be at the discretion of the minister when granting the BVE. The minister will not be required by statutory provisions to consider the ability of the visa applicant to maintain an adequate standard of living when deciding whether or not to impose a no work condition.

1.103 The statement of compatibility sets out the forms of support that may be available to BVE holders if they are unable to work. The statement of compatibility notes that not all individuals who are not permitted to work will be provided with support. The statement of compatibility states that this will 'generally' be because of non-cooperation with the department in resolving the individual's visa status. However, there is no statutory requirement that the minister only impose a no work condition on an individual who is not cooperating with the department. Accordingly, the regulation may impose a limitation on the right to an adequate standard of living which is not proportionate. That is, the regulation would allow the imposition of a no work condition even where an individual is cooperating and has no alternative means of financial support. A least rights restrictive approach would appear to be to limit the power to cases where there is non-cooperation or other non-compliance.

1.104 **The committee considers that the regulation engages and limits the right to an adequate standard of living. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to an adequate standard of living.**

Obligation to consider the best interests of the child

1.105 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 are a primary consideration.[4]

1.106 This principle requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and

4 Article 3(1).

assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

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

1.107 The imposition of a no work condition on the grant of a BVE holder may inhibit a parent's ability to provide for their child and accordingly the imposition of a no work condition may not be in the best interests of the child. The committee considers that any limitation on the obligation to consider the best interests of the child may have a legitimate objective, as set out above in relation to the right to work and the right to an adequate standard of living. However, the committee is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

1.108 The statement of compatibility explains that:

> I [the minister] may consider the best interests of the child when deciding whether or not to impose condition 8101 on a BVE granted under section 195A, in particular, how the inability of a parent to work may impact upon any dependent children.

1.109 The decision to allow a BVE holder to work will be at the discretion of the minister when granting the BVE. As the committee has previously noted, administrative and discretionary processes are likely to be less stringent than the protection of statutory processes. In the absence of a statutory requirement to consider the interests of a BVE holder's child when deciding whether or not to impose a no work condition, it is unclear whether the regulation may be considered compatible with the obligation to consider the best interests of the child.

1.110 **The committee considers that the regulation engages and limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.**