Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-second report of the 44th Parliament

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Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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 23 to 26 March 2015, legislative instruments received from 6 March to 9 April 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.

- Charter of Budget Honesty Amendment (Regional Australia Statements) Bill 2015;
- Food Standards Amendment (Fish Labelling) Bill 2015; and
- Tax and Superannuation Laws Amendment (Employee Share Schemes) Bill 2015.

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.

- Communications Legislation Amendment (SBS Advertising Flexibility and Other Measures) Bill 2015;
- Customs and Other Legislation Amendment (Australian Border Force) Bill 2015; and
- Judiciary Amendment Bill 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 following previously deferred regulations and makes no comment on the instruments:

- 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]; and
- Criminal Code (Terrorist Organisation—Lashkar-e Jhangvi) Regulation 2015 [F2015L00236].[2]

Deferred bills and instruments

1.11 The committee has deferred its consideration of the Criminal Code Amendment (Animal Protection) Bill 2015 (deferred 3 March 2015).

1.12 As previously noted, the committee continues to defer a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.[3]

1.13 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 [F2014L00694];

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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.

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015).

3 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015).

- 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] (deferred 24 March 2015);
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2015 (No. 2) [F2015L00216] (deferred 24 March 2015);
- 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] (deferred 24 March 2015);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Amendment List 2015 (No. 1) [F2015L00215] (deferred 24 March 2015);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2015 (No. 1) [F2015L00217] (deferred 24 March 2015);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) List 2014 [F2014L00745];
- 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 2014 [F2014L00411];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2015 (No. 1) [F2015L00218] (deferred 24 March 2015);

- Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [F2014L00720];
- 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 (Sanctions – Yemen) Regulation 2014 [F2014L00551];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 2) [F2014L00568];
- Charter of the United Nations Legislation Amendment (Central African Republic and Yemen) Regulation 2014 [F2014L00539];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 Measures No. 1) Regulations 2014 [F2014L01131]; and
- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701] (deferred 3 March 2015).

Australian Border Force Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 25 February 2015

Purpose

1.14 The Australian Border Force Bill 2015 (the bill) provides the legislative framework for the establishment of the Australian Border Force (ABF) within the Department of Immigration and Border Protection (the department), including establishing the role of the Australian Border Force Commissioner (ABFC), from 1 July 2015.

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

Setting of essential qualifications for employment within the Australian Border Force

1.16 Section 26 of the bill would give the ABFC the power to issue written directions in connection with the administration of the ABF. Section 26(2) sets out that the directions may relate to the essential qualification of workers and contractors working in the ABF. Subsection 26(3) provides that these essential qualifications may relate to a number of characteristics, including 'physical or psychological health or fitness'.

1.17 Similarly, section 55 of the bill would give the Secretary of the Department of Immigration and Border Protection (the secretary) the power to issue written directions in connection with the administration of the department. Under section 55(2) the directions may relate to the essential qualification of workers and contractors working in the department. Subsection 55(3) provides that these essential qualifications may relate to a number of characteristics, including 'physical or psychological health or fitness'.

1.18 The setting of essential qualifications may engage the right to equality and non-discrimination. Such qualifications may be more difficult for certain individuals to meet because of a protected attribute such as gender or disability. In addition, as the position in the ABF, and the department more broadly, are public service positions the setting of essential qualifications engages the right to take part in public affairs as well as rights at work.

Right to equality and non-discrimination

1.19 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).

1.20 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.

1.21 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[1] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[2] 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.[3]

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

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

1.24 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 ICCPR.

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

1.25 The committee notes that the giving the ABFC and the Secretary the power to set the essential criteria for employment may not necessarily lead to discrimination in practice. The committee also notes that the powers are modelled on the existing powers of the current CEO of Customs.

1.26 The statement of compatibility states:

> [t]he setting of essential qualifications in the performance of duties … does not represent discrimination as these qualifications are legitimately required for the performance of work and are specific to the role.[4]

1.27 The statement of compatibility also states that:

> The Department will apply requirements for essential qualifications according to an assessment of the physical, psychological, professional and

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1 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.

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

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

4 Explanatory Memorandum (EM) 4.

> technical requirements of a positon and ensure that such requirements are reasonable in the circumstances.[5]

1.28 The committee notes that the statement of compatibility does not acknowledge the obligation to make reasonable accommodations (adjustments) for persons with disabilities so that they are not unreasonably excluded from accessing employment where they would be able to fulfil the requirements of a position provided adjustments are made.

1.29 The committee considers that the provisions in the bill grant wide discretions to the ABFC and Secretary in determining the essential criteria of any job in the ABF and the department more broadly. In addition, any written direction by the ABFC or Secretary setting out the essential criteria will not be a legislative instrument and thus not subject to parliamentary scrutiny. Accordingly, the committee considers that it is unable to assess whether determinations of essential criteria for jobs in the ABF and the department might be discriminatory in practice.

Right to take part in public affairs

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

1.31 The right to have access to positions in the public service is based on general terms of equality and principles of merit. The term 'public service' applies to all administrative positions within the executive, judiciary and legislature and other areas.

1.32 As with most rights, the right to take part in public affairs is not absolute and may be limited if it is reasonable and proportionate to do so. There may be reasonable limits on the right to vote, such as age restrictions. It is considered unreasonable to restrict the right to vote on grounds of physical disability, party membership or to impose literacy, educational or property requirements.

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

1.33 As set out above, as positions in the ABF and the department are public service positions, the setting of essential qualifications engages the right to take part in public affairs. Provided those qualifications are reasonable and necessary there would be no limitation on the right to take part in public affairs.

1.34 As set out above, in relation to the right to equality and non-discrimination, the provisions in the bill grant wide discretions to the ABFC and secretary in determining the essential criteria of any job in the ABF and the department respectively. In addition, any written direction by the ABFC or secretary setting out

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5 EM 5.

the essential criteria will not be a legislative instrument and thus not subject to parliamentary scrutiny. Accordingly, the committee is unable to assess whether determinations of essential criteria for jobs in the ABF and the department are appropriate and do not impose any unnecessary barrier to access to jobs in the public service.

Right to just and favourable conditions of work

1.35 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).[6]

1.36 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. The right to work includes the right to equal opportunity for advancement.

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

- the immediate obligation to satisfy certain minimum aspects of the right; the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right; and
- the right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measures with the right to just and favourable conditions of work

1.38 The right to just and favourable conditions includes the right to access promotions on an equal and non-discriminatory basis. As set out above, the bill would give the ABFC and the Secretary the power to set essential qualifications for position within the ABF and the department. Provided those qualifications are

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

reasonable and necessary there would be no limitation on the right to just and favourable conditions at work.

1.39 As set out above in relation to the right to equality and non-discrimination, the provisions in the bill grant wide discretions to the ABFC and the Secretary in determining the essential criteria of any job in the ABF and the department. In addition, any written direction by the ABFC setting out the essential criteria will not be a legislative instrument and thus not subject to parliamentary scrutiny. Accordingly, the committee is unable to assess whether determinations of essential criteria for jobs in the ABF are appropriate and do not impose any unnecessary barrier to access to promotions or career advancement.

1.40 **Accordingly, the committee recommends that the essential qualifications for positions within the ABF and the Department for Immigration and Border Protection should be set out in regulations or legislative rules to ensure that those qualifications are subject to parliamentary scrutiny, in particular in relation to the right to equality and non-discrimination, the right to take part in public affairs and the right to just and favourable conditions of work.**

Requiring immigration and border protection workers to complete an organisation suitability assessment

1.41 Section 55 of the bill would give the Secretary the power to issue written directions in connection with the administration of the department. Under section 55(4) the directions may relate to the imposition of organisational suitability assessments (OSA) on immigration and border protection staff. Whilst not specifically mentioned in the legislation, it would appear that section 26 of the bill would also give the ABFC the power to issue written directions requiring completion of an OSA, as the power to give directions is unlimited.

1.42 The statement of compatibility explains what an OSA might be:

> The OSA is based on the Australian Standards AS: 4811-2006: Employment Screening… OSAs seek to identify professional integrity risks based on a person's character and the detection of any criminal associations. This will help to ensure employees employed or engaged by the Department, are suitable to work in, or access information held by the Department.[7]

1.43 The statement of compatibility states that the requirement to undertake an OSA engages the right to freedom of assembly and association and the right to privacy, noting:

> The OSA may require IBP workers to declare any family, friends or associates whose activities, for example a criminal history or associations with organised crime or an Outlaw Motorcycle Gang, may be relevant to

7 EM 7.

> the assessment of the worker's organisational suitability and the assessment of the worker's honesty, integrity and trustworthiness….

1.44 As the committee has little information about the type of matters that will be included in an OSA, the committee considers that more information is required to determine whether the imposition of an OSA engages and limits rights, including the type and nature of information required to be disclosed as part of the assessment.

1.45 The committee also considers that clarification as to who will be subject to the OSA is required. The statement of compatibility suggests that the OSA would be a requirement for all immigration and border protection workers. The committee notes that no justification for extending the OSA beyond the ABF to all immigration and border protection workers has been provided. It is unclear why such assessments are required across the department when such assessments are not routinely applied in other Commonwealth departments.

1.46 **Accordingly, the committee seeks further information as to the content and nature of any proposed OSA, including the information required to be disclosed as part of the assessment, which individuals will be required to complete the OSA and the consequences of an adverse OSA for that individual's employment. In light of this, the committee seeks further information as to the human rights compatibility of imposing an OSA requirement under the bill.**

Alcohol and drug testing of immigration and border protection workers

1.47 Part 5 of the bill sets out the legislative framework for the testing of immigration and border protection workers for the presence of drugs and alcohol. The committee considers that testing workers for drugs and alcohol engages and limits the right to privacy.

Right to privacy

1.48 Article 17 of the 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, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing);
- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measures with the right to privacy

1.49 The statement of compatibility acknowledges that the drug and alcohol testing regime engages the right to privacy. The statement of compatibility states that the regime serves a number of legitimate objectives including:

- ensuring that immigration and border protection workers are not seen to condone drug importation; and
- promoting a drug and alcohol free work place.[8]

1.50 The committee agrees that drug and alcohol free workplaces are particularly important in a law enforcement context and that these provisions largely mirror those that currently apply to customs workers. The committee considers that the measures have a legitimate objective and that the measures are rationally connected to that objective, in that a testing regime may encourage compliance and otherwise provide the evidence to address failures to comply with the regime.

1.51 The committee considers that the statement of compatibility has not demonstrated that the regime is proportionate to that objective, in that the regime's coverage appears overly broad and there is an absence of sufficient safeguards in the legislation.

1.52 The regime would apply to all immigration and border protection workers and not just those engaged in the ABF. Whilst drug and alcohol testing is not uncommon for law enforcement agencies, it would seem unusual for such a regime to apply across a public service department. In this respect, the committee notes that it is not proposed to apply drug and alcohol testing to other public service departments or agencies. It is not clear, on the basis of the information provided in the statement of compatibility, why immigration workers not engaged in the ABF should be subject to such a regime.

1.53 In terms of safeguards, the committee welcomes the department's stated intention to implement drug testing processes in line with the *Australian Standards* and use evidentiary breath analysing instruments which are recognised by Australian courts of law.[9] The committee also welcomes the department's stated intention to develop instructions and guidelines which will include measures to safeguard the privacy of individuals.[10]

1.54 However, the committee notes that the bill largely leaves the details of the alcohol and drug testing regime to regulations. The rules will establish how drug and alcohol tests will be conducted, the procedure for managing test results, and the keeping and destruction of records. The committee notes that the legislation does not include limitations on the rule making powers such that the testing has to be done in the least personally intrusive manner or requiring that records be destroyed after a certain period of time. The rules also permit the ABFC or secretary to declare, by legislative instrument, any drug as a prohibited drug. This enables the ABFC or secretary to expand on the drugs that are prohibited for immigration and border

8 EM 10.

9 EM 10.

10 EM 10.

protection workers beyond those that are defined as a narcotic substance. No limitation is placed on this power, such as a requirement that the ABFC or secretary must be satisfied that the drug is illegal and/or has a demonstrated deleterious effect on an individual's ability to perform their functions as an immigration and border protection worker.

1.55 **The committee considers that the imposition of a drug and alcohol testing regime across the Department of Immigration and Border Protection engages and limits the right to privacy. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective, particularly whether there are effective safeguards over the measures.**

Exemption of Fair Work Act where an immigration or border protection worker is terminated for serious misconduct

1.56 Part 4 of the bill provides that if the secretary terminates the employment of an APS employee in the department and the secretary or the ABFC reasonably believes that the employee's conduct or behaviour amounts to serious misconduct, the secretary or the ABFC may make a declaration to that effect. The effect of the declaration is that provisions of the *Fair Work Act 2009* dealing with unfair dismissal, and notice of termination or payment in lieu, will not apply to the APS employee. These committee considers that these measures engage and limit the right to just and favourable conditions at work.

Right to just and favourable conditions of work

1.57 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.[11] More information is provided at paragraphs [1.35]-[1.37] above.

Compatibility of the measures with the right to just and favourable conditions of work

1.58 The statement of compatibility notes that the provisions in Part 4 of the bill engage and limit the right to just and favourable conditions at work. The statement of compatibility does not specifically and explicitly set out the legitimate objective of the measures. The statement of compatibility does, however, explain that:

> Serious misconduct has the potential to put at risk the protection of the Australian border, and adversely impact the carriage of the Department's

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

> law enforcement responsibilities and damage the Department's reputation. It also places at risk the safety and welfare of Departmental employees and strategic partners. Therefore in instances where serious misconduct is reasonably suspected in terms of an employee's conduct or behaviour, swift action must be taken to both discipline those involved and to demonstrate such behaviour will not be tolerated.[12]

1.59 The committee agrees with the statements. However, the committee notes that the statement of compatibility does not explain how the provisions of the *Fair Work Act 2009* relating to unfair dismissal may limit the ability of the department to carry out its functions effectively. 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,[13] 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'.[14] 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.

1.60 **The committee considers that excluding provisions of the Fair Work Act engages and limits the right to just and favourable conditions of work. The committee considers that the statement of compatibility has not explained the legitimate objective of the measure. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether Part 4 of the bill is compatible with the right to just and favourable conditions of work, and particularly:**

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

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12 EM 12.

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

14 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).

- **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.**

Power to delay resignation to complete investigation into serious misconduct

1.61 Part 3 of the bill would give the secretary or the ABFC the power to delay an employee's resignation by up to 90 days in circumstances where the employee may have engaged in serious misconduct, to allow further investigation of that conduct.

1.62 These measures engage and limit the right to just and favourable conditions at work because this limits an employee's ability to determine their date of termination. It may limit their ability to obtain alternative employment in circumstances where they are technically still employed in the department.

Right to just and favourable conditions of work

1.63 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.[15] More information is provided at paragraph [1.35] to [1.37] above.

Compatibility of the measures with the right to just and favourable conditions of work

1.64 The statement of compatibility notes that the provisions in Part 3 of the bill engage and limit the right to just and favourable conditions at work. The statement of compatibility does not specifically and explicitly set out the legitimate objective of the measures. The statement of compatibility does, however, explain that:

> The ability of the Secretary of my Department or the ABF Commissioner to substitute the date of effect of resignation in circumstances where it is alleged that an employee has engaged in, or is being investigated for serious misconduct and has provided notice of his or her resignation, is considered an important demonstration to both staff, the Government and the wider community of the Department's commitment to professionalism and high standards of integrity and its unwillingness to tolerate conduct that threatens these values.[16]

1.65 While the intention behind the provisions may be considered important, 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

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

16 EM 13.

international human rights law. This conforms with the committee's Guidance Note 1,[17] 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'.[18] 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.

1.66 **The committee considers that giving the secretary and the ABFC the power to delay resignation to complete an investigation into serious misconduct engages and limits the right to just and favourable conditions of work. The committee considers that the statement of compatibility has not explained the legitimate objective of the measure. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether Part 3 of the bill is compatible with the right to just and favourable conditions of work, and particularly:**

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

Mandatory reporting of immigration workers associations with known criminals

1.67 Section 26 of the bill would give the ABFC the power to issue written directions in connection with the administration of the ABF. Similarly, section 55 of the bill would give the secretary the power to issue written directions in connection with the administration of the department. The statement of compatibility states that this would include a direction that immigration and border protection workers

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

18 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).

'declare associations and other relevant information.'[19] The statement of compatibility indicates that the department will require workers to disclose associations with criminals and/or those involved in misconduct.

1.68 The statement of compatibility suggests that this engages the rights to freedom of assembly and association and the right to privacy and reputation. From the limited amount of information in the statement of compatibility, and the EM more generally, as to the nature of the proposed disclosure requirement, the committee agrees that such a requirement may engage and limit these rights. Such a requirement may also engage the right to the protection of family provided by articles 17 and 23 of the ICCPR and article 10 of the ICESCR. This is because those associations immigration and border protection workers may be required to declare may extend to family members.

1.69 **In order to assess the compatibility of a direction that may require immigration and border protection workers to declare their associations, the committee requests a copy of the draft order and detailed information as to how the department proposes to implement the order in practice.**

Requirement to disclose information that may incriminate an individual

1.70 Section 26 of the bill would give the ABFC the power to issue written directions in connection with the administration of the ABF. Section 26(4) provides that the directions may include a requirement that immigration and border protection workers report serious misconduct and/or criminal activity by an immigration and border protection worker. Section 26(8) provides that if a person is required to provide information under a direction issued under section 26, that they are not excused from providing information on the grounds it might incriminate them.

1.71 Similarly, section 55 of the bill would give the Secretary the power to issue written directions in connection with the administration of the department. Section 55(5) provides that the directions may include a requirement that immigration and border protection workers report serious misconduct and/or criminal activity by an immigration and border protection worker. Section 55(10) provides that if a person is required to provide information under a direction issued under section 55, that they are not excused from providing information on the grounds it might incriminate them.

1.72 As this bill deals with provisions that require individuals to provide self-incriminating information, the committee considers that the bill engages and limits the protection against self-incrimination a core element of fair trial rights.

19 EM 13.

Right to a fair trial and fair hearing rights

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

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

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

1.75 The statement of compatibility identifies that the measures engage the right to be free from self-incrimination. The statement of compatibility provides no justification for the limitation on the protection against self-incrimination. The committee notes that the bill includes a use immunity which prevents 'the self-incriminating evidence being used in most legal proceedings' against the person required to disclose the evidence.[20] The committee notes that there is no justification for the exceptions provided to the use immunity and no justification for the absence of a derivative use immunity.[21]

1.76 As the statement of compatibility does not provide information on the legitimate objective of the measure it is difficult for the committee to assess the compatibility of the measure with international human rights law. 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,[22] 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

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20 EM 14.

21 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See Rank Film Distributors Ltd and Others v Video Information Centre and Others [1982] AC 380 per Lord Wilberforce at 443.

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

demonstrate that [it is] important'.[23] 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.

1.77 **The committee considers that the provisions that require an immigration and border protection worker to disclose information at the direction of the departmental secretary of ABFC even if that information would incriminate them, engages and limits the right to a fair trial. The committee considers that the statement of compatibility has not justified the abrogation of the protection against self-incrimination. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the limitations on the right to freedom from self-incrimination are compatible with the right to a fair trial, 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.**

Secrecy provisions

1.78 Part 6 of the bill includes an offence provisions which criminalises the disclosure by an immigration and border protection worker[24] of any information

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23 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).

24 Which is defined as :

(a) an APS employee in the Department; or

(b) a person covered by paragraph (d), (e) or (f) of the definition of officer of Customs in subsection 4(1) of the Customs Act 29 1901; or

(c) a person covered by paragraph (f) or (g) of the definition of officer in subsection 5(1) of the Migration Act 1958; or

(d) a person who is:

(i) an employee of an Agency (within the meaning of the 34 Public Service Act 1999); or

(ii) an officer or employee of a State or Territory; or

(iii) an officer or employee of an agency or authority of the Commonwealth, a State or a Territory; or

obtained by a person in their capacity as an immigration protection worker. A breach of the penalty provision is subject to a maximum penalty of two years in prison.

1.79 The offence provision includes limited exceptions which would permit disclosure in circumstances including where:

- it is permitted by the secretary of the department;
- the disclosure is required by an order of a court or tribunal;
- the disclosure is required by the *Law Enforcement Integrity Commissioner Act 2006*; or
- disclosure is necessary to prevent a serious threat to the life or health of an individual.

1.80 These exceptions would reverse the onus of proof and place an evidential burden on the defendant to establish (prove) that the statutory exception applies in a particular case. The committee considers that reversing the burden of proof engages and limits the right to be presumed innocent.

1.81 The committee also considers that the offence provision engages and may limit the right to effective remedy. Public interest disclosure of potential human rights abuses by employees or contractors of the department may be the only way in which potential human rights abuses come to the attention of the public and the relevant authorities. The department is responsible for individuals both in Australia as well as Manus Island and Nauru who are in detention and, as such, are highly vulnerable. The committee considers the relationship between the offence provision and the Public Interest Disclosure Bill 2013 is not clear, particularly as the department will be a law enforcement agency following the merger with Customs. The committee considers that this offence provision may further reduce disclosure, potentially limiting individual's access to an effective remedy in circumstances where their human rights have been violated.

(iv) an officer or employee of the government of a foreign country, an officer or employee of an agency or authority of a foreign country or an officer or employee of a public international organisation;
and whose services are made available to the Department; or

(e) a person who is:
(i) engaged as a consultant or contractor to perform services for the Department; and 11
(ii) specified in a determination under subsection 5(1); or

(f) a person who is:
(i) engaged or employed by a person to whom paragraph (e) or this paragraph applies; and
(ii) performing services for the Department in connection with that engagement or employment; and
(iii) specified in a determination under subsection 5(2).

1.82 The committee also considers that the offence provision limits the right to freedom of expression in that it would limit the disclosure by individuals of information gained in the course of their work with the department, including discussions that may be in the public interest.

Right to a fair trial (presumption of innocence)

1.83 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.

1.84 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.

Compatibility of the measure with the right to a fair trial

1.85 The statement of compatibility does not identify the offence provision as engaging the right to a fair trial. Accordingly, it does not seek to justify its compatibility with human rights. As set out in the committee's Guidance Note 2, 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.

1.86 The committee considers that reversing the burden of proof engages and limits the right to be presumed innocent.

1.87 **The committee considers that as the secrecy offence provision contains an evidentiary burden on the accused that the provision engages and limits the right to a fair trial. This has not been addressed in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the offence provisions which includes a reverse evidentiary burden is compatible with the right to a fair trial, 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.**

Right to an effective remedy

1.88 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 appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities. Accessing effective remedies requires an ability to access information which may identify human rights violations.

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

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

Compatibility of the measure with the right to an effective remedy

1.91 The statement of compatibility does not identify the measure as engaging the right to an effective remedy. As set out above, offence provisions that prohibit the disclosure of government information may prevent relevant information coming to light that would enable human rights violations to be addressed as required by the right to an effective remedy. That is, the prohibition on disclosing information by government employees may adversely affect the ability of individual members of the public to know about possible violations of their human rights and therefore seek redress for such potential violations.

1.92 As the statement of compatibility does not identify the right to an effective remedy as engaged, no justification for the limitation on the right is provided. The committee considers that this offence provision would further reduce disclosure potentially limiting individual's access to an effective remedy in circumstances where their human rights have been violated.

1.93 **The committee considers that the secrecy offence provision engages and may limit the right to effective remedy as public interest disclosure of potential human rights abuses by employees or contractors of the department may be the only way in which potential human rights abuses come to the attention of the public and the relevant authorities. The engagement of the right to an effective**

remedy is not addressed in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the offence provisions is compatible with the right to an effective remedy, and particularly:

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

Right to freedom of opinion and expression

1.94 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.

1.95 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*)[25], or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.[26]

Compatibility of the measure with the right to freedom of expression

1.96 The statement of compatibility does not identify the offence provision as engaging the right to freedom of expression. Accordingly, it does not seek to justify its compatibility with human rights. The offence provision will criminalise the disclosure of any information which an individual has come across in the course of their work with the department. This limits freedom of speech directly. It also may limit free speech indirectly as the offence provision may discourage immigration and border protection workers from speaking freely about their opinions regarding immigration policy even if those opinions do not include information that may be considered secret.

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25 '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.

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

1.97 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,[27] 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'.[28] 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.

1.98 **The committee considers that the offence provision limits the right to freedom of expression as it would restain an individual from discussing information gained in the course of their work with the department, including discussions that may be in the public interest. The limitation of this right was not justified in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the bill is compatible with the right to freedom of opinion and expression, and particularly:**

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

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

28 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).

Construction Industry Amendment (Protecting Witnesses) Bill 2015

Portfolio: Employment
Introduced: Senate, 25 March 2015

Purpose

1.99 The Construction Industry Amendment (Protecting Witnesses) Bill 2015 (the bill) seeks to amend the *Fair Work (Building Industry) Act 2012* (the Act) to extend a sunset provision from three years to five years.

1.100 Under the Act, the Director of the Fair Work Building Industry Inspectorate (the director) may apply to a nominated Administrative Appeal Tribunal (AAT) presidential member for an examination notice relating to an investigation into suspected breaches of the Act or a designated building law.

1.101 Currently, the director can apply for an examination notice up until 1 June 2015. This bill would extend the period to 1 June 2017.

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

Background

1.103 The committee has considered similar powers to those proposed in the bill in relation to the Building and Construction Industry (Improving Productivity) Bill 2013 (2013 bill) which is currently before the Senate. The committee commented on the 2013 bill in its *Second Report of the 44th Parliament* and the *Tenth Report of the 44th Parliament*.[1]

Examination notices—coercive information-gathering powers

1.104 As set out above, the director may apply to a nominated AAT presidential member for an examination notice. The investigation[2] must relate to a suspected contravention by a building industry participant of a designated building law[3] or a

1 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014) 1-30, and Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 43-77.

2 See section 36A of the *Fair Work (Building Industry) Act 2012*.

3 Which is defined in section 4 of the *Fair Work (Building Industry) Act 2012* as the *Independent Contractors Act 2006*, the *Fair Work Act 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* or a Commonwealth industrial instrument (such as awards or workplace agreements).

safety net contractual entitlement.[4] This is an industry-specific workplace relations compliance regime for the building and construction industry.

1.105 A person who has been given an examination notice commits an offence, punishable by imprisonment of up to six months, if they fail to give the required information or documents in time, or in the form specified, or fail to answer questions put to them.[5] A person is not excused from giving information or documents or answering a question on the grounds that it might tend to incriminate them or expose them to a penalty or other liability (although the Act does include a use and derivative use immunity).[6]

1.106 The committee considers that making it a criminal offence to require a person to provide information or documents or answer questions engages and limits the right to privacy and the right to a fair trial (right not to incriminate oneself).

Right to privacy

1.107 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 respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information;
- 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 bill engages the right to privacy, but concludes that to the extent that extending the period in which the director may apply for an examination notice limits the right to privacy:

> …it is a reasonable, necessary and proportionate limitation in the pursuit of the legitimate policy objective of seeking to ensure that building industry participants observe applicable workplace relations laws.[7]

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4 Which is an entitlement under a contract relating to subject matters described in National Employment Standards or modern awards (see the definition of 'safety net contractual entitlement' in section 12 of the *Fair Work Act 2009*.

5 See section 52 of the *Fair Work (Building Industry) Act 2012*.

6 See section 53 of the *Fair Work (Building Industry) Act 2012*.

7 Explanatory Memorandum (EM) vi.

1.110 The statement of compatibility gives a detailed explanation of the objective sought to be achieved by the examination notice. It gives the history behind the introduction of the powers, noting that coercive information gathering powers were recommended by a Royal Commissions into the building industry and a report on the industry by Justice Wilcox.[8] The committee notes that when the Act was introduced, the explanatory memorandum stated in relation to the sunset clause (which this bill seeks to extend):

> This section implements the Wilcox Report recommendation that the compulsory examination power be subject to a sunset clause. It provides that an application for an examination notice may not be made after the end of 3 years after the day on which section 45 commences. It is intended that, before the end of that period, the Government would undertake a review into whether the compulsory examination powers continue to be required.[9]

1.111 The statement of compatibility does not state that any review has been carried out as to whether the compulsory examination powers continue to be required. However, the statement does state:

> It is considered that the examination notice powers remain essential to allow the regulator to act rapidly when required. This is particularly so in light of the interim report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) released by Commissioner Heydon in December 2014. In this report the Heydon Royal Commission recommended that the interim report and any other relevant materials be referred to the relevant authorities to consider whether criminal or civil proceedings should be brought against named persons or organisations, or whether other investigations should be undertaken…
>
> The information obtained through examination notices allows the regulator to determine whether breaches of the law have occurred and to make an informed judgment about whether to commence proceedings or take other steps to ensure compliance with the law. The Fair Work Building Industry Inspectorate has advised that information obtained through the examination notice process has been important in around a quarter of its decisions to initiate proceedings. In other cases, the information obtained through the notice has led to a decision not to proceed with court action, thereby sparing the proposed respondent from

8 See Royal Commission into the Building and Construction Industry (the Cole Royal Commission) and the 'Transition to Fair Work Australia for the Building and Construction Industry' Report, prepared by the Honourable Murray Wilcox QC.

9 Explanatory Memorandum to the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012, 19-20.

the burden of court proceedings and avoiding unnecessary use of the regulator's and the court's resources.[10]

1.112 The committee considers that it is likely that the objective of seeking to ensure that participants in an industry observe the workplace relations laws that apply to that industry, and allowing the regulator to act rapidly when required, is a legitimate objective for the purposes of international human rights law.

1.113 The committee notes that the statement of compatibility has set out reasons for the powers in the bill being proportionate to the objective sought to be achieved. In particular, the statement of compatibility, details the safeguards included in the Act:

- that the use of the powers is dependent on a presidential member of the AAT being satisfied of a number of grounds, including:
    - that there are reasonable grounds to believe that the person has information or documents, or is capable of giving evidence, relevant to the investigation;
    - that any other method of obtaining the information, documents or evidence has been attempted and has been unsuccessful or is not appropriate;
    - that the information, documents or evidence would be likely to be of assistance in the investigation;[11]
- persons summonsed to interview may be represented at an examination;
- an examination must not take place until at least 14 days after the notice is given, ensuring a person will have adequate opportunity to seeks and arrange legal representation if required;
- people summonsed for examination will be reimbursed for their reasonable expenses, including reasonable legal expenses,
- the Commonwealth Ombudsman will monitor and review all examinations (videotapes and recordings of the examination must be provided to the Ombudsman) and provide reports to the Parliament on the exercise of this power.

1.114 Nevertheless, the committee notes that the Act gives coercive information gathering powers to investigate matters that largely operate in relation to alleged breaches of industrial law for which civil penalties may be imposed. The coercive investigation powers are not targeted at violence or property damage which is regulated under existing criminal laws. The committee notes that such extensive

10 EM v-vi.

11 See section 47 of the *Fair Work (Building Industry) Act 2012*.

coercive powers are generally not available to the police in the context of criminal investigations. That is, the powers go beyond those that are usually available in a criminal investigatory context.

1.115 The committee also notes that there is a significant maximum penalty available for a failure to cooperate, of up to six months imprisonment. A measure which limits human rights will only be proportionate if it is the least rights restrictive method of achieving the legitimate objective.

1.116 The committee further notes the ILO Committee on Freedom of Association has criticised similar measures under the former Australian Building and Construction Commission (ABCC) regime:

> As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.[12]

1.117 The committee considers that coercive powers granted to an investigatory body need to be proportionate to the contraventions of the law it is required to investigate. Indeed the committee notes that these proposed coercive investigative powers may arise in the context of alleged conduct by persons which may be a permissible and legitimate exercise of the right to strike as protected under international human rights law.[13]

1.118 The committee notes that a number of safeguards are included in the Act. In the committee's view, the key safeguard in the Act is that an examination notice can only be granted by an AAT presidential member if that member is satisfied of a number of specified matters. In addition, the committee notes that the bill does not confer these powers permanently, rather it extends the powers by two years. The

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12 ILO Committee on Freedom of Association, Case No 2326 (Australia), June 2006, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908526.

13 See, for example, UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/4, 12 June 2009, p. 5: 'The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8). The Committee recommends that the State party continue its efforts to improve the realization of workers rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87.

statement of compatibility has indicated that these powers remain necessary following recommendations made by the recent Heydon Royal Commission.[14]

1.119 **The committee considers that extending the operation of the coercive information gathering powers in the Act limits the right to privacy. The committee notes its particular concern about the appropriateness of such coercive powers in the context of alleged breaches of workplace relations law. However, the statement of compatibility provides justification as to why these powers may be considered reasonable and necessary. On balance, having considered the relevant safeguards and that the time period for the measure is limited to two years, the committee considers that the limitation on the right to privacy has been justified.**

Right to a fair trial

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

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

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

1.122 Under section 53 of the Act a person is not excused from giving information, producing a document or answering a question under an examination notice on the ground that it may incriminate them or otherwise expose them to a penalty or other liability. The committee considers that this engages and limits the right not to incriminate oneself.

1.123 The statement of compatibility acknowledges that this limits the right not to incriminate oneself, but provides the following justification:

> The abrogation of the privilege against self-incrimination was considered necessary by the Cole Royal Commission on the grounds that the building industry regulator would otherwise not be able to adequately perform its functions. After examining the necessity of the examination notice process, the Wilcox Report concluded that a new regulator should be invested with powers similar to those contained in the Building and Construction Industry Improvement Act 2005.[15]

14 EM v.

15 EM vii (footnotes not included).

1.124 Subsection 53(2) of the Act does provide for both a use and derivative use immunity, meaning that information, answers or documents given or produced (either directly or indirectly) under an examination notice is not admissible in evidence against the person except for proceedings relating to compliance with the examination notice itself.

1.125 The committee notes that the right not to incriminate oneself may be permissibly limited provided the limitation is appropriately justified. In other words, such restrictions must be reasonable, necessary and proportionate to that aim.

1.126 **The committee considers that extending the operation of the coercive information gathering powers in the Act limits the right not to incriminate oneself. The committee notes its particular concern about the appropriateness of such coercive powers in the context of alleged breaches of workplace relations law. However, the statement of compatibility provides justification as to why these powers may be considered reasonable and necessary. The committee therefore considers, particularly in light of the use and derivative use immunity and that the time period for the measure is limited to two years, that the limitation on the right not to incriminate oneself has been justified.**

Copyright Amendment (Online Infringement) Bill 2015

Portfolio: Attorney-General
Introduced: House of Representatives, 26 March 2015

Purpose

1.127 The Copyright Amendment (Online Infringement) Bill 2015 (the bill) seeks to amend the *Copyright Act 1968* (the Act) to reduce copyright infringement by enabling copyright owners to apply to the Federal Court of Australia for an order requiring a carriage service provider (CSP) to block access to an online location operated outside Australia that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

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

Copyright owners to be able to apply for an injunction to disable access to infringing online locations outside of Australia

1.129 The bill allows copyright owners to apply for injunctions from the Federal Court to force CSPs to block certain internationally operated online locations, with the effect of preventing CSP subscribers from accessing both authorised and unauthorised content such as video and music files from these websites.

1.130 The committee considers that the bill engages and may limit the right to freedom of opinion and expression and the right to a fair hearing.

Right to freedom of opinion and expression

1.131 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (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.

1.132 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*)[1], or public health or morals. Limitations must be prescribed by

1 '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.

law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.[2]

Compatibility of the measure with the right to freedom of opinion and expression

1.133 The bill allows copyright owners to seek injunctions from the Federal Court against CSPs in order to block access to certain online locations, such as file-sharing or torrenting websites[3]. The statement of compatibility states that the bill promotes the right to freedom of opinion and expression. However, while a website may have disproportionately high infringement of copyright materials, preventing users who are legally sharing or distributing files from accessing these websites, and preventing the general public from accessing such lawful material, could potentially limit their enjoyment of the right to freedom of opinion and expression and their right to receive information.

1.134 The committee accepts that the reduction in accessing online copyright infringement is a legitimate objective for the purposes of international human rights law, and that the measures are rationally connected to that objective as the measures will inhibit access to material that breaches copyright.

1.135 However, 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). For example, it is likely that the granting of injunctions may adversely affect internet users who are legally accessing authorised data via the online locations concerned–such as smaller content producers who use torrenting websites as a legitimate platform for distribution. An injunction could also mean that some material, which has been legally shared on the website, is no longer accessible to members of the general public, thereby limiting their right to receive information.

1.136 The committee acknowledges that certain safeguards have been included in the bill. The statement of compatibility for the bill sets out the factors that must be taken into consideration by the Federal Court, so as to capture only online locations that have a primary purpose of 'facilitating the infringement of copyright', including:

> …the flagrancy of the infringement or its facilitation, whether disabling access to the online location is a proportionate response in the circumstances, the impact on any person likely to be affected by the grant

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

3 The term torrenting can be defined as 'a file transfer protocol which enables users to upload and download large files on the internet in the form of software, games, film, video, music, etc, from other users rather than from a central server': Collins Dictionary at http://www.collinsdictionary.com/dictionary/english/bittorrent#bittorrent_1.

> of the injunction, and whether it is in the public interest to disable access to the online location.[4]

1.137 It is likely that despite these safeguards there could remain potential issues of proportionality in relation to the scheme. The statement of compatibility sets out that:

> It is possible to take direct action against an online location within Australia under the Act (section 115), but it is difficult to take action against the operator of an online location that is operated outside Australia.[5]

1.138 However, the proponent of the legislation does not provide further information or examples as to how direct action against internationally operated online locations would be a difficult mechanism for combating copyright infringement. The committee considers that further analysis or evidence would assist to substantiate the above statement.

1.139 Traditionally injunctions are equitable remedies which, in order to be granted, require the establishing by a claimant that damages under the circumstances are an inadequate remedy. The committee notes that the proponent of the legislation has not explained why other less rights restrictive methods of reparation for copyright owners in the case of copyright infringement would be insufficient in achieving the desired objective. Other potential mechanisms could include, for example, issuing infringement notices to individual copyright infringers and/or the provision of damages.

1.140 **The committee therefore considers that the bill engages and limits the right to freedom of opinion and expression. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the bill 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 Attorney-General as to whether the bill imposes a proportionate limitation on the right to freedom of opinion and expression.**

Right to a fair hearing

1.141 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

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4 Explanatory memorandum (EM) 2.

5 EM 5.

Compatibility of the measure with the right to a fair hearing

1.142 The statement of compatibility states that the bill promotes the right to a fair hearing, and ensures the right of due process for both CSPs and the operators of affected online locations.[6] If court proceedings are instigated by a copyright owner, the operator of the online location concerned would be able to apply to the Federal Court to be joined as a party to proceedings. However, the committee notes that it is up to the court's discretion to grant the operator access as a party to the proceedings, and is not necessarily guaranteed. This ability is dependent on the operator of the online location being notified of the application, which the statement of compatibility notes may not be possible due to difficulties in ascertaining their identity. Further, individuals that use the online locations for legitimate or authorised use (some of whom may have contractual rights with the online location to store or distribute content) would not have the ability to be party to proceedings.

1.143 In the absence of a number of the parties that may have their rights affected by the use of the injunction power, the measure may not satisfy the requirement of access to a fair hearing despite the relevant safeguards contained within the bill. The committee therefore considers that the bill may limit the right to a fair hearing.

1.144 The committee accepts that the reduction in accessing online copyright infringement is a legitimate objective for the purposes of international human rights law, and that the measures are rationally connected to that objective as the measures will inhibit access to material that breaches copyright. However, for the reasons listed above, the committee is concerned that granting copyright owners the power to seek from the court an injunction against CSPs to block particular overseas websites may not be the least rights restrictive method of achieving the stated objective, as set out at [1.139].

1.145 **The committee considers that the bill engages and limits the right to a fair hearing. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the bill 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 Attorney-General as to whether the bill imposes a proportionate limitation on the right to a fair hearing.**

6 EM 5-6.

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Portfolio: Attorney-General
Introduced: House of Representatives, 19 March 2015

Purpose

1.146 The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (the bill) amends various Commonwealth Acts including to:

- amend the operation of serious drug and precursor offences in the Criminal Code Act 1995 (Criminal Code);
- clarify the scope and application of the war crime offence of outrages upon personal dignity in non-international armed conflict;
- expand the definition of forced marriage and increase penalties for forced marriages in the Criminal Code;
- amend the Criminal Code to insert 'knowingly concerned' as an additional form of secondary criminal liability;
- introduce mandatory minimum sentences of five years imprisonment for firearm trafficking;
- make technical amendments to the *Crimes Act 1914* (Crimes Act) in relation to sentencing, imprisonment and release of federal offenders;
- allow the interstate transfer of federal prisoners to occur at a location other than a prison;
- facilitate information sharing about federal offenders between the Attorney-General's Department and relevant third party agencies;
- amend the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 to clarify internal operations and procedures of the Australian Transaction Reports and Analysis Centre;
- amend the Law Enforcement Integrity Commissioner Act 2006 by clarifying the Integrity Commissioner functions and duties;
- amend the definition of 'eligible person' and clarify an examiner's power to return 'returnable items' during an examination under the Australian Crime Commission Act 2002;
- amend the Proceeds of Crime Act 2002 (POC Act) to increase penalties for failing to comply with a production order or with a notice to a financial institution in proceeds of crime investigations;
- make minor and technical amendments to the POC Act;

- allow ICAC SA the ability to access information from Commonwealth agencies that relates to its investigations;

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

Background

1.148 The amendments in Schedule 6 of the bill reintroduce measures related to mandatory minimum sentencing for trafficking in guns that were originally included in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014. The Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 was amended by the Senate prior to the bill's passage through the parliament to remove the measures related to mandatory minimum sentencing for trafficking in guns. The committee considered those measures in its *Tenth*, *Fifteenth* and *Nineteenth Reports* of the 44th Parliament.[1] In its *Fifteenth Report* the committee concluded that the mandatory minimum sentencing provisions were likely to be incompatible with the right to a fair trial and the right not to be arbitrarily detained.

1.149 The committee notes that the Explanatory Memorandum (EM) includes advice 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 statement was included in response to the committee's previous correspondence with the minister in relation to the measure.[2]

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

1.150 Schedule 6 would introduce new offences of trafficking prohibited firearms and firearm parts into and out of Australia into the *Criminal Code Act 1995* (proposed Division 361). A mandatory minimum five-year term of imprisonment for the new offences in Division 361 as well as existing offences in Division 360 would also be inserted. As set out in the Committee's Guidance Note 2 mandatory minimum sentences engage both the right to freedom from arbitrary detention and the right to a fair trial.

Right to security of the person and freedom from arbitrary detention

Right to a fair trial and fair hearing rights

1.151 Article 9 of the International Covenant on Civil and Political Rights (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

1 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 15-19; *Fifteenth Report of the 44th Parliament* (14 November 2014) 30-32; and *Nineteenth Report of the 44th Parliament* (3 March 2015) 104-107.

2 EM 26.

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).[3] 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.

1.152 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 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.[4]

Compatibility of the measures with the right to security of the person and freedom from arbitrary detention and the right to a fair trial and fair hearing rights

1.153 The statement of compatibility identifies the right to freedom from arbitrary detention as being engaged by the introduction of mandatory minimum five year sentences.[5] The committee notes that detention may be considered arbitrary where it is disproportionate to the crime. This is why it is generally important for human rights purposes to allow courts discretion to ensure that punishment is proportionate to the seriousness of the offence and individual circumstances. The statement of compatibility identifies the legitimate objective being pursued as 'ensuring offenders receive sentences that reflect the seriousness of their offending.' The statement of compatibility further reasons that:

> Failure to enforce harsh penalties on trafficking offenders could lead to increasing numbers of illegal firearms coming into the possession of

3 See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; 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).

4 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 2/3 of the head sentence).

5 EM 26.

organised crime groups who would use them to assist in the commission of serious crimes.[6]

1.154 The committee notes the strong interest of government in regulating the trafficking of firearms from the perspective of public safety and systemic harms. The committee notes that the statement of compatibility has provided some analysis of the proportionality of the proposed mandatory sentencing measures including that the penalties do not impose a minimum non-parole period on offenders and thereby preserves some of the court's discretion as to sentencing.

1.155 The committee welcomes the inclusion in the EM of a statement 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'.[7] This was included following discussions between the committee and the Minister for Justice in relation to these measures which were previously part of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014. The committee considers that this statement in the EM is likely to provide some protection of judicial discretion in sentencing.

1.156 However, the committee considers that the statement of compatibility has failed to provide a full analysis of why mandatory minimum sentences are required to achieve the legitimate objective being pursued. In particular there is no analysis as to why the exercise of judicial discretion, by judges who have experience in sentencing, would be inappropriate or ineffective in achieving the objective of appropriately serious sentences in relation to firearm-trafficking crimes.

1.157 The committee considers that mandatory sentencing may also engage article 14(5) of the ICCPR which provides the right to have a sentence reviewed by a higher tribunal. This is because mandatory minimum sentencing impacts on judicial review of the minimum sentence. The statement of compatibility does not address the potential engagement of article 14(5).[8]

1.158 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary for the attainment of a legitimate objective.

1.159 **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**

6 EM 26.

7 EM 26.

8 See, eg A v Australia (2000) UN doc A/55/40, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

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.

Anti-Money-Laundering and Counter Terrorism Financing Amendments

1.160 Schedule 10 of the bill would make a number of amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act). Currently, section 169 of the AML/CTF Act provides that a person is not excused from giving information or producing a document under paragraph 167 on the grounds that compliance might be incriminating. Subsection 169 (2) currently provides a 'use' immunity for information that is given that may be self-incriminating with limited exceptions.[9] The bill would expand the exceptions thus reducing the scope and effect of the use immunity. Under the bill, it would be permissible to use any self-incriminating information gathered for the following purposes:

- proceedings under this AML/CFT Act or proceedings under the Proceeds of Crime Act 2002 that relate to the AML/CFT Act; or
- criminal proceedings for an offence against the AML/CFT Act; or an offence against the Criminal Code that relates to the AML/CFT Act.

1.161 As this bill deals with provisions that require individuals to provide self-incriminating information under the AML/CTF Act, the committee considers that the bill engages and limits the protection against self-incrimination a core element of fair trial rights.

Right to a fair trial and fair hearing rights

1.162 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.

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

9 A use immunity prevents the subsequent admission of evidence of the fact of a disclosure made under compulsion, or of the information disclosed, in a proceeding against the individual who was compelled to provide the information.

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

1.164 The statement of compatibility identifies that the measures engage the right to be free from self-incrimination. The statement of compatibility also sets out that the measures are reasonable, necessary and proportionate. The statement of compatibility does not explain why the amendments are necessary beyond a statement that the changes 'provide greater consistency in the operation and interpretation of the [AML/CFT] Act'.[10] The statement of compatibility does not explicitly identify a legitimate objective for the measure or explain why they are necessary.

1.165 The statement of compatibility states that section 169 of the AML/CTFC Act provide both a use and a derivative use immunity.[11] However, the committee considers that the section 169 only provides a use immunity and not a derivative use immunity as there is no prohibition on the use of any information, document or thing indirectly obtained as a consequence of the self-incriminating information. Whether the AML/CFT Act provides only a use immunity rather than use immunity and derivative use immunity is relevant to an assessment of the proportionality of the measures.

1.166 As the statement of compatibility does not provide information on the legitimate objective it is difficult for the committee to assess the compatibility of the measure. 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,[12] 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'.[13] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address

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10 EM 34.

11 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See Rank Film Distributors Ltd and Others v Video Information Centre and Others [1982] AC 380 per Lord Wilberforce at 443.

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

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

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.

1.167 **The committee considers that the amendments which require an individual to give information that may be self-incriminating engages and limit the fair trial rights. The committee considers that the statement of compatibility has not explained the legitimate objective for the measure. The committee therefore seeks the advice of the Minister for Justice as to whether the amendments to the AML/CFT Act are compatible with the right to a fair trial, 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.**

Defence Legislation (Enhancement of Military Justice) Bill 2015

Portfolio: Defence
Introduced: House of Representatives, 26 March 2015

Purpose

1.168 The Defence Legislation (Enhancement of Military Justice) Bill 2015 (the bill) seeks to amend the *Defence Force Discipline Act 1982* (Defence Force Discipline Act) and the *Defence Act 1903* to:

- repeal provisions in respect of 'old service offences' and 'previous service law', being certain offences committed between July 1982 and July 1985;
- clarify that a service offence is an offence against the law of the Commonwealth—meaning that a conviction imposed by a service tribunal (a court martial, a Defence Force magistrate or a summary authority) will be considered a conviction under the ordinary criminal law;
- create two new service offences and clarify the elements of an existing offence;
- replace recognisance release orders with the power to set fixed non-parole periods, and apply parts of the *Crimes Act 1914* to the non-parole periods set by a service tribunal;
- enable the disclosure of certain convictions of service offences to an authority of the Commonwealth or state or territory and ensure a convicted person is not required to disclosure certain other convictions;
- replace dollar amounts with penalty units (and increase the applicable penalty);
- correct technical errors in the charge referral process and in the Discipline Officer scheme; and
- establish the Director of Defence Counsel Services as a statutory office.

1.169 The bill also seeks to amend the *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) to extend the period of appointment of the Chief Judge Advocate and full-time Judge Advocates by a further two years, making the period of appointment up to eight years instead of six years.

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

Background

1.171 In 2005 the Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the effectiveness of Australia's military justice

system (the 2005 report).[1] In this report, the Committee noted that a number of countries had seen numerous court challenges to the legal validity of their respective military justice systems, including whether service tribunals could be said to be independent and impartial.

1.172 Following the 2005 report, legislation[2] was introduced to create a permanent military court (the Australian Military Court) which was intended to satisfy the principles of impartiality, judicial independence and independence from the chain of command.[3] However, in 2009 the High Court struck down this legislation as being unconstitutional.[4] In response, Parliament put in place a series of temporary measures pending the introduction of legislation to establish a constitutional court. The *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) largely returned the service tribunal system to that which existed before the creation of the Australian Military Court.[5]

1.173 In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 amended the Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and Judge Advocates by an additional two years. The committee reported on this bill in its *Sixth Report of 2013*.[6]

Extension of the appointments of Chief Judge Advocate and full-time Judge Advocate

1.174 Initially, the Interim Act provided a fixed tenure of up to two years for both the Chief Judge Advocate and full-time Judge Advocates who were appointed pursuant to the provisions of the Interim Act. In 2011 and 2013 the period of appointment was extended by a further two years each time, so that the current period of appointment is up to six years.[7] That tenure is due to expire in September 2015. The bill amends Schedule 3 of the Interim Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years, thereby providing a fixed tenure for the Chief Judge Advocate and current full-time Judge Advocate of up to eight years, or until the

1 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005.

2 *Defence Legislation Amendment Act 2006*.

3 See Explanatory Memorandum (EM) to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

4 *Lane v Morrison* [2009] HCA 29.

5 See EM to the Military Justice (Interim Measures) Bill (No. 1) 2009, 1.

6 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 40.

7 See the *Military Justice (Interim Measures) Amendment Act 2011* (extended the period of appointment to four years) and *Military Justice (Interim Measures) Amendment Act 2013* (extended the period of appointment to six years).

Minister for Defence declares, by legislative instrument,[8] a specified day to be a termination day, whichever is sooner.

1.175 The committee considers that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and Judge Advocates engages and may limit the right to a fair hearing and fair trial.

1.176 The committee notes that there are other provisions in this bill that relate to the system of military justice, however, as they do not in themselves expand the operation of the system, the committee makes no further comment in relation to them.

Right to a fair hearing and fair trial

1.177 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.

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

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

1.179 The Defence Force Discipline Act sets out a number of disciplinary offences, ranging from defence specific offences such as mutiny or failure to follow commands to offences such as assault and theft. These offences are dealt with by court martial, Defence Force Magistrates or by summary authorities. The trial of members of the armed services for serious service offences by service tribunals (including courts-martial) has been identified as giving rise to issues of compatibility with the right to a fair hearing in the determination of a criminal charge. The question is whether a person who is a member of a military with a hierarchical chain of command and who serves as a judge or member of a military tribunal, can be said to constitute an independent tribunal in light of the person's position as part of a military hierarchy. Concerns about the impartiality of the disciplinary structure and the need to ensure defence personnel are able to access fair and independent tribunals were influential

8 The legislative instrument would not be subject to disallowance.

in the establishment of the Australian Military Court that was held to be unconstitutional by the High Court.[9]

1.180 The UN Human Rights Committee has stated that 'the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception' and that 'the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military'.[10]

1.181 The question of whether a tribunal enjoys the institutional independence guaranteed by article 14(1) requires consideration of a number of factors, including whether the members of the court or tribunal are independent of the executive. In addition to the relationship of members of a tribunal to a military chain of command, the term of appointment of members may also be relevant. In particular, the fact that the term of appointment of a member of a court or tribunal is terminable at the discretion of a member of the executive, would appear to be incompatible with the requirement that tribunals be independent.[11]

1.182 The statement of compatibility states that it is necessary to further extend the statutory period of appointment 'to support the current arrangements…[and] continue the effective operation of the superior tribunal system pending a decision in respect of a permanent system to try serious service offences'.[12] The statement of compatibility does not assess whether extending the operation of the military system of justice is compatible with the right to a fair trial. Rather, it has an overview statement of the human rights implications of the bill as a whole and states:

> The purpose of Australia's military discipline system is to support military commanders in maintaining and enforcing service discipline to enhance operational effectiveness. A military discipline system that supports the authority and effectiveness of commanders is of vital importance in the efficient, effective, and proper operation of the [Australian Defence Force].
>
> …
>
> The Bill operates to make military justice enhancements to the existing military discipline system and to extend the appointments of the current CJA and full-time Judge Advocate, who contribute to the effective operation of the military justice system and the dispensation of military discipline.

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9 These concerns were raised by the Senate Standing Committee on Foreign Affairs, Defence and Trade, in its report *The effectiveness of Australia's military justice system*, June 2005, which was the impetus for the introduction of legislation establishing the Australian Military Court.

10 UN Human Rights Committee, General Comment No. 32 (2007) para [22].

11 UN Human Rights Committee, General Comment No. 32 (2007) paras [19]-[20].

12 Explanatory Memorandum (EM) 9.

> The Bill reflects a positive human rights milieu. It is, therefore, compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[13]

1.183 The committee notes that maintaining and enforcing discipline within the Defence Force, including supporting the authority of commanders, is an important objective under international human rights law. However, the committee notes that the requirement under article 14 of the independence and impartiality of a tribunal is an absolute right and not subject to any exceptions. The Australian Military Court was established, in part, to satisfy the principles of impartiality, judicial independence and independence from the chain of command.[14] As a result of the High Court's decision in 2009, the system of military justice has reverted to the previous system which had raised questions about independence and impartiality.[15] The committee notes that it has been six years since the Interim Act was introduced. In 2010 and 2012 bills were introduced into Parliament to establish a permanent military court, but both bills have lapsed.[16] No information was provided in the statement of compatibility as to what steps are being taken to establish a permanent system of military justice.

1.184 **The committee therefore considers that extending the appointments of the Chief Judge Advocate and full-time Judge Advocate, and thereby extending the current system of military justice, may limit the right to a fair hearing. As set out above, the statement of compatibility does not address this issue. The committee therefore seeks the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial.**

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13 EM 3.

14 See Explanatory Memorandum to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

15 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005.

16 See Military Court of Australia Bill 2010 and Military Court of Australia Bill 2012 and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012.

Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]

Portfolio: Employment
Introduced: House of Representatives, 19 March 2015

Purpose

1.185 The Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] (the 2015 bill) seeks to amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

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

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

Background

1.187 The 2015 bill is the second re-introduction of the Fair Work (Registered Organisations) Amendment Bill 2013 (the 2013 bill).[1] The 2013 bill was negatived in the Senate on 14 May 2014. The Fair Work (Registered Organisations) Amendment Bill 2014 (the 2014 bill) was then introduced on 19 June 2014. The committee considered the 2013 bill and the 2014 bill in its *First Report of the 44th Parliament, Fifth Report of the 44th Parliament* and *Ninth Report of the 44th Parliament*.[2]

1.188 The committee raised a number of issues in relation to the right to freedom of association and the right to fair trial and fair hearing rights in its *First Report of the 44th Parliament*. The committee sought the further advice of the Minister for Employment as to the compatibility of the measures with each of these rights.

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1 The Fair Work (Registered Organisations) Amendment Bill 2014 was a re-introduction of the Fair Work (Registered Organisations) Amendment Bill 2013.

2 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 21; *Fifth Report of the 44th Parliament* (13 May 2014) 63; and *Ninth Report of the 44th Parliament* (15 July 2014) 21.

1.189 The committee considered the minister's response in its *Fifth Report of the 44th Parliament.* The minister's response included proposals to amend the 2013 bill. On the basis of the proposed amendments and the further information provided in the minister's response, the committee concluded its examination of the bill.

1.190 The amendments proposed by the minister were subsequently not included in the 2014 bill. Accordingly, the committee in its *Ninth Report of the 44th Parliament* reiterated its previous analysis with respect to 2013 bill.

1.191 The 2014 bill was subsequently amended by the government prior to it being negatived in the Senate. The 2015 bill is identical to the text of the 2014 bill, as amended. The committee notes that the statement of compatibility for the 2015 bill refers and responds to some of the committee's previous analysis in relation to the earlier bills.[3] The committee notes that as a result of the changes incorporated into the 2015 bill most of the committee's previous concerns have been addressed, outstanding issues are set out below.

Breadth of disclosure requirements

1.192 Proposed section 293B would require paid officers of registered organisations to disclose any remuneration paid to them. Proposed section 293C would also require a 'disclosing officer' whose duties relate to financial management of the organisation to disclose any material personal interests that the officer acquires. The committee considers that the measure engages and may limit the right to freedom of association.

Right to freedom of association

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

Compatibility of the measure with the right to freedom of association

1.194 The committee considers that the measure engages and may limit the right to freedom of association as it regulates the internal operations of unions and employer associations.[4] The statement of compatibility acknowledges that the

3 Explanatory memorandum (EM), statement of compatibility (SoC) 1.

4 See, for example, International Labour Organization (ILO), Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (fifth edition, 2006) [369].

financial disclosure requirements engage and limit the right to freedom of association but argues that this limit is justifiable.[5] A limitation on the right to freedom of association will be justifiable where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving this objective.

1.195 In its analysis of the 2013 bill, the committee acknowledged that the measure pursues the legitimate objective of achieving better governance of registered organisations, but requested further advice as to whether the breadth of the disclosure regime was necessary and proportionate to the stated legitimate objective. The committee had been concerned that the proposed disclosure requirement, as then formulated, may have been broader than was strictly necessary to achieve that objective because it was not limited to officers who were responsible for the financial management of the organisation, and would also apply to officers who were volunteers.[6] The committee notes that the statement of compatibility to the 2015 bill advises:

> The Bill makes appropriate reductions in the scope of disclosure obligations on organisations and officers to reflect the Corporations Act 2001 (Corporations Act) and to respond to concerns with the disclosure regime introduced by the Fair Work (Registered Organisations) Amendment Act 2012 identified by the Senate Standing Committee on Education and Employment (discussed below). These amendments also directly address the concerns raised by the Joint Committee as to whether the breadth of the proposed disclosure regime in the previous Bills is necessary and proportionate to the objective of achieving better governance of registered organisations.[7]

1.196 The committee welcomes the reductions to the scope of disclosure obligations to paid officers and the disclosure of material personal interests to officers whose duties relate to financial management.[8] In light of these changes, the committee considers that the disclosure requirement appears to be a proportionate means of achieving the stated objective of achieving better governance of registered organisations. The disclosure requirement appears to be a permissible limitation on the right to freedom of association and is accordingly likely to be compatible with this right.

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5 EM, SoC 3-4.

6 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 21.

7 EM, SoC 5.

8 Proposed section 293C.

1.197 **The committee welcomes the reduction to the scope of disclosure obligations in the bill. The committee considers that the disclosure obligations are likely to be compatible with the right to freedom of association in accordance with its previous analysis as set out in its *Fifth Report of the 44th Parliament*.**

Reverse burden offence

1.198 Proposed new section 337AC creates an offence for concealing documents relevant to an investigation and carries a maximum penalty of five years imprisonment. Section 337AC(2) provides a defence if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation'.[9] The defendant is required to bear a reverse legal burden of proof in relation to this defence.[10] The committee considers that this provision engages the right to a fair trial and the presumption of innocence.

Right to a fair trial and fair hearing

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

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

Compatibility of the measure with the right to a fair trial

1.201 The statement of compatibility does not identify section 337AC as engaging and limiting the right to be presumed innocent.

1.202 However, the committee notes that the right to be presumed innocent requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact therefore engages and limits the right to be presumed innocent. 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 defence, exception or excuse is provided against an offence provision, this must be considered as part of a

9 Proposed section 337AC (2).

10 Proposed section 337AC.

contextual and substantive human rights assessment of potential limitations on the right to be presumed innocent.

1.203 Accordingly, the committee considers that the offence provision in proposed section 337AC(2) engages and limits the right to be presumed innocent because it requires the defendant to prove that they did not possess the requisite intention (to defeat the purposes of the investigation, or to delay or obstruct the investigation or any proposed investigation). This is a reversal of the legal burden of proof. The committee further considers that the proposed offence in this case represents a significant limitation on the right to be presumed innocent, taking into account the penalty for the offence (imprisonment) and the difficulty for the defendant, who is effectively required to prove a negative intention.

1.204 However, such reverse evidential or legal burden offences can nevertheless be permissible limitations on the right to be presumed innocent where they address a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective (that is, are the least rights restrictive way of achieving that objective).

1.205 In its *First Report of the 44th Parliament*, the committee accepted the measure pursued a legitimate objective of ensuring better governance of registered organisations.[11] However, the committee considered that the reverse legal burden may have been broader than strictly necessary to achieve this objective (that is, that the measure may have been disproportionate). The committee therefore sought further information as to whether the proposed reverse burden offence was compatible with the right to be presumed innocent. The committee also sought specific advice as to whether the less rights restrictive alternative of an evidentiary burden would be sufficient in these circumstances to achieve the legitimate objective. An evidentiary burden would require the defendant to provide some evidence (for example, a statement under oath) regarding the absence of intention, but would not require the defendant to prove the absence of intention on the balance of probabilities.[12]

1.206 In its *Fifth Report of the 44th Parliament*, the committee noted the minister's advice that the proposed offence:

> …is very important in terms of the integrity of the investigations framework under the Bill and is central to the Bill's objectives' and that recent investigations have shown the existing framework to be

11 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 22.

12 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 26.

'spectacularly ineffective in both deterring inappropriate behaviour and holding wrongdoers to account'.[13]

1.207 The minister further stated that breaches of the law in this field 'should be treated just as seriously as such conduct by company directors'.[14]

1.208 The committee acknowledges the minister's view that there is a need for a strong regulatory framework in this area, and, as noted above, considers that the measure addresses a legitimate objective for the purposes of international human rights law.

1.209 However, the minister's response did not directly address the committee's question as to the proportionality of the measure, and specifically whether the imposition of a less rights restrictive evidential burden would be sufficient to achieve the stated legitimate objective in this case.[15]

1.210 The committee notes that the statement of compatibility to the 2015 bill does not provide any further information in relation to this measure. The committee's usual expectation where it has raised concerns in relation to a measure in a bill is that any subsequent re-introduction of the measure is accompanied by a statement of compatibility addressing the issues previously identified by the committee.

1.211 **The committee considers that the reverse legal burden in proposed section 337AC engages and limits the right to be presumed innocent. As set out above, the statement of compatibility does not provide an assessment as to whether the measure engages and limits the right to be presumed innocent. On the basis of correspondence in relation to earlier bills, the committee considers that the reverse burden offence in section 337AC is aimed at achieving a legitimate objective for the purposes of international human rights law, but remains concerned that the measure may not be proportionate (to the extent that there may be less rights restrictive ways of achieving its objective). In the absence of a justification for the limitation imposed on the right to be presumed innocent, and particularly the absence of any discussion of the availability of a less limiting way of achieving the objective than reversing the legal burden, the committee considers that the measure may be incompatible with human rights.**

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

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

15 See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (13 May 2014) 63; and *Ninth Report of the 44th Parliament* (15 July 2014) 21.

Law Enforcement Legislation Amendment (Powers) Bill 2015

Portfolio: Justice
Introduced: House of Representatives, 26 March 2015

Purpose

1.212 The Law Enforcement Legislation Amendment (Powers) Bill 2015 (the bill) seeks to amend the *Australian Crime Commission Act 2002* (ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to enhance the powers of Australian Crime Commission examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, to conduct hearings.

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

Background

1.214 The committee notes that the ACC Act and the LEIC Act were enacted prior to the establishment of the committee. Consequently, neither Act has a statement of compatibility with human rights nor have they been reviewed by the committee for compliance with Australia's human rights obligations. The committee notes that its analysis of the bill is limited to an examination of the specific provisions in the bill and not the human rights compatibility of the Acts more broadly.

1.215 The committee notes that different terminology is used under the ACC Act and LEIC Act to describe essentially identical processes and procedures. For simplicity, this analysis uses the applicable terminology from the ACC Act.

Authorising post-charge examinations and hearings

1.216 Part 1 of Schedule 1 of the bill, will enable an Australian Crime Commission (ACC) examiner to conduct an examination of a person who has been charged with an offence and to ask that person questions that relate to the subject matter of the charge. Schedule 2 will make similar amendments to the LEIC Act to enable the Law Enforcement Integrity Commissioner (LEI Commissioner) to conduct a hearing and question a witness who has been charged with an offence and to ask that person questions that relate to the subject matter of the charge.

1.217 The powers provided for in the bill allow:

- ACC examiners to compel a person to answer questions relating to an ACC special operation or special investigation into serious and organised criminal activity; and
- the Integrity Commissioner to compel a person to answer questions relating to an investigation into law enforcement corruption.

1.218 A person cannot refuse to answer a question, or produce a document or thing, in an examination or a hearing on the basis that it might incriminate them, or expose them to a penalty. However, the bill contains limits on the circumstances in

which answers can be used in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty.

1.219 As set out in the statement of compatibility, these measures engage and limit the right to a fair trial, specifically the equality of arms principle and the protection against self-incrimination.

Right to a fair trial

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

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

Compatibility of the measures with the right to a fair trial

1.222 The committee considers that these measures contain significant limitations on the right to a fair trial. The statement of compatibility explains that these measures limit the right to a fair trial, specifically the equality of arms principle and the protection against self-incrimination.

1.223 The right to a fair trial in this context may be limited if it can be demonstrated that the measure supports a legitimate objective, being one that seeks to 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.

1.224 The statement of compatibility explains that the measures in the bill serve the legitimate objective of protecting the community from serious and organised crime (in the case of the ACC) and preventing corruption in law enforcement agencies (in the case of the LEI Commissioner). The committee agrees that these are legitimate objectives for the purpose of international human rights law. The committee also agrees that the measures are rationally connected to this objective as these extraordinary powers may facilitate evidence that otherwise would not be obtained through the use of ordinary police powers, which may assist in disrupting organised crime and tackling corruption in law enforcement agencies.

1.225 A limitation may be permitted if it can be demonstrated that it is proportionate to the legitimate objective being sought, including that there are effective safeguards or controls over the measures. The committee notes that the bill includes a number of important safeguards, including:

- that material obtained from the ACC compulsory questioning must not be disclosed in a way that would prejudice the fair trial of the examinee. Further, the bill requires an examiner to issue a direction preventing the disclosure of material obtained from the ACC compulsory questioning if, amongst other things, the examinee has been charged with an offence (or a charge is imminent) and the failure to make the direction would reasonably be expected to prejudice his or her fair trial. Similar provisions would apply to the LEI Commissioner; and
- that the bill contains a use immunity and a partial derivative use immunity. Information directly provided by a person under an examination notice cannot be used in criminal proceedings against that person (use immunity).[1] Information indirectly obtained from the person during compulsory questioning of an examinee cannot be disclosed to a prosecutor of the examinee without an order from the court hearing the charges (partial derivative use immunity).[2] The court may only order the disclosure of derivative examination material to a prosecutor if it would be in the interests of justice. To the extent that an examination order may cause prejudice, the amendments expressly preserve a court's ability to make all necessary orders to manage and remove that prejudice.

1.226 The committee notes that compelling a person to answer questions after they have been charged with an offence (but before they have been convicted) significantly limits the right not to incriminate oneself, as information provided under this process may incriminate the person. As set out in the committee's Guidance Note 2, the existence of both use and derivative use immunities will be crucial to assessing whether a provision that limits the protection against self-incrimination is nevertheless compatible with the right to a fair trial. The committee notes that while the bill includes a use immunity, the absence of a full derivative use immunity raises questions about the compatibility of the measure, particularly given the extraordinary powers granted to the ACC and LEI Commissioner.

1.227 However, in this case, the committee notes that the statement of compatibility sets out in detail how the measures impose a proportionate limitation on fair trial rights and why a partial derivative use immunity is reasonable, necessary and proportionate. In coming to the view that the statement of compatibility has

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1 There are a number of exceptions to the use immunity which do not relate specifically to the matter for which an accused has been charge- see: EM 16.

2 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See Rank Film Distributors Ltd and Others v Video Information Centre and Others [1982] AC 380 per Lord Wilberforce at 443.

justified the limitation on fair trial rights, the committee draws particular attention to the control that the court will have in determining whether it is in the interests of justice to admit evidence that has been obtained as a result of compulsory questioning. The committee notes that the courts have developed over many centuries detailed rules of evidence and procedure that seek to ensure that evidence that is prejudicial to the accused is only admitted in court when a judge is satisfied that it is in the interests of justice to do so. These rules of evidence and procedure assist in limiting the prejudice to an accused and thus assist the committee in assessing that the limitation imposed by the measure on the right to a fair trial may be proportionate.

1.228 **The committee considers that the powers granted to the ACC and LEI Commissioner to compulsorily question a person who has been charged with an offence significantly limits the right to a fair trial, in particular, the principle of equality of arms and the protection against self-incrimination. However, the statement of compatibility provides a detailed justification of why these powers are considered reasonable and necessary. On balance, having considered the relevant safeguards provided in the bill, the committee considers that the limitation on fair trial rights has been justified.**

Authorising post-confiscation application examinations and hearings

1.229 The bill will also amend the ACC Act and LEIC Act to enable ACC examiners and the LEI Commissioner to conduct examinations in the context of confiscation proceedings against the examinee under the *Proceeds of Crime Act 2002* (POC Act) and equivalent state and territory legislation, as well as the circumstances in which examination material may be used in such proceedings. These amendments largely mirror those outlined above, with the key difference that confiscation proceedings are typically civil rather than criminal proceedings. However, any information obtained through the examination process may be used in other criminal proceedings against the person, subject to the use and derivative use immunities as described above.

1.230 The committee considers that the amendments impose significant limitations on fair hearing rights. The committee considers for the reasons outlined above that these limitations have been sufficiently justified for the purposes of international human rights law.

1.231 **The committee considers that the powers granted to the ACC and LEI Commissioner to compulsorily question a person in the context of confiscation proceedings significantly limits fair hearing rights, in particular, the principle of equality of arms and the protection against self-incrimination. However, the statement of compatibility provides a detailed justification of why these powers are considered reasonable and necessary. On balance, having considered the relevant safeguards provided in the bill, the committee considers that the limitation on fair hearing rights has been justified.**

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 5 May 2015

1.232 The Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to implement a number of reforms to the provisions relating to the collection of personal identifiers. Specifically, the amendments to the Migration Act include:

- replacing the eight existing personal identifier collection powers with a broad, discretionary power to collect one or more personal identifiers or biometric data from non-citizens, and citizens at the border, for the purposes of the Migration Act and the Migration Regulations 1994 (the Migration Regulations);
- allowing flexibility in relation to the types of personal identifiers (as defined in the existing legislation) that may be required, the circumstances in which they may be collected, and the places where they may be collected;
- enabling personal identifiers to be provided either by way of an identification test, or by another way specified by the minister or officer (such as a live scan of fingerprints on a handheld device);
- enabling personal identifiers to be required by the minister or an officer, either orally, in writing, or through an automated system, and allow for existing deemed receipt provisions in the Migration Act to apply in relation to requests in writing; and
- enabling personal identifiers to be collected from minors and incapable persons for the purposes of the Migration Act and Migration Regulations under the new broad collection power without the need to obtain the consent, or require the presence of a parent, guardian or independent person during the collection of personal identifiers.

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

Broad discretionary power to collect biometric data

1.234 The powers to collect biometric data or personal identifiers from an individual are currently authorised under eight separate sections of the Migration Act depending on the particular circumstances. The bill would replace these powers with a broad discretionary power to collect personal identifiers in proposed section 257A of the Migration Act.[1] Personal identifiers include fingerprints, handprints,

1 There would remain one exception with an additional power to require personal identifiers from immigration detainees.

measurements of height and weight, photographs or images of a person's face and shoulders, an audio or visual recording of a person, an iris scan, a person's signature or other identifiers specified by regulation.[2] The power would provide that the minister or an officer may require a person to provide one or more personal identifiers for the purposes of the Migration Act or Migration Regulations.[3]

1.235 The committee considers that these measures engage and limit the right to privacy, the right to equality and non-discrimination and the right to equality before the law.

Right to privacy

1.236 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:

- the right to personal autonomy and physical and psychological integrity over one's own body;
- the right to respect for private and confidential information, particularly the storing, use and sharing of such information;
- the prohibition on unlawful and arbitrary state surveillance.

1.237 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

1.238 The committee considers that as the proposed power expands the circumstances in which biometric data or personal identifiers may be collected the power engages and limits the right to privacy. The statement of compatibility acknowledges that the measure engages and limits the right to privacy but argues that this limitation is justifiable.[4] The statement of compatibility states that:

> The restriction on the privacy of persons whose information is collected is aimed at the legitimate goal of ensuring the integrity of Australia's borders and visa system more generally, including by detecting the ingress, egress, and change in status of persons of concern, both Australians and non-citizens.[5]

2 Migration Act, section 5A(1).

3 Explanatory Memorandum (EM) 10.

4 EM 40.

5 EM 40.

1.239 The committee agrees that this may be regarded as a legitimate objective for the purpose of international human rights law.

1.240 The committee notes the information provided in the statement of compatibility that the collection of personal identifiers would enable the department to conduct identity, security, law enforcement and immigration checks that are of higher integrity than checks possible using biographic details, such as name and date of birth, alone.[6] However, while the proposed power appears to be rationally connected to the stated objective it may not be a proportionate means to achieve this stated objective. The committee notes that in order for a limitation on human rights to be proportionate it must be only as rights restrictive as strictly necessary. The bill would enable the collection of personal identifiers wherever this is considered necessary for the purposes of the Migration Act or regulations under that Act. There is no requirement that the collection of the identifier be considered necessary in the circumstances or that an officer must be reasonably satisfied that the collection would assist in the identification of an individual. Accordingly, the bill could permit the collection of personal identifiers where it is not strictly necessary or where identity could be verified in a less intrusive manner. Accordingly, the committee considers that the statement of compatibility has not demonstrated that the measures in the bill are the least rights restrictive way of achieving the legitimate objective and so the measures may not be a proportionate limitation on the right to privacy.

1.241 Further, the committee notes that the measures in the bill, in addition to allowing the collection of personal identifiers by an authorised identification test, will allow personal identifiers to be collected in a manner 'specified by the minister or officer'. If personal information is collected in this way, particular safeguards provided for under the Act, such as that the identification test 'must be carried out in circumstances affording reasonable privacy to the person' would not apply.[7] Whilst noting that the power is 'extremely broad' it indicates that the power would only be used in limited circumstances. However, the bill is not restricted in the way suggested by the statement of compatibility. The committee considers that the statement of compatibility has not demonstrated that this broad power imposes a necessary or proportionate limitation on the right to privacy. The committee considers that this power has the potential to be used to bypass a number of safeguards in the Migration Act and the Migration Regulations which seek to ensure that the collection of personal identifiers is done in a manner that is least intrusive on an individual's privacy. No rationale is provided for removing such safeguards, beyond an indication of the government's current intended use of this provision.

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6 EM 40.

7 Section 258E of the Act.

1.242 **The committee considers that the broad discretionary power to collect personal identifiers engages and limits the right to privacy. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.**

Right to equality and non-discrimination

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

1.244 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.

1.245 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[8] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[9] 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.[10]

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

1.246 The statement of compatibility acknowledges that the measures may engage the right to equality and non-discrimination. The analysis in the statement of compatibility focuses primarily on the distinctions between citizens and non-citizens, noting that to the extent that the amendments single out non-citizens, this is a permissible aspect of immigration control.[11] The committee accepts this type of differential treatment between citizens and non-citizens may be acceptable under international human rights law so long as there is an objective and reasonable justification for this treatment.

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8 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.

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

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

11 EM 42.

1.247 As set out at paragraph [1.239] above, the committee agrees that the measure pursues a legitimate objective for the purpose of international human rights law. The committee notes, however, that the statement of compatibility states that:

> The amendment does not target any particular person or group based on any criteria, such as type of visa, although there will be some risk-based and intelligence-based targeting.[12]

1.248 The statement of compatibility does not explain whether 'risk-based and intelligence-based targeting' may have a disproportionate or unintended negative impact on particular groups based on race or religion and therefore be potentially indirectly discriminatory. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.

1.249 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. The statement of compatibility does not justify the possible limitation on the right to equality and non-discrimination imposed by 'targeting' and profiling.

1.250 The committee considers that information as to how the risk-based and intelligence based-targeting will be undertaken in practice will be critical to assessing whether such practices impose a proportionate limitation on the right to equality and non-discrimination.

1.251 **The committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality and non-discrimination particularly in relation to profiling and targeting of individuals for scrutiny. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.**

Right to equality before the law

1.252 The right to equality before the law is protected by article 26(1) of the ICCPR.[13] It is an important aspect of the right to equality and non-discrimination.

1.253 The right to equality before the law provides that law must not be applied by law enforcement authorities or the judiciary in an arbitrary or discriminatory manner.[14]

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12 EM 42.

13 Article 26 (1) of the ICCPR. Article 14(1) also specifically protects the right to equality before courts or tribunals.

Compatibility of the measure with the right to equality before the law

1.254 The committee considers that the measure engages and may limit the right to equality before the law. This is because, unless there are sufficient safeguards, the collection of personal identifiers has the potential, in practice, to be applied in a manner which may target, for example, persons with certain physical characteristics or particular national or ethnic origins.[15] Where this kind of targeting occurs, without objective or reasonable justification, it will be incompatible with the right to equality before the law. That is, it may result in the law being applied in ways that are arbitrary or discriminatory. This form of targeting is often referred to as racial profiling.[16]

1.255 As set out at paragraph [1.239] above, the committee agrees that the measure pursues a legitimate objective for the purpose of international human rights law. The committee notes that the statement of compatibility states that the measure 'does not target any person or group based on any criteria'.[17] However, the statement of compatibility explains that there will be 'some risk-based and intelligence based-targeting'.[18] No specific information is provided on the compatibility of the measure with the rights to equality before the law or whether there is a reasonable and objective basis for determining such risks. Further, the statement of compatibility does not identify any safeguards which may assist to ensure that the measure is not applied in an arbitrary or discriminatory manner. The committee notes that Australia's obligations under international human rights law extend to ensuring that there are sufficient safeguards in place to prevent abuse.

1.256 The committee considers that information as to how the risk-based and intelligence based-targeting will be undertaken in practice will be critical to assessing whether such practices impose a proportionate limitation on the right to equality before the law.

1.257 **The committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality before the law, particularly in relation to profiling and targeting of individuals for scrutiny. As noted above, the statement of compatibility does not provide a specific assessment of whether the right to equality before the law is engaged and limited.**

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14 See, for example, *Williams Lecraft v Spain,* UN Human Rights Committee, Communication No. 1493/2006 (27 July 2009); *Timishev v Russia*, ECHR (55762/00) (13 December 2005).

15 See, *Williams Lecraft v Spain,* UN Human Rights Committee, Communication No. 1493/2006 (27 July 2009) [7.2].

16 See, for example, Martin Scheinin, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (29 January 2007) A/HRC/4/26.

17 EM 42.

18 EM 42.

The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is compatible with the right to equality before the law and particularly whether the limitation is a proportionate measure for the achievement of that objective.

Removal of restrictions on the collection of personal identifiers from minors

1.258 The bill seeks to remove the current restrictions on collection of personal identifiers on minors. Specifically, the measure would allow for the collection of personal identifiers of children under the age of 15 without the presence of a parent, guardian or independent person.

1.259 The committee considers that the measure engages and limits the rights of the child.

Rights of the child

1.260 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 Convention on the Rights of the Child (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;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

1.261 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. In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;
- there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

Compatibility of the measure with the rights of the child

1.262 The statement of compatibility explains that when the original personal identifiers provisions were added to the Migration Act in 2003 it was considered by the government that 15 years of age was an appropriate minimum age for the collection of fingerprints. The statement of compatibility further explains that the government no longer considers this appropriate for a number of reasons including:

- the need to protect minors from people smugglers and traffickers; and
- recent terrorist-related incidents involving minors travelling to conflict in the Middle East.[19]

1.263 The committee agrees with the statement of compatibility that the amendments have the dual legitimate objective of maintaining effective immigration controls and the protection of vulnerable minors. The committee considers that the measures are rationally connected to the legitimate objective as fingerprinting of minors may enhance integrity checks at Australia's borders and may assist in the identification of minors who are vulnerable and at risk.

1.264 However, the committee considers that the statement of compatibility has not demonstrated that the amendments impose a proportionate limitation on the rights of the child in pursuit of that legitimate objective.

1.265 The statement of compatibility states that:

> …these amendments will address a known vulnerability in Australia's security and immigration framework on a case by case basis, based on risk and intelligence. The department's intent is that only a small number of minors would be required to provide fingerprints. Departmental staff will be given clear policy guidance about the restrictive use of finger print checks for minor.[20]

1.266 However, while the statement of compatibility says it is 'the department's intent' that this only be used in a narrow range of circumstances, the bill is not limited in such a way. The committee considers that the statement of compatibility has not sufficiently explained why it is necessary to provide broad discretionary powers with few statutory safeguards if the intention is only to target specific minors.

1.267 In addition, the committee notes that the amendment would remove requirements for parents and guardians to consent to, and be present during, the fingerprinting of minors. In relation to this specific amendment the statement of compatibility provides that:

> The intent is that the consent and presence of parents would only be bypassed where necessary – there are circumstance, for example where the person who appears to be a child's parent is in fact trafficking the child, where consent may be refused for reasons which undermine the very purpose of the legislation and the best interest of the child themselves.[21]

19 EM 45.

20 EM 45.

21 EM 46.

1.268 The committee considers that the statement of compatibility has not sufficiently explained why it is necessary to provide broad discretionary powers with few statutory safeguards if the intention is that minors would usually be fingerprinted with the consent and or presence of the minor's parents or guardians. It would, for example, be possible to have an exceptions based provision that would permit fingerprinting in more limited circumstances.

1.269 As the measures do not appear to be the least rights restrictive approach to achieving the government's legitimate objective, the committee considers that the measures have not been justified as proportionate and may not be compatible with the obligation to consider the best interests of the child.

1.270 **The committee considers that removing the current restrictions on collection of personal identifiers on minors engages and limits the obligation to consider the best interests of the child as a primary consideration. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.**

Norfolk Island Legislation Amendment Bill 2015

Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Bill 2015

A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment Bill 2015

Health and Other Services (Compensation) Care Charges Amendment (Norfolk Island) Bill 2015

Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment (Norfolk Island) Bill 2015

Health Insurance (Pathology) (Fees) Amendment (Norfolk Island) Bill 2015

Private Health Insurance (Risk Equalisation Levy) Amendment (Norfolk Island) Bill 2015

Aged Care (Accommodation Payment Security) Levy Amendment (Norfolk Island) Bill 2015

Portfolio: Infrastructure
Introduced: House of Representatives, 26 March 2015

Purpose

1.271 The Norfolk Island Legislation Amendment Bill 2015, Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Bill 2015, A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment Bill 2015, Health and Other Services (Compensation) Care Charges Amendment (Norfolk Island) Bill 2015, Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment (Norfolk Island) Bill 2015, Health Insurance (Pathology) (Fees) Amendment (Norfolk Island) Bill 2015, Private Health Insurance (Risk Equalisation Levy) Amendment (Norfolk Island) Bill 2015 and Aged Care (Accommodation Payment Security) Levy Amendment (Norfolk Island) Bill 2015 (the bills) seek to:

- amend the *Norfolk Island Act 1979* in order to implement reforms to certain governance and legal arrangements of Norfolk Island, including the abolition of the Norfolk Island Legislative Assembly and consequent establishment of the Norfolk Island Regional Council to act as the elected local government body for the territory, and the introduction of a mechanism which applies New South Wales state law to Norfolk Island as commonwealth law; and

- extend mainland social security (including payments such as the Age Pension, Newstart Allowance, Disability Support Pension and Youth Allowance), immigration (with the effect of ensuring that Norfolk Island is treated consistently with Australia's other inhabited external territories) and health arrangements (including the Medicare Benefits Schedule, the Pharmaceutical Benefits Scheme and the Private Health Insurance Rebate) to Norfolk Island.

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

Background

1.273 Previously the committee in its *Seventh Report of the 44th Parliament*[1] raised concerns in relation to the exclusion of certain New Zealand citizens from access to benefits, such as the National Disability Insurance Scheme (NDIS), despite being required to contribute to the NDIS levy. In its concluding comments, the committee noted that 'under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), non-citizens are entitled to the enjoyment of the human rights guaranteed by the covenants without discrimination.'[2]

Exclusion of some categories of Australian permanent residents from eligibility for social security

1.274 Currently, on mainland Australia all permanent visa holders are entitled to social security under the *Social Security Act 1991* (the Act). Under the Norfolk Island Legislation Amendment Bill 2015 (the bill), the Act will be extended to Norfolk Island providing the same social security system on the island as is provided on mainland Australia. However, the extension of social security payments to residents of Norfolk Island will not apply to New Zealand citizens that hold an Australian permanent visa.[3]

1.275 The committee notes that while the extension of social security benefits will, in the main, promote access to healthcare and advance the right to social security, it also engages and limits the right to equality and non-discrimination and the right to social security.

Right to equality and non-discrimination

1.276 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).

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1 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 76-81.

2 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 80.

3 See proposed section 7(2AA) of the *Social Security Act 1991*.

1.277 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.

1.278 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[4] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[5] 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.[6]

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

1.279 The explanatory memorandum for the bill states that:

> Item 323 inserts a new subsection 7(2AA) into the *Social Security Act 1991* so that subparagraph (2)(b)(ii) does not apply to a New Zealand citizen who resides on Norfolk Island. This and item 324 put long-term Norfolk Island residents who are New Zealand citizens in the same position as residents of Australia who are New Zealand citizens, despite Norfolk Island residents not previously being required to hold an Australian visa to remain on Norfolk Island.[7]

1.280 The committee notes that the new subsection 7(2AA) would exclude New Zealand citizens who reside on Norfolk island and hold an Australian permanent visa from being considered an Australian resident under the *Social Security Act 1991* (the Act). The amendment proposed in the bills would result in Australian permanent resident New Zealand citizens living on Norfolk Island being ineligible for social security benefits. It would appear that this could result in a New Zealand citizen living on mainland Australia and receiving social security benefits, losing eligibility if they were to move to Norfolk Island. The committee notes that the proposed provision does not merely put long-term Norfolk Island residents who are New Zealand citizens in the same position as residents of Australia who are New Zealand citizens as is set out in the explanatory memorandum (EM).[8] Further, the extension of social security

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

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

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

7 Explanatory memorandum (EM) 55.

8 EM 55.

benefits to Norfolk Island applies to Australian permanent residents who are citizens of all countries except New Zealand. No rationale is provided in the EM or statement of compatibility for this specific exclusion of Australian permanent residents who are New Zealand citizens. Accordingly, the measure appears to be directly discriminatory and therefore limits the right to equality and non-discrimination. The committee notes that even if a provision directly or indirectly discriminates against specific groups it may nevertheless be justifiable where it pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

1.281 As the statement of compatibility does not identify this amendment as engaging human rights it does not explain whether the limitation is justifiable. Further, the statement of compatibility does not more generally address the engagement of the bill with the right to equality and non-discrimination. 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,[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 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.

1.282 **The committee therefore considers that the exclusion of some categories of Australian permanent residents from eligibility for social security limits the right to equality and non-discrimination. As set out above, the statement of compatibility does not provide an assessment of the limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Infrastructure and Regional Development as to:**

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

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).

- **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.**

Right to social security

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

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

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

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

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

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

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

1.287 While the statement of compatibility acknowledges that the bill engages the right to social security, it does not address this particular provision or its implications

for the enjoyment of the right to social security by Australian permanent residents living on Norfolk Island who are New Zealand citizens. The committee notes that for the large majority of residents on Norfolk Island, the extension of social security benefits will promote access to healthcare and advance the right to social security. However, the exemption of Australian permanent residents who are New Zealand citizens from receiving these benefits limits the right to social security for this group.

1.288 As the statement of compatibility for the bill has not identified this limitation, it does not provide a justification for the limitation for the purposes of international human rights law. As set out above at [1.281], 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, whether the measure is rationally connected to achieving that objective and whether it is a proportionate limitation on the right in pursuit of that legitimate objective

1.289 **The committee therefore considers that the exclusion of some categories of Australian permanent residents from eligibility for social security limits the right to social security for this group. As set out above, the statement of compatibility does not provide an assessment of the limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Infrastructure and Regional Development 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.**

Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015

Portfolio: Employment
Introduced: House of Representatives, 25 March 2015

Purpose

1.290 The Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (the bill) amends the *Safety, Rehabilitation and Compensation Act 1988* (the Act) in relation to:

- eligibility requirements for compensation;
- the financial viability of the Comcare scheme;
- medical expense payments;
- requirements for determining compensation payable;
- household and attendant care services;
- suspension of compensation payments for certain citizens absent from Australia;
- taking or accruing leave while on compensation leave;
- calculation of compensation payments;
- the compulsory redemption threshold;
- legal costs for proceedings before the Administrative Appeals Tribunal;
- compensation for permanent impairment;
- single employer licences;
- gradual onset injuries and associated injuries;
- obligations of mutuality; and
- exception of defence-related claims from certain changes.

1.291 The bill also amends the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation Act 1988* and *Seafarers Rehabilitation and Compensation Act 1992* in relation to the vocational nature of rehabilitation services and return to work outcomes.

1.292 The bill additionally amends the *Administrative Decisions (Judicial Review) Act 1977* to provide that decisions relating to compensation paid for detriment caused by defective administration are not subject to review.

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

Redefining work related injuries (Schedule 1)

1.294 Schedule 1 of the bill would tighten the eligibility criteria for accessing Comcare by reducing the number of injuries and disease that will be compensable under the Act. Currently where a condition, such as a heart attack or stroke occurs at the workplace that is sufficient for workers' compensation liability to exist. The bill would change these criteria so that workers' compensation is only available where either an underlying condition or the culmination of that condition is significantly contributed to by the employee's employment.

1.295 The committee considers that the measure engages and limits the right to social security and the right to health.

Right to social security

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

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

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

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

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

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

Right to health and a healthy environment

1.300 The right to health is guaranteed by article 12(1) of ICESCR, and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information). As set out above in relation to the right to social security, under article 2(1) of ICESCR, Australia has certain minimum obligations in relation to the right to health (see paragraph [1.298]).

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

1.301 The statement of compatibility states that the measure engages and limits the right to social security and the right to health:

> Because the effect of the amendments is that some injuries will no longer be compensable under the Act…[1]

1.302 The statement of compatibility explains that the legitimate objective of the measures is to re-align the Act so that it better achieves its purpose of compensating individuals for injuries and diseases that are related to a person's work. The committee considers that, without further information, this is not a legitimate objective for human rights purposes.

1.303 As set out in the committee's Guidance Note 1,[2] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, 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. In this respect, the committee notes that detailed information is not provided explaining why the changes pursue a legitimate objective

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1 Statement of Compatibility (SOC) 17.

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.

and how they may be proportionate. Further relevant information would include, for example, the sustainability of the Comcare scheme, the ability of insured employers to meet premium increases, and the other support available to individuals who are injured or unwell and who would no longer be eligible for Comcare.

1.304 **The committee therefore considers that the redefining work related injuries measure engages and limits the right to health and the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the measure pursues a legitimate objective for human rights purposes (that is addresses a pressing or substantial concern). 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.**

Introduction of 'Compensation Standards' (Schedule 1)

1.305 Schedule 1 of the bill would give Comcare the power to determine by legislative instrument a 'Compensation Standard' which would set out for an ailment the factors that must be met before an employee may be said to be suffering from that ailment. If the employee does not meet the Compensation Standard for an ailment then they will not be taken to have suffered a compensable injury under the Act.

1.306 The committee considers that the measures engage and limit the right to health, the right to social security as the measures will reduce access to workers' compensation.

Right to social security and the right to health

1.307 These rights are described above at paragraphs [1.296] to [1.300].

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

1.308 The statement of compatibility explains the legitimate objective of the measure as:

> The legitimate objective of the amendments is to ensure that an employer's liability will not extend to diseases or injuries that are

> manifestations of underlying mental health conditions which manifest in the workplace but have no significant basis in employment.[4]

1.309 The committee agrees that this may be a legitimate objective for the purposes of human rights law. Nevertheless, whilst the committee accepts that limiting an employer's liability in this way may be acceptable, it also notes that for the purpose of international human rights law, an 'underlying' condition is a disability, for which an employer owes a duty to ensure a healthy work environment.[5] The committee agrees that the measure is rationally connected to this objective as the amendments will enable Comcare to establish criteria for particular ailments which will determine whether an employee is eligible for worker compensation.

1.310 However, the committee considers that the statement of compatibility has not established that the measure is proportionate to that objective. Currently, the Act provides a general framework for assessing injuries and their connection with employment. This measure would enable Comcare to impose additional requirements that an employee must satisfy in relation to specific ailments in order to qualify for compensation , called the 'Compensation Standard'. The measure gives broad discretion to Comcare in establishing the 'Compensation Standard'. There is no requirement for Comcare to act on advice from medical professionals nor a specific requirement to consult medical professionals before making a Compensation Standard, or that a Compensation Standard be based on objective evidence.

1.311 The committee considers that the statement of compatibility has not explained why Compensation Standards are necessary. Moreover, in the absence of safeguards, the committee notes that Comcare will have the power, through Compensation Standards, to limit access to workers' compensation in circumstances that may be inconsistent with medical evidence. Accordingly, the committee considers that the statement of compatibility has not explained how these broad powers are a proportionate means of achieving the legitimate objective.

1.312 **The committee therefore considers that the measure granting Comcare the power to establish 'Compensation Standards' engages and limits the right to health and the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the bill 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 Employment as to whether the measure imposes a proportionate limitation on the right to health and the right to social security.**

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4 SOC 19.

5 Convention on the Rights of Persons with Disabilities (CRPD), article 27.

Workplace rehabilitation plans (Schedule 2)

1.313 Schedule 2 of the bill would introduce provisions in relation to 'workplace rehabilitation plans'.[6] Currently a rehabilitation program for an injured employee will set out the details of service and activities to assist an injured worker in rehabilitation and return to work.[7] The new 'workplace rehabilitation plan' continues to concern the rehabilitation of an injured employee but emphasises the vocational nature of the services provided under the scheme, and removes references to other forms of treatment.[8] The bill provides that a workplace rehabilitation plan may require an employee to carry out specified activities, and that the obligation to do so becomes part of the employee's responsibilities under the plan.[9]

1.314 The measure engages and may limit the right to health and the right of persons with disabilities to rehabilitation.

Rights of persons with disabilities to rehabilitation

1.315 Article 26 of the Convention on the Rights of Persons with Disabilities (CRPD) protects the rights of persons with disabilities to rehabilitation (right to rehabilitation). This right obliges Australia to take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, Australia is required to organise, strengthen and extend comprehensive habilitation and rehabilitation services and programs, particularly in the areas of health, employment, education and social services. These services and programs need to:

- begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
- support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.[10]

Compatibility of the measure with the rights of persons with disabilities to rehabilitation

1.316 The statement of compatibility acknowledges that, to the extent that the measure could be viewed as narrowing the scope of medical rehabilitation, that is, rehabilitation for the purpose of increasing independent functioning, the

6 SOC 21.

7 See, section 37 of the *Safety, Rehabilitation and Compensation Act 1988.*

8 SOC 21.

9 Proposed section 36A.

10 CRPD, article 26.

amendments may limit the right to rehabilitation.[11] The committee agrees that the measure engages and may limit the right to rehabilitation to the extent that they narrow the scope of medical rehabilitation or mandate participation.

1.317 The statement of compatibility identifies the objective of the measure as to:

> enable the Comcare scheme to more effectively pursue one of its core purposes: to, as far as possible, provide for early intervention and rehabilitation support for injured employees to stay in or return to suitable employment.[12]

1.318 The committee notes that the statement of compatibility sets out a range of reasons as to why this objective is important and addresses a pressing concern.[13] Based on the information provided the committee considers that the measures pursue a legitimate objective for the purpose of justifying a limitation on human rights.

1.319 The committee notes that in order to constitute a permissible limitation on human rights a measure must additionally be rationally connected to and a proportionate means of achieving the stated objective. The statement of compatibility argues that the measure is also rationally connected and a proportionate means of achieving this objective because:

> First, the amendments are reasonable and necessary as they clarify and strengthen existing rehabilitation obligations and responsibilities of employers and employees and provide for early access to rehabilitation support which underpins an effective workers' compensation system. It is reasonable to require employees to fulfil their responsibilities under a workplace rehabilitation plan because active participation in rehabilitation is essential for an employee's recovery.
>
> Second, by emphasising the vocational nature of rehabilitation and returning and maintaining employees in work, the amendments positively engage the right to work under both the ICESCR and the CRPD. [14]

1.320 However, while the committee acknowledges these points, it notes that the statement of compatibility does not explain how specifically the measures will support the stated legitimate objective and whether less rights restrictive measures would achieve the same result.

1.321 **The committee considers that the introduction of workplace rehabilitation plans engages and may limit the right to rehabilitation. The committee agrees that the measure pursues a legitimate objective. However, as set out above, the**

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11 SOC 22.

12 SOC 22.

13 SOC 22.

14 SOC 22.

statement of compatibility does not sufficiently justify the potential limitation for the purpose of international human rights law as rationally connected to and a proportionate means of achieving that objective. The committee therefore seeks the advice of the Minister for Employment as to:

- **whether there is a rational connection between the limitation and the legitimate objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly whether a less rights restrictive alternative would achieve the same result.**

Right to health and a healthy environment

1.322 The right to health is set out above at [1.300].

Compatibility of the measure with the right to health

1.323 The statement of compatibility states that, to the extent that the measures could be viewed as narrowing the scope of medical rehabilitation, the measures may also limit the right to health.[15] The committee agrees that the measures may accordingly limit the right to health as medical rehabilitation services are an important aspect of this right. While the committee notes that the measure appears to be in pursuit of a legitimate objective, as noted above at [1.319] the statement of compatibility has not provided sufficient reasoning as to whether the measure is rationally connected to and a proportionate means of achieving that objective as required to permissibly limit a right under international human rights law.

1.324 **The committee considers that the introduction of workplace rehabilitation plans engages and may limit the right to health. The committee agrees that the measure pursues a legitimate objective. However, as set out above, the statement of compatibility does not sufficiently justify the potential limitation for the purpose of international human rights law as rationally connected to and a proportionate means of achieving that objective. The committee therefore seeks the advice of the Minister for Employment as to:**

- **whether there is a rational connection between the limitation and the legitimate objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly, whether a less rights restrictive alternative would achieve the same result.**

15 SOC 22.

Obligations under a workplace rehabilitation plan not subject to review (Schedule 2)

1.325 Schedule 2 of the bill would also provide that an injured employee's responsibilities and the obligations of a liable employer under a workplace rehabilitation plan are not reviewable.[16] Currently section 38 out the Act sets out when decisions by Comcare are reviewable.[17] The committee accordingly considers that the measure engages and limits the right to a fair hearing.

Right to a fair hearing

1.326 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, and to cases before both courts and tribunals. The right is concerned with procedural fairness and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

Compatibility of the measure with the right to a fair hearing

1.327 The committee considers that the measure limits the right to a fair hearing as it renders obligations under a workplace rehabilitation plan non-reviewable. The statement of compatibility acknowledges that the measure limits the right to a fair hearing but argues that the limitation is justifiable.[18] It argues that the legitimate objective of the measure is to:

> avoid frustration of the purpose of these provisions which is to promote compliance with rehabilitation plans rather than arguments regarding particular employee responsibilities and obligations of the liable employer.[19]

1.328 However, the committee notes that the statement of compatibility does not provide any detailed analysis as to why the measure is needed in pursuit of this stated objective or why current arrangements would be insufficient to address this objective. 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

16 SOC 21.

17 Section 38 of the Act.

18 SOC 23.

19 SOC 23.

Guidance Note 1,[20] 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'.[21] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

1.329 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. The committee considers that the statement of compatibility has not demonstrated that the measure is rationally connected to and a proportionate means of achieving the stated objective. The statement of compatibility argues that the measure is a reasonable, necessary and proportionate means of achieving the stated objective because:

> Firstly, there are substantial safeguards in place to ensure that employee responsibilities are tailored and appropriate to the individual circumstances of an employee. The plans are developed in consultation with the employee and his or her medical practitioner which will ensure that the workplace rehabilitation plan reflects the capacity and abilities of an individual employee.
>
> Secondly, the formulation (and any variation of) a workplace rehabilitation plan will be reviewable by Comcare and the AAT. In practice this means that the development of the plan or the objectives and main components of a workplace rehabilitation plan will be reviewable. [22]

1.330 However, as limited information has been provided as to the content or adequacy of such safeguards it is difficult for the committee to make a full assessment of the human rights compatibility of the proposed measure.

1.331 **The committee therefore considers that the lack of reviewability of obligations under a workplace rehabilitation plan limits the right to a fair hearing. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to:**

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20 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.

21 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.

22 SOC 23.

- **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.**

Expanded definition of suitable employment (Schedule 2)

1.332 Under section 40 of the Act employers currently have a duty to provide 'suitable employment' to injured employees who have undertaken or are undertaking a rehabilitation program. Schedule 2 of the bill would broaden the definition of 'suitable employment'. Employment with any employer who is not the Commonwealth or a licensee (including self-employment) may now be considered 'suitable employment'. Failure by an employee to accept or engage in such 'suitable employment' would be subject to the sanctions regime in proposed Schedule 15 of the Bill. New section 34K requires a liable employer to take all reasonably practicable steps to provide an injured employee with suitable employment or assist the employee to find such employment.[23]

1.333 The committee considers that the expanded definition of suitable employment engages and may limit multiple rights.

Multiple rights

The committee considers that the measure engages and may limit the following rights:

- the right to work;
- the right to just and favourable conditions at work;
- the right of persons with disabilities to work; and
- the right to rehabilitation.

1.334 The committee notes in particular that these rights include the ability to freely choose work.

Compatibility of the measure with multiple rights

1.335 The statement of compatibility states that the measure engages and may limit the right to work and the right to persons with disabilities to work:

> However, it could also be argued that the amendment may indirectly limit the right to freely choose one's work which is a key aspect of the right to work. Article 27 of the CRPD reiterates the right of persons with disabilities

23 SOC 25.

> to have the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible. States parties have responsibilities to, among other things, provide assistance in returning to employment and promoting vocational and professional rehabilitation, job retention and return-to-work programs for persons with disabilities.[24]

1.336 The committee agrees that, the expansion of what constitutes 'suitable employment' together with a consequential obligation on an injured employee to accept and maintain 'suitable employment', limits the ability of such injured employees to freely choose work. As noted above, this accordingly engages and may limit a range of human rights. However, the statement of compatibility argues that any limitation on human rights is justifiable and the legitimate objective of the measure is to:

> to strengthen the obligations of employers to provide greater opportunities for injured employees to engage in suitable employment and thereby improve health and return to work outcomes for injured employees. Under the current Act, an employee may have some capacity to work but be prevented from doing so due to a lack of suitable employment with their pre-injury employer. The amendments could therefore provide more employment options for some injured employees.[25]

1.337 The committee considers that this may be regarded as a legitimate objective for the purpose of international human rights law. The committee also agrees that the measure is rationally connected to this objective. The statement of compatibility further argues that the measure is a proportionate approach to achieving this objective as:

> First, the amendments are necessary for supporting injured employees to stay in, or return to, suitable employment. The amendments clarify and strengthen the obligations of employers and employees to support employees to remain in or engage in suitable employment if they have the potential to be in suitable employment. The amendments will be supported by the ability of Comcare to implement an incentive scheme for employers under new section 70D as inserted by Item 84 to provide for employment opportunities outside of the employment which gave rise to their injury.
>
> Second, the amendments are reasonable and proportionate in that there are substantial safeguards in place to ensure that suitable employment is appropriate to the individual circumstances of an employee. Relevant considerations include the capacity of an employee to remain or engage in

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24 SOC 25.

25 SOC 25.

> suitable employment which must be assessed in consultation with the employee and their medical practitioner to ensure that employment reflects the capacity and abilities of an individual employee. If necessary, a relevant authority is empowered to arrange a work readiness assessment to determine an employee's capacity to return to work and the medical and rehabilitation support needed to help achieve a safe and sustainable return to work.[26]

1.338 The committee considers that such explanation goes some way to demonstrating that the expanded definition of 'suitable employment' in context may be a proportionate means of achieving the stated objective to the extent that there are sufficient safeguards in place to ensure that such 'suitable employment' is appropriate to the individual circumstances. The committee notes that aspects of the proposed changes including the further obligations on employers with respect to suitable employment would appear to promote the right to work. However, the committee considers that further information regarding the specifics of the safeguards is needed for the committee to fully assess the human rights compatibility of the expanded definition of suitable employment.

1.339 The committee also notes that no information has been provided as to whether less rights restrictive measures would have achieved the same result. Specifically no information has been provided as to whether a regime where employees were encouraged rather than mandated to accept or engage in an expanded definition of 'suitable employment' has been provided. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive means of achieving the stated objective.

1.340 **The committee considers that the expanded definition of suitable employment engages and limits multiple rights. 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 the limitation is a proportionate measure for the achievement of that objective (that is, particularly, whether there is a less rights restrictive and whether there are sufficient safeguards).**

Amendments to the amount and type of medical expenses covered (Schedule 5)

1.341 Schedule 5 of the bill would make a number of changes to the type and amount of medical expenses covered by Comcare. The schedule requires Comcare and licensees to consider certain matters in determining whether medical treatment was reasonably obtained. It is intended that Clinic Framework Principles will be established under regulation to assist in determining whether a medical treatment is

26 SOC 25.

reasonably obtained. The schedule also empowers Comcare to establish by regulation an amount payable for medical services and examinations.

1.342 These measures will limit the existing discretion afforded to Comcare and licensees to provide compensation for the cost of medical treatment and as a result this may reduce the extent to which an employee is fully compensated for medical expenses incurred as a result of a workplace injury. The measures may also limit patient choice with respect to medical practitioners where the medical practitioner is unwilling to charge for services at the rate prescribed under regulations established by provisions in these measures.

1.343 Accordingly, the measures engage and limit the right to social security and the right to health.

Right to social security and the right to health

1.344 These rights are described above at paragraphs [1.296] to [1.300].

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

1.345 The statement of compatibility explains that the measures may limit the right to social security and the right to health. The statement of compatibility also explains that the measures are intended to achieve two legitimate objectives:

- improving the sustainability of the scheme by focussing limited resources on medical treatment that is reasonable; and
- containing medical costs under scheme.

1.346 The committee agrees that these may be legitimate objectives for the purpose of international human rights law. The committee also agrees that the measures are rationally connected to that objective as the measures focus on establishing a Clinical Framework which will assist in determining whether medical treatments are reasonable. In addition, the introduction of a schedule of medical expenses is capable of reducing medical expenses payable under the scheme.

1.347 The committee notes that the statement of compatibility explains the measures as proportionate on the basis that:

> The amendments are reasonable and proportionate because they promote greater transparency and consistency in Comcare's decision-making.[27]

1.348 The committee notes, however, that the measures give Comcare broad discretion to set scheduled fees for specific medical treatments. There is no requirement to have regard to rates endorsed by the Australian Medical Association or even to consult the Australian Medical Association. Accordingly, it may be possible that scheduled fees may be set at such a low level that the most appropriately trained and qualified medical practitioners are unwilling to provide services at that

27 SOC 36.

rate. Moreover, the amendments allow Comcare not only to consider the Clinic Framework Principles (which will be developed under regulations) when determining whether a medical treatment is reasonable but to any other matter that Comcare considers relevant. As a result, matters that are not strictly medical in nature may be considered. Accordingly, the committee considers that the statement of compatibility has not explained how these broad powers are a proportionate means of achieving the legitimate objective.

1.349 **The committee therefore considers that the measures in Schedule 5 of the bill amending the amount and type of medical expenses covered under the Comcare scheme engage and limit the right to health and the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that these measures 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 Employment as to whether the measures impose a proportionate limitation on the right to health and the right to social security.**

Compensable household and attendant care services (Schedule 6)

1.350 Schedule 6 of the bill would introduce a requirement that attendant care services be compensable only where they are provided by a registered provider and where there has been an independent assessment of an injured employee's need for household services and/or attendant care service.

1.351 The measure engages and may limit the right to social security and the right to health.

Right to social security and the right to health

1.352 These rights are described above at paragraphs [1.296] to [1.300].

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

1.353 The statement of compatibility notes that:

> The registration requirements limit the right to social security and arguably the right to health, as the care provided by some individuals may no longer be compensable.[28]

1.354 The statement of compatibility explains that:

> The legitimate objective of these amendments is to ensure that individuals providing attendant care services are appropriately trained and qualified.[29]

1.355 The committee agrees that this is a legitimate objective for human rights purposes and that the measures are rationally connected to that objective.

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28 SOC 37.

29 SOC 37.

1.356 In terms of proportionality, the statement of compatibility notes that the measures are directed towards ensuring that employees are provided with appropriate and professional care. The statement of compatibility also notes that the amendment is proportionate as:

> …it does not prevent family members from providing care and support to an injured worker. However, for this care to be compensated, the person providing the services must be suitably qualified and able to pass the requirements for registration with a registered entity.[30]

1.357 The committee notes that attendant care services can be highly personally intrusive including assistance with bathing and toileting. Consequently, it may be entirely reasonable in certain circumstances for an injured worker to prefer that such services be provided by a family member. The committee notes that this may be possible where the family member is or is able to become, suitably qualified and registered. The committee notes that such processes may take some time and in the interim this would either have to be done without compensation by a family member or, instead, by a registered provider. There may also be circumstances where a family member is providing sufficient and appropriate care but is unable to meet the qualifications or registration requirements.

1.358 The committee considers it could be possible to include statutory exemptions for family members to provide attendant care services without registration at the discretion of Comcare. This would appear to be a less rights restrictive approach than that adopted by this schedule. Accordingly, the committee considers that the statement of compatibility has not demonstrated that the measures are a proportionate means of achieving the legitimate objective.

1.359 **The committee therefore considers that the measures which change when household and attendant care services are compensable engage and limit the right to health and the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that these measures 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 Employment as to whether the measures impose a proportionate limitation on the right to health and the right to social security.**

Reducing compensation paid to employees suspended for misconduct (Schedule 9)

1.360 Schedule 9 of the bill would insert a provision which would reduce to zero the compensation paid to an injured worker who is suspended without pay.

1.361 This measure engages the right to social security and the right to health.

30 SOC 37.

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

1.362 The right to social security and an adequate standard of living are described above at paragraphs [1.296] to [1.299].

Compatibility of the measures with the right to social security and the right to an adequate standard of living

1.363 The statement of compatibility explains that:

> The amendment limits the right to social security by reducing the current level of workers' compensation payable to an injured employee who is suspended without pay.[31]

1.364 The committee also considers that the measure may limit the right to an adequate standard of living as an injured worker who is denied compensation payments may not be able to meet the expenses of providing an adequate standard of living as they may not be eligible for social security whilst they are suspended from work.

1.365 The statement of compatibility explains that:

> The objective of the amendment is to correct an anomaly under which an employee who would not have earned anything if free from incapacity is able to receive an income because of his or her incapacity.[32]

1.366 The committee considers that, as expressed, this is not a legitimate objective for the purpose of human rights law as the objective does not appear to be meet a pressing or substantial concern.

1.367 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 purpose of international human rights law. This conforms with the committee's Guidance Note 1,[33] 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'.[34] To be capable of

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31 SOC 41.

32 SOC 41.

33 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.

34 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.

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.

1.368 **The measure would reduce access to workers compensation where an employee is suspended for misconduct with out pay. This engages and limits the right to health and social security. The statement of compatibility has not established the legitimate objective for the measure. The committee therefore seeks the advice of the Minister for Employment as to whether this measure is compatible with the right to social security and the right to an adequate standard of living, and particularly:**

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

Calculation of compensation – introduction of structured reductions (Schedule 9)

1.369 Schedule 9 would also introduce structured reductions (commonly referred to as 'step-downs') in the calculation of weekly compensation payments for incapacity based on the period of incapacity. Currently, under the Act there is a single step down point at approximately 45 weeks at which point compensation is reduced to 75% of the injured employee's normal weekly earnings.

1.370 The amendments reduce compensation in three increments over a 52 week period at the end of which the incapacity payment is capped at 70% of the employee's average weekly remuneration.

1.371 The committee considers that the measure engages and limits the right to social security.

Right to social security

1.372 The right to is social security is described above at paragraphs [1.296] to [1.299].

Compatibility of the measures with the right to social security

1.373 The statement of compatibility explains that:

> The amendments limit the right to social security by reducing the current levels of workers' compensation payable to injured workers…[35]

35 SOC 42.

1.374 The statement of compatibility also explains that:

> The objectives of these amendments are to:
>
> - align the Comcare scheme with state and territory workers' compensation scheme
> - address a concern identified by the [Safety, Rehabilitation and Compensation Act] Review that a single step down point after 45 weeks creates a disincentive for early return to work by injured employees[36]

1.375 The committee agrees that the objective set out in the second bullet point may be considered a legitimate objective for the purpose of international human rights law. The committee also considers that the measures may be rationally connected to the legitimate objective.

1.376 The statement of compatibility also states that the measures are reasonable necessary and proportionate:

> Earlier step downs will encourage employees who are able to return to work to do so as quickly as possible (or, put another way, provide a disincentive to remain on income support any longer than is necessary); in the case of employees who are unable to return to work, a staggered approach to step downs will ease the transition to what may be an extended period of income support.[37]

1.377 The statement of compatibility explains that at all step-down stages targeted return-to-work measures will be introduced to facilitate return to work. The committee notes that the measures will be a matter of Comcare policy and not a statutory requirement. The committee also notes that whilst the earlier step-downs may encourage earlier re-engagement with work, for those injured employees who are unable to return to work the measures will simply mean that the injured employee suffers earlier reductions in income support. The step-downs are mandatory and do not take into account an employee's ability to return to work and do not allow for flexibility in applying the step-downs. Accordingly, the committee considers that the statement of compatibility has not justified the measures as the least rights restrictive and therefore has not justified the measures as proportionate.

1.378 **The committee therefore considers that the introduction of earlier structured reductions in compensation for lost income engages and limits the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that these measures 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**

36 SOC 42.

37 SOC 43.

Minister for Employment as to whether the measures impose a proportionate limitation on the right to social security.

Capping of legal costs (Schedule 11)

1.379 Schedule 11 of the bill proposes a new section 67A to the Act which would allow Comcare, by legislative instrument, to prescribe a Schedule of Legal Costs which would cap the amount of legal costs that the Administrative Appeals Tribunal (AAT) may award under the Act. Currently, section 67 of the Act allows the AAT to order that the costs incurred by the claimant, or a part of those costs, be payable by the responsible authority, Comcare or the Commonwealth.

1.380 The committee considers that this measure engages and may limit the right to a fair hearing, in particular, the right to equal access to the courts and tribunals.

Right to a fair hearing (equal access)

1.381 The right to a fair hearing is described above at paragraph [1.326]. All people are to have equal access to the courts, regardless of citizenship or other status. To be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.[38]

Compatibility of the measure with the right to a fair hearing

1.382 The statement of compatibility recognises that the measure limits the right to a fair hearing as it 'may discourage some claimants from bringing proceedings and affect their representation choices'. However, it states:

> The legitimate objective of the amendment is to remove any incentives for employees to participate in drawn out proceedings. Prolonged litigation is detrimental to an employee's health and wellbeing and may affect their recovery and return to work.[39]

1.383 The statement of compatibility states that the amendment is proportionate to that objective as:

- any schedule of legal costs made under this provision will be a legislative instrument, developed in consultation with stakeholders and subject to parliamentary oversight;
- the amendment will not prevent employees from incurring legal costs that exceed the specified amounts in the schedule of legal costs; and
- the amendment will bring the Comcare scheme in line with some state schemes.

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38 Human Rights Committee, General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007).

39 SOC 46.

1.384 The Regulatory Impact Statement (RIS) provides additional reasons for introducing a schedule of legal costs. The RIS states that a formalised schedule of legal costs would limit the potential for over-charging and over-servicing and may reduce the incentive for individuals and their lawyers to litigate weak and unlikely claims, and provide an incentive to resolve disputes in a timely manner.[40]

1.385 The committee agrees that ensuring that legal proceedings do not become unnecessarily drawn out and are resolved in a timely manner is a legitimate objective for the purpose of international human rights law and the measure is rationally connected to that objective. However, it is concerned that the measure may not be proportionate. In particular, if the cap on the amount of legal fees that may be awarded is set too low, a claimant may end up having to bear the majority of his or her legal fees and may prevent that person from accessing his or her AAT review rights, despite having a meritorious claim. The committee notes that many law firms take on workplace injury cases on a 'no win no pay' arrangement, and if the schedule of legal costs is set too low, law firms may not provide representation for clients without the means to pay, regardless of the merits of the claim.

1.386 The committee notes that the availability or absence of legal assistance often determines whether or not a person can access judicial forums and participate in them in a meaningful way. The right to a fair hearing encompasses a right of equal access to the courts and tribunals, and the affordability of legal assistance can affect the right of equal access to the courts and tribunals. The UN Human Rights Committee has encouraged states to provide free legal aid for individuals who do not have sufficient means to pay for it and has noted that the imposition of fees on parties to legal proceedings that would de facto prevent their access to justice might give rise to issues under article 14(1) of the ICCPR.[41]

1.387 The committee is concerned that if the level of costs that may be awarded under a schedule of legal costs is set at below that which is necessary to litigate a case this may, de facto, prevent access to justice and so unjustifiably limit the right to a fair hearing.

1.388 **The committee therefore considers that the cap on the amount of legal costs payable may limit the right to a fair hearing. Whether the cap on legal costs is proportionate to meet the stated objective will depend on whether the amount specified in the schedule of legal costs, to be set out in a legislative instrument, is sufficient to meet the claimant's reasonable costs to litigate their claim. The committee is unable to complete its assessment as to the compatibility of this measure until it has reviewed the relevant schedule of legal costs to be prescribed by legislative instrument.**

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40 Regulatory impact statement 47.

41 See UN Human Rights Committee, *General Comment 32: right to equality before courts and tribunals and to a fair trial* (2007).

Changes to payments for permanent impairment (Schedule 12)

1.389 Schedule 12 would make a number of changes to the way that compensation for permanent impairment is calculated. A number of changes would increase compensation to certain injured workers. In addition, the proposed changes to the way permanent impairment is calculated will result in reduced compensation for:

- employees with a permanent impairment resulting from a single injury (or multiple injuries arising out of the same incident or state of affairs) of greater than 10% and less than 40%; and
- employees with multiple injuries arising from one incident where each of the injuries reach the applicable threshold.

1.390 The committee considers that the measures in Schedule 12 engage and limit the right to social security.

Right to social security

1.391 The right to social security is described above at paragraphs [1.296] to [1.299].

Compatibility of the measure with the right to social security

1.392 The statement of compatibility explains that the measure limits the right to social security for certain injured workers. It also explains that the measures pursue the legitimate objective of:

> …improv[ing] scheme equity by better targeting support. The level of compensation payable for permanent impairment should reflect the severity of an employee's injury and the impact that it has on their life.[42]

1.393 The committee agrees that this is a legitimate objective for the purpose of international human rights law and that the measures are rationally connected to that objective.

1.394 In terms of the proportionality of the measures the statement of compatibility explains:

> The amendments are a reasonable, necessary and proportionate approach for a number of reasons. First, without significantly raising the amount of compensation payable for each level of permanent impairment, it is not possible to design a compensation regime that results in no injured employee being worse off. It is therefore necessary to prioritise resources in the Comcare scheme so that the amendments will achieve fairer outcomes that recognise the needs of severely impaired employees.[43]

42 SOC 47.

43 SOC 48.

1.395 The committee agrees that it is necessary to prioritise resources in the Comcare scheme and ensure that severely impaired employees are properly compensated. However, in order to establish the proportionality of the amendments it is necessary to show that the changes to calculations of permanent impairment are the most effective in responding to degrees of impairment and that any individual's loss of compensation under the amendments is both necessary as a result of resource constraints and proportionate in the operation of the whole scheme. Detailed evidence as to how the new calculation formulas have been derived and why they are the most appropriately suited to calculating compensation for permanent impairment is required to demonstrate that the amendments are proportionate.

1.396 **The committee therefore considers that the changes to the calculation of permanent impairment compensation engages and limits the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that these measures 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 Employment as to whether the measures impose a proportionate limitation on the right to social security.**

Removal of compensation for psychological or psychiatric injuries and ailment that are secondary injuries (Schedule 12)

1.397 Schedule 12 would also introduce provisions that would provide that permanent impairment compensation is not payable for psychological or psychiatric ailments or injuries that are secondary injuries. As a result no compensation would be payable for permanent impairment resulting from a secondary psychological or psychiatric injury, for example, a major depressive disorder that was the latent result of a spinal injury that arose out of, or in the course of, employment.

1.398 The committee considers this measure engages and limits the right to social security and the right to equality and non-discrimination.

Right to social security

1.399 The right to social security is described above at paragraphs [1.296] to [1.299].

Compatibility of the measures with the right to social security

1.400 The statement of compatibility explains that the measure limits the right to social security for certain injured workers. It also explains that the measures pursue the legitimate objective of:

> …improv[ing] scheme equity by better targeting support. The level of compensation payable for permanent impairment should reflect the severity of an employee's injury and the impact that it has on their life.[44]

1.401 The committee agrees that this is a legitimate objective for the purpose of international human rights law and that the measures are rationally connected to that objective.

1.402 In terms of the proportionality of the measures the statement of compatibility explains:

> First, as outlined above, it is necessary to amend existing provisions in the Act to ensure that resources are targeted appropriately.
>
> Second, an employee's income replacement payments will not be affected and an employee will remain entitled to compensation for medical treatment and rehabilitation for the secondary injury. Only access to permanent impairment payments will be restricted.[45]

1.403 The committee agrees that it is necessary to prioritise resources in the Comcare scheme and ensure that severely impaired employees are properly compensated. However, the committee notes that no evidence has been provided to explain the economic cost to Comcare of compensating for secondary psychological or psychiatric injuries and ailments. Accordingly, the statement of compatibility has not justified the measure as the least rights restrictive approach.

1.404 **The committee therefore considers that the removal of compensation for psychological or psychiatric injuries and ailments that are secondary injuries engages and limits the right to social security. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that these measures 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 Employment as to whether the measures impose a proportionate limitation on the right to social security.**

Right to equality and non-discrimination

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

1.406 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.

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44 SOC 48.

45 SOC 48.

1.407 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[46] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[47] 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.[48]

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

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

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

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

1.411 As set out above at paragraph [1.401], the committee agrees that the measure has a legitimate objective and is rationally connected to that objective for the purpose of international human rights law.

1.412 In terms of the proportionality of the measure the statement of compatibility states that:

> To the extent that the amendments will disproportionately affect employees suffering from psychological or psychiatric ailments and injuries, the right to non-discrimination is indirectly engaged. However, the indirect differential treatment of employees with such ailments and injuries is permissible as the amendments are justified by a legitimate aim and are an appropriate, objective and necessary approach to achieving that aim.[49]

1.413 The committee considers that the statement of compatibility has simply asserted that the amendments are a proportionate limitation on the right to equality

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46 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.

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

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

49 SOC 48.

and non-discrimination. No evidence has been provided in the statement of compatibility in support of this assertion.

1.414 **The committee therefore considers that the removal of compensation for psychological or psychiatric injuries and ailment that are secondary injuries engages and limits the right to equality and non-discrimination. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that these measures 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 Employment as to whether the measures impose a proportionate limitation on the right to social security.**

Schedule 15

1.415 Schedule 15 of the bill seeks to amend the Act relating to the suspension and cancellation of the right to compensation. In particular, these amendments:

- identify key requirements of the Act that an injured employee must comply with as 'obligations of mutuality', and
- where obligations of mutuality have been breached, provide for the application of sanctions in stages, culminating in a cancellation of compensation, rehabilitation and review rights.

1.416 While many of the measures may be considered to be interrelated, the committee considers that there are three aspects of the proposed regime for suspending and cancelling workers' compensation that engage and may limit human rights:

- imposing 'mutual obligations' as conditions of continuing to access worker compensation;
- the process and procedure for cancellation of compensation where there are breaches; and
- the removal of review rights in certain circumstances.

Obligations of mutuality (Schedule 15)

1.417 The bill establishes that a number of the obligations imposed on an injured worker by the Act are 'obligations of mutuality.' An example of one such obligation, is an obligation on an injured worker to follow a reasonable medical treatment advice. As the consequence of failing to meet obligations of mutuality might include the suspension and cancellation of workers compensation (including on a permanent and ongoing basis), the regime engages and limits the right to health, the right to rehabilitation and the right to social security.[50]

50 See proposed sections 29Y – 29ZA.

Right to social security, right to health and right to rehabilitation

1.418 The right to social security and the right to health are described above at [1.296] to [1.300]. The right to rehabilitation is described above at [1.315].

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

1.419 The statement of compatibility states that the obligations of mutuality engage the right to social security and the rights of persons with disabilities.[51] It explains that the legitimate objective of Schedule 15 is 'to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to improve the integrity of the scheme'.[52] The statement of compatibility states that the existing mechanisms allowing for the suspension of payments in more limited circumstances (but not for permanent cancellation of payments) is not effective 'due to the lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature'.[53]

1.420 The committee agrees that seeking to improve health and rehabilitation outcomes and improving the integrity of the Comcare scheme is a legitimate objective for the purposes of international human rights law. It also agrees that the measures are rationally connected to that objective. However, it is unclear to the committee as to whether the measures are proportionate to achieve that objective. The committee considers that the some obligations of mutuality may be drafted so broadly that the sanctions regime that flows from breach of these obligations may not be proportionate to the objective sought to be achieved.

1.421 For example, under proposed new section 29L it will be a breach of the obligation of mutuality to fail to accept, engage in or seek suitable employment without a reasonable excuse.[54] The statement of compatibility states that there are sufficient safeguards in place to ensure this measure is proportionate, as the Act sets out what 'suitable employment' means, which takes into account individual circumstances. In addition, the bill sets out the potential of an employee to be

51 SOC 9, 11.

52 SOC 52.

53 SOC 52.

54 Section 4 of the Act defines 'suitable employment', as being employment that the employee is suited to having regard to: (i) the employee's age, experience, training, language and other skills; (ii) the employee's suitability for rehabilitation or vocational retraining; (iii) where employment is available in a place that would require the employee to change his or her place of residence—whether it is reasonable to expect the employee to change his or her place of residence; and (iv) any other relevant matter.

employed, which must have regard to the potential for the employee to be rehabilitated, to benefit from medical treatment and any other relevant matter.[55]

1.422 However, it is not clear to the committee how it will be determined that an employee has 'failed to seek' suitable employment. The bill does not set out a definition of this, although proposed section 29L provides that the requirements will not apply in such circumstances as are set out in the regulations. The committee notes that the bill does not set out the circumstances when a person will be deemed to have failed to have sought employment. On this basis the committee considers that the measure risks being more rights restrictive than is strictly necessary to achieve the stated objective (that is, disproportionate). Further the committee notes that the statement of compatibility does explain why less rights restrictive measures would have been ineffective or unworkable.

1.423 In addition, under proposed new section 29P it will be a breach of the obligation of mutuality to refuse or fail, without reasonable excuse, to follow medical treatment advice. The definition of 'medical treatment' in the Act includes medical, surgical, dental or therapeutic treatment or examination or tests carried out on, or in relation to, an employee.[56] The bill states that it will be a reasonable excuse if the employee refuses to undergo surgery or to take or use a medicine.[57] The committee is concerned that a person's right to compensation must be permanently removed if the responsible authority is satisfied that the person has failed to follow medical treatment advice, including treatment by a physiotherapist, osteopath, masseur or chiropractor. The committee notes that this could result in, for example, a person who fails to consistently undertake physical exercises set for them by their physiotherapist having their right to compensation suspended and cancelled. This could be unduly harsh in a range of circumstances. Further, the committee notes that the measure may risk a lack of openness by employees with treating medical professionals in ways that ultimately adversely affect health and rehabilitation outcomes.

1.424 The committee notes that an employee's responsibilities under a 'workplace rehabilitation plan' will constitute obligations of mutuality to which sanctions may apply under new section 29R. As noted above, a 'workplace rehabilitation plan' will set out the details of services and activities to assist an injured worker in rehabilitation and return to work with an emphasis on vocational services.[58] The nature of a 'workplace rehabilitation plan' means that there may necessarily be a high degree of specificity in relation to an injured employee's responsibilities under the plan. This is likely to include responsibilities to undertake a range of particular

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55 See proposed new subsection 29L(7).

56 See the definition of 'medical treatment' in section 4 of the Act.

57 See proposed new subsection 29P(5).

58 See, section 37 of the *Safety, Rehabilitation and Compensation Act 1988.*

activities. The committee is concerned that failure to perform these activities may result in suspension or cancellation of the payments in circumstances where such a cancelation would be unduly harsh or disproportionate to the nature of the breach. The committee is therefore of the view that, as currently formulated, the obligations of mutuality may be more rights restrictive than is strictly necessary to achieve the stated objective of improving health and rehabilitation outcomes.

1.425 **The committee therefore considers that the obligations of mutuality limit the right to social security and the right to health. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to whether the limitation is a proportionate means to achieve the stated objective.**

Cancellation of compensation for breaches of mutual obligations (Schedule 15)

1.426 Employees who breach an obligation of mutuality in relation to the same injury or an associated injury will be subject to a 3-stage sanctions regime. At the third stage, an employee's rights to compensation and to institute or continue any proceedings in relation to compensation in respect of all current and future associated injuries are permanently cancelled. This will also have the effect of permanently cancelling the employee's right to rehabilitation.

1.427 The power to suspend and cancel workers compensation for breaches of mutual obligation engages and limits the right to health, the right to social security, the right to rehabilitation and the right to a fair hearing.

Right to social security, right to health and right to rehabilitation

1.428 The right to social security and the right to health are described above at [1.296] to [1.300].

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

1.429 The statement of compatibility states that the obligations of mutuality and the sanction provisions engage the right to social security and the rights of persons with disabilities.[59] It explains that the legitimate objective of Schedule 15 is 'to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to improve the integrity of the scheme'.[60] The statement of compatibility says the existing mechanisms allowing for the suspension of payments in more limited circumstances (but not for cancellation of payments) is

59 SOC 9, 11.

60 SOC 52.

not effective 'due to the lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature'.[61]

1.430 The committee accepts that seeking to improve health and rehabilitation outcomes and improving the integrity of the Comcare scheme is a legitimate objective for the purposes of international human rights law. It also accepts that the measures are rationally connected to that objective. However, it is unclear to the committee as to whether the measures are proportionate to achieve that objective.

1.431 The statement of compatibility states that there are safeguards in the bill that make the measures proportionate to the objective sought to be achieved:

> Generally, an employee will only have breached an obligation of mutuality where they have refused or failed to fulfil their responsibilities without a reasonable excuse…The key principle underpinning the strengthening of mutual obligations is that it is fair and reasonable to expect that people receiving workers' compensation payments do their best to improve their health and undertake activities that will improve their ability to work…Where it is clear that a person receiving workers' compensation payments does not intend to meet any or all of their mutual obligations, the sanction provisions should be engaged. The sanction regime has been developed in an escalating framework so as to ensure that it is clear and operates effectively as a deterrent.[62]

1.432 The statement of compatibility notes a number of specific provisions stating that these are safeguards which mean the limitation on the right is proportionate, namely:

- the provisions do not affect an employee's right to compensation for medical treatment payments until the final stage of the sanctions regime;
- the suspension of compensation will end when the employee remedies a breach;
- in the case of a breach of the suitable employment provisions, the employee's compensation is only reduced by the amount they are deemed able to earn;
- employees will be notified in writing of any breach of obligation of mutuality;
- employees may seek review of a relevant authority's decision to subject them to a sanction;
- employees whose compensation payments are cancelled will still be able to apply for support through social security and where an injury has resulted in

61 SOC 52.

62 SOC 52-53.

permanent disability, an employee may apply for access support through the National Disability Insurance Scheme (where eligible).[63]

1.433 The committee is concerned that suspending and cancelling an employee's right to compensation may not be proportionate to achieve the stated objective. In particular, permanently cancelling an employee's right to compensation, including their right to medical treatment, may have adverse impacts on the health and rehabilitation of the employee. The committee notes that while employees would continue to have access to the social security system, this could provide a much lower level of support and at this stage the National Disability Insurance Scheme is in a trial phase and the majority of persons with a disability are not able to access support through this scheme.

1.434 The committee also has concerns about a number of specific aspects of the suspension and cancellation regime. In particular, the sanctions regime requires a relevant authority (such as Comcare) to suspend compensation if it is 'satisfied' that an employee has breached an obligation of mutuality. There is no requirement that the authority must be 'reasonably' satisfied, nor does it give discretion to the authority in deciding whether, in all the circumstances, compensation payments should be suspended or cancelled. In addition, while the statement of compatibility says that it is 'expected that in practice a relevant authority will contact the employee and undertake any other appropriate enquiries before determining that they have breached an obligation of mutuality',[64] there is no requirement in the legislation that the authority must do so.

1.435 The committee is also concerned that an employee's right to compensation can be permanently cancelled in relation to the primary injury as well as to any associated injuries that may later arise.[65] This is regardless of the level of the employee's injury and the level of treatment they may require as a result of that injury. If the relevant breaches of the obligation of mutuality are established to have occurred, there is no discretion for the relevant authority or the AAT to decide not to permanently cancel or reinstate compensation based on the affected employee's circumstances.

1.436 **The committee therefore considers that the power to suspend and cancel compensation payments limits the right to social security, the right to health and the rights of persons with disabilities. 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 the limitation is a proportionate means to**

63 SOC 53-54.

64 SOC 53.

65 See proposed section 29Z.

achieve the stated objective, in particular, whether the bill is drafted in the least rights restrictive way.

Removal of review rights in certain circumstances (Schedule 15)

1.437 Schedule 15 of the bill also includes measures that limit judicial and merits review of decisions made by Comcare under the scheme. Specifically, where an injured worker is subject to the suspension and cancellation regime (whether at stage 1, 2 or 3), the bill provides that the injured worker is barred from instituting or continuing any proceedings in relation to compensation under Act for the injury or associated injury other than proceedings in the AAT in relation to the sanction regime.

1.438 The committee considers that this measure engages and limits the right to a fair hearing.

Right to a fair hearing

1.439 The right to a fair hearing is described above at paragraph [1.326].

Compatibility of the measure with the right to a fair hearing

1.440 The statement of compatibility states that as the measure provides for the suspension and cancellation of an injured employee's right to institute or continue any proceedings (both merits review and judicial review) under the Act in relation to compensation for any current or future associated injury, the measure engages the right to a fair hearing.[66]

1.441 The statement of compatibility notes that the amendments in Schedule 15, which includes the proposed removal of review rights, pursue the legitimate objective of improving health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to ensure the integrity of the scheme. The committee agrees that this may be considered a legitimate objective for the purpose of international human rights law.

1.442 However, based on the information provided, the committee considers that the proposed removal of the right to review may not be rationally connected to, and a proportionate way to achieve, its stated objective so as to be a justifiable limitation under international human rights law.

1.443 First, the committee considers that, as it has been explained in the statement of compatibility, there is not a clear link between the stated objective and the removal of review rights. No evidence or information has been provided in the statement of compatibility to explain how the removal of review rights would be effective or capable of achieving this stated objective.

66 SOC 16.

1.444 Second, the committee notes that the statement of compatibility has not shown that removal of review rights is the least rights restrictive alternative to achieve the stated objective (that is, that removing review rights would be proportionate).

1.445 **The committee therefore considers that the power to suspend and cancel the right to institute or continue proceedings limits the right to a fair hearing. As set out above, the statement of compatibility does not sufficiently justify this limitation the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to:**

- **whether there is a rational connection between the limitation and the stated objective of the measure to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to ensure the integrity of the scheme; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Social Services Legislation Amendment Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 25 March 2015

Purpose

1.446 The Social Services Legislation Amendment Bill 2015 (the bill) amends the *Social Security Act 1991* to cease social security payments to certain people who are in psychiatric confinement because they have been charged with a serious offence.

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

Ceasing social security payments to certain people who are in psychiatric confinement

1.448 The measures in the bill would result in certain individuals who are in psychiatric confinement because they have been charged with a serious offence losing existing entitlements to social security payments. The bill engages and limits the right to social security.

Right to social security

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

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

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

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and

- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

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

Compatibility of the bill with the right to social security

1.453 The statement of compatibility states that the bill engages the right to social security together with rights to social protection and the right to an adequate standard of living. The statement of compatibility states that whilst individuals are in psychiatric care, they are receiving benefits in kind and do not require social security. The analysis in the statement of compatibility appears to assume that the 'in kind' benefits provided are of equal or equivalent value to the social security payments an individual would be entitled to if they were not under psychiatric care. No analysis or evidence is provided to substantiate this assumption. No information is provided in the statement of compatibility as to what is the legitimate objective being sought or how the limitation on the right is proportionate to achieving that objective.

1.454 The bill would result in certain individuals who are in psychiatric confinement because they have been charged with a serious offence losing existing entitlements to social security payments. Accordingly, the committee considers that the bill limits the right to social security. 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,[1] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[2] 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.

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

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

1.455 **The committee considers that the amendments which would result in certain individuals who are in psychiatric confinement because they have been charged with a serious offence losing existing entitlements to social security engages and limits the right to social security. The committee considers that the statement of compatibility has not explained the legitimate objective for the measure. The committee therefore seeks the advice of the Minister for Social Services as to whether the bill is compatible with the right to social security, and particularly:**

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

Extradition (Vietnam) Regulation 2013 [F2013L01473]

Portfolio: Attorney-General
Authorising legislation: Extradition Act 1988

1.456 The Extradition (Vietnam) Regulation 2013 (the regulation) extends the definition of an 'extradition country' in the *Extradition Act 1988* (the Extradition Act) to include Vietnam, thereby giving effect to the Treaty between Australia and the Socialist Republic of Vietnam on Extradition.

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

Background

1.458 In its *First Report of 2013*, the committee considered a similar regulation and asked the then Attorney-General whether that regulation was compatible with a number of human rights.[1]

1.459 In its *Sixth Report of 2013* the committee gave detailed consideration to the issue and further requested the then Attorney-General's advice on the compatibility of the Extradition Act with a number of specific rights.[2]

1.460 In its *Tenth Report of 2013* the committee published the then Attorney-General's response, noting that the response did not address a number of the committee's concerns.[3] The committee concluded that the Extradition Act raised serious human rights concerns and considered that this was an issue that may benefit from a full review of the human rights compatibility of the legislation. The committee suggested that in the 44th Parliament the committee may wish to determine whether to undertake such a review.

1.461 In its *First Report of the 44th Parliament* the committee deferred its detailed consideration of the regulation while it gave consideration to the concerns raised in the previous reports and the suggestion of a full review of the Extradition Act and related legislation.

Multiple rights

1.462 The committee previously noted that it had concerns with the compatibility of the Extradition Act with a number of human rights, including:

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1 Parliamentary Joint Committee on Human Rights, *First Report of 2013* (6 February 2013) 111. See also Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 128 where the committee published the then Attorney-General's response but deferred its consideration to include consideration of the response together with a number of new instruments dealing with extradition.

2 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 149.

3 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 56.

- prohibition against torture, cruel, inhuman and degrading treatment;[4]
- right to life;[5]
- right to a fair hearing and fair trial;[6]
- right to liberty;[7]
- right to equality and non-discrimination;[8] and
- right to a fair hearing and fair trial (presumption of innocence).[9]

1.463 The committee notes that the regulation effectively extends the operation of the Extradition Act, by including a newly listed country as one to which a person may be subject to extradition. Accordingly, it is necessary to assess whether the Extradition Act is compatible with human rights in order to assess whether the regulation is compatible with human rights.

1.464 In its *Sixth Report of 2013* the committee noted it had been unable to exhaustively review the Extradition Act, but hoped that the then Attorney-General, in responding to the committee's concerns, might undertake a wider review to consider the compatibility of the Extradition Act with human rights.

1.465 The then Attorney-General's response stated that a significant level of scrutiny had already been applied and addressed in relation to Australia's extradition regime. As the committee previously noted, while other parliamentary committees have examined the issue of extradition, those committees did not have a specific mandate to undertake a broader examination of the compatibility of the legislation with international human rights.[10]

1.466 The committee is not in a position to undertake a full review of the Extradition Act to assess it for compatibility with human rights. The committee considers that the Extradition Act could benefit from a comprehensive review to assess its provisions against Australia's human rights obligations.

1.467 **Until a comprehensive review is undertaken of the Extradition Act which assesses the compatibility of the Act with Australia's international human rights**

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4 Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture.

5 Article 6 of the ICCPR.

6 Article 14 of the ICCPR.

7 Article 9 of the ICCPR.

8 Article 26 of the ICCPR.

9 Article 14 of the ICCPR.

10 See Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) at 58.

obligations, the committee is unable to conclude that the regulation is compatible with the human rights identified above.

Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 [F2015L00265]

Portfolio: Attorney-General
Authorising legislation: Federal Circuit Court of Australia Act 1999
Last day to disallow: 22 June 2015

1.468 The Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 (the instrument) requires the Federal Circuit Court (FCC) to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW.

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

Background

1.470 The committee considered the Federal Courts Legislation Amendment Bill 2014 (the bill) in its *Eighteenth Report of the 44th Parliament*.[1] The bill sought to amend the *Federal Court of Australia Act 1976* and the *Federal Circuit Court of Australia Act 1999* to confer jurisdiction on the Federal Circuit Court of Australia (FCC) in relation to certain tenancy disputes to which the Commonwealth is a party. For example, such a dispute may arise may arise in the case of public or government housing where the lessor is the Commonwealth government. The committee raised concerns in relation to the conferral of jurisdiction on the Federal Circuit Court for certain tenancy disputes, and requested further information from the Attorney-General as to whether this conferral is compatible with fair hearing rights.

1.471 The committee considered the Attorney-General's response in its *Nineteenth Report of the 44th Parliament*.[2] In his response to the committee, the Attorney-General stated 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'.[3] However, the instrument makes a number of amendments to state and territory law applicable to such disputes.

1.472 The bill finally passed both Houses of Parliament and received Royal Assent on 25 February 2015 as the *Federal Courts Legislation Amendment Act 2015* (the Act).

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

2 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 109-111.

3 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 110.

Power of the FCC to dictate vacation date of tenant

1.473 As outlined, the instrument requires the FCC to apply NSW law (namely the *Residential Tenancies Act 2010* (NSW) (the NSW Residential Tenancies Act), the Residential Tenancies Regulation 2010, and the *Sheriff Act 2005*) when determining Commonwealth tenancy disputes involving land within NSW. The instrument makes a number of modifications to the application of these laws, including subsection 8(2) which allows the FCC to dictate the date of vacant possession for tenants who have received a termination order. This differs from section 94(4) of the NSW Residential Tenancies Act which provides that long-term tenants must not be ordered to vacate premises earlier than 90 days after a termination order is made. As a result of this modification to the NSW law, this could result in tenants being given a date to vacate premises of less than 90 days.

1.474 The committee considers that the instrument engages and may limit the right to an adequate standard of living (housing).

Right to an adequate standard of living

1.475 The right to an adequate standard of living is guaranteed by article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.476 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

1.477 The explanatory statement for the regulation acknowledges that the instrument engages the right to an adequate standard of living in relation to housing, but states that:

> By allowing the FCC to exercise discretion in these cases, the Instrument does not limit the right of long-term tenants to adequate housing. The measure is reasonable and appropriate to ensure that both parties to a Commonwealth tenancy dispute are provided with equitable rights by the FCC in the determination of the date vacant possession of residential premises should be provided.[4]

1.478 However, the committee considers that the explanatory statement has failed to set out how amending existing NSW law which would allow the FCC to exercise discretion in determining a vacation date seeks to achieve a legitimate objective. In

4 ES 12.

particular, there is no justification provided as to why the existing provisions of the NSW Residential Tenancies Act as detailed above at [1.473] would be inappropriate or ineffective when determining Commonwealth tenancy disputes. The committee therefore considers that the proponent of the legislation has not justified this limitation for the purposes of international human rights law.

1.479 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[5] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.480 Further, as noted above, in response to the committee's consideration of the human rights compatibility of the primary legislation, the Attorney-General advised the committee that state and territory law would continue to govern tenancy arrangements where the Commonwealth is a lessor. It was on the basis of this information that the committee concluded that the *Federal Courts Legislation Amendment Act 2015* was compatible with human rights.

1.481 **The committee therefore considers that the ability of the Federal Circuit Court to determine the date for tenants to vacate premises limits the right to an adequate standard of living. 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 Attorney-General 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.**

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5 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].

Powers when executing orders made by the Court

1.482 Section 10 of the instrument grants the Sheriff and Deputy Sheriff of the FCC any of the powers prescribed under section 7A of the *Sheriff Act 2005* (NSW), including use of force powers, when enforcing a warrant for the possession of residential premises owned by the Commonwealth involving land in NSW.

1.483 The committee considers that the instrument engages and may limit the right to security of the person.

Right to security of the person

1.484 Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

Compatibility of the measure with the right to security of the person

1.485 The committee notes that empowering the Sheriff and the Deputy Sheriff to use force against a person in exercising a writ or warrant engages and limits the right to security of the person, as levels of force could be used that restrict or interfere with their personal integrity. However, a measure that limits the right to security of the person may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.486 The explanatory statement acknowledges that the instrument engages and limits the right to security of the person. It also sets out that 'section 10 of the Instrument is aimed at the legitimate and lawful objective of executing a warrant for possession of Commonwealth property in NSW where the FCC finds that the Commonwealth is entitled to possession of the premises'.[6] The committee accepts that the lawful execution of a warrant is a legitimate objective for the purposes of international human rights law, and that the measures are rationally connected to that objective. However, 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).

1.487 The explanatory statement points to a range of safeguards to support its conclusion that the proposed measures are proportionate to their stated objective, such as:

> Paragraph 10(2)(c) provides that a Sheriff or a Deputy Sheriff must not use more force, or subject any person on the premises to greater indignity,

6 ES 12-13.

> than is necessary and reasonable to execute the warrant. Paragraph 10(2)(d) provides that a Sheriff or a Deputy Sheriff must not do anything that is likely to cause the death of, or grievous bodily harm to, any person on the premises unless he or she reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person, including the Sheriff or a Deputy Sheriff.[7]

1.488 It is likely, however, that despite these safeguards there could remain potential issues of proportionality in relation to the measures, and the committee considers that further safeguards could have been put in place. These could include, for example, requirements that:

- the use of force only be used as a last resort;
- force should be used only if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force;
- the infliction of injury is to be avoided if possible; and
- the use of force be limited to situations where the officer cannot otherwise protect him or herself or others from harm.

1.489 **The committee therefore considers that the instrument engages and limits the right to security of the person. As set out above, the explanatory statement for the instrument does not provide sufficient information to establish that the instrument 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 Attorney-General as to whether the instrument imposes a proportionate limitation on the right to security of the person.**

7 ES 8.

Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958 and Australian Citizenship Act 2007
Last day to disallow: 25 March 2015

Purpose

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

- extend the entry period (the period between the grant of the visa and entry into Australia) and maximum period of stay (the period between entry into Australia and exit out of Australia) from three months to six months for a Subclass 400 (Temporary Work (Short Stay Activity);
- enable automated processing of persons departing Australia;
- enable the Minister for Immigration and Border Protection to authorise the disclosure of certain information (including personal identifiers) about visa holders to the CrimTrac Agency (CrimTrac);
- expand the scope of personal information that can be disclosed to the police to include certain identification reference numbers, and to allow those identifiers and certain information currently disclosable to the police to be disclosed to the CrimTrac Agency;
- allow applicants for student visas who are enrolled in Advanced Diploma courses with an approved education provider to access streamlined visa processing arrangements;
- amend the definition of 'financial institution' applicable to all student visas to clarify that both the financial institution and the regime under which that institute operates must meet effective prudential assurance criteria; and
- exempt persons who were minors at the time of application from the exclusion periods applied by public interest criterion (PIC) 4020 regarding grant of a visa.

1.491 The Regulation also amends the Australian Citizenship Regulations 2007 (Citizenship Regulations) to:

- allow children adopted by Australian citizens in accordance with a bilateral arrangement to be registered as Australian citizens; and
- update references to instruments made by the minister that enable a person to pay fees at the correct exchange rate for an application made under the *Australian Citizenship Act 2007* (Citizenship Act) in a foreign country and using a foreign currency.

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

Registration of children adopted from countries that are not party to the Hague Convention as citizens

1.493 As noted at [1.491] above the regulation amends the Citizenship Regulations to allow children adopted by Australian citizens in accordance with a bilateral arrangement to be registered as Australian citizens. Previously section 6 of the Citizenship Regulations provided only for children adopted by an Australian citizen in accordance with the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption to be registered as Australian Citizens (Hague Convention).[1]

1.494 This aspect of the regulation reflects the amendments in the Australian Citizenship Amendment (Intercountry Adoption) Bill 2014 (the bill) which allowed for the acquisition of Australian citizenship by a person adopted outside Australia by an Australian citizen in accordance with a bilateral arrangement between Australia and another country. Specifically, the bill amended the Citizenship Act to create an entitlement to citizenship for persons adopted in accordance with a bilateral arrangement.[2] The entitlement is equivalent to that provided to persons adopted in accordance with the Hague Convention.[3]

1.495 The bill received Royal Assent on 25 February 2015 after passing both Houses of Parliament. The committee first reported on the bill in its *Eighth Report of the 44th Parliament* and raised concerns in relation to the compatibility of the bill with the rights of the child.[4] The committee reported on the minister's response in its *Tenth Report of the 44th Parliament* and concluded that the bill was likely to be incompatible with the rights of the child.[5]

1.496 The committee considers that the regulation engages and limits the obligation to consider the best interests of the child as set out below.

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1 Explanatory Statement (ES), Attachment B 12.

2 Bilateral arrangements with non-state parties to the Hague Convention appear currently to be in force with Taiwan and South Korea. South Korea signed the Convention on 24 May 2013, but is yet to ratify it. The committee notes in this regard that the texts of the bilateral agreements referred to on the Attorney-General's Department website between Australia and Taiwan and between Australia and South Korea do not appear to be available on that website.

3 (The Hague, 29 May 1993), Entry into force for Australia: 1 December 1998, [1998] ATS 21.

4 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 8-10.

5 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 143.

Rights of the child

1.497 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 Convention on the Rights of the Child (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;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

1.498 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. In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;
- there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

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

1.499 Article 21 of the CRC provides special protection in relation to inter-country adoption, seeking to ensure that it is performed in the best interests of the child. Specific protections include that inter-country adoption:

- is authorised only by competent authorities;
- is subject to the same safeguards and standards equivalent to which apply to national adoption; and
- does not result in improper financial gain for those involved.

1.500 The Hague Convention establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that inter-country adoptions are performed in the best interests of the child and with respect for the fundamental rights guaranteed by the CRC. The Hague Convention also assists in combatting the sale of children and human trafficking.

1.501 As noted in the committee's previous analysis of the bill, compliance with the Hague Convention is a critical component of ensuring the protections required by article 21 of the CRC are maintained in any inter-country adoption.[6] The minister has previously acknowledged that whether Australian inter-country adoption arrangements meet Hague Convention standards is relevant to compliance with article 21 of the CRC.[7]

1.502 The committee therefore considers that providing for the registration of children adopted through inter-country adoption proceedings engages and may limit the rights of the child, and in particular the obligation to ensure that inter-country adoption is performed in the best interests of the child.

1.503 As the committee noted in its consideration of the bill (now Act), the limitation potentially arises as the *Australian Citizenship Amendment (Intercountry Adoption) Act* 2014 (the Act) specifies no standards or safeguards that will apply to inter-country adoptions under a bilateral agreement, and it is therefore not clear whether lower standards, or fewer safeguards, may apply to inter-country adoptions under a bilateral agreement than those that apply under the Hague Convention and the framework it sets out to ensure the best interests of the child. Similarly, the committee notes that neither are such standards or safeguards contained in this or other regulations.[8]

1.504 The committee notes the Australian government's previous advice in relation to the bill (now Act), that it only establishes international adoption arrangements with countries which can apply the standards required by the Hague Convention. However, this response did not provide information on how Australia establishes that a country that is not a party to the Hague Convention can nevertheless apply the standards required by that convention. In addition, the response did not explain how Australia confirms the efficacy of child protection measures in countries to which Australia has or proposes to have bilateral relationships which are not party to the Hague Convention. Further, the response does not explain how the Australian government determines its satisfaction that inter-country adoptions will take place in an ethical and responsible way in jurisdictions beyond its control.[9]

1.505 On the basis of this information and the committee's analysis, the committee was of the view that the information provided by the minister was insufficient to

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6 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 140.

7 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 140.

8 See Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 10.

9 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 140-142.

support a conclusion that the bill (now Act) is compatible with article 21 of the CRC. The committee therefore concluded that the bill (now Act) is likely to be incompatible with Australia's international human rights obligations under the CRC.[10] It follows from this analysis that the measure in the regulation which implements the Act is also likely to be incompatible with Australia's obligations under the CRC.

1.506 The committee notes the statement of compatibility provides no further information in respect of these matters in response to this conclusion. Rather, the statement of compatibility asserts that the measure does not engage the rights of the child. It is the committee's usual expectation that where a regulation relates to a bill with which the committee has previously raised concerns, that the regulation is accompanied by a statement of compatibility addressing the issues previously identified by the committee.

1.507 **In accordance with its previous analysis, the committee considers that providing for the registration of children adopted through inter-country adoption proceedings engages and may limit the rights of the child, and in particular the obligation to ensure that inter-country adoption is performed in the best interests of the child under article 21 of the Convention on the Rights of the Child. As set out above, the statement of compatibility does not provide any information to justify that limitation for the purpose of international human rights law. The committee has already concluded that the *Australian Citizenship Amendment (Intercountry Adoption) Act 2014* which the measure in the regulation implements is likely to be incompatible with the rights of the child. The committee therefore seeks the views of the Minister for Immigration and Border Protection as to the compatibility of the measure with the obligation to ensure that inter-country adoption is performed in the child's best interests.**

Disclosure of information

1.508 Section 5.34F of the Migration Regulations permits the Department of Immigration and Border Protection (the department) to disclose certain information to the Australian Federal Police (AFP) and to state and territory police for the purpose of supporting existing powers to cancel a Bridging Visa E. This includes names, addresses, dates of birth, sex and immigration status of Bridging E visa (Class WE) visa (BVE) holders and people subject to a residence determination (community detainees).[11]

1.509 The committee initially examined the regulation implementing these measures in its *Second Report of the 44th Parliament* and requested the further advice of the Minister for Immigration and Border Protection as to the compatibility

10 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 140-143.

11 ES, Attachment B 12.

of the measures with the right to privacy.[12] The committee reported on the minister's response in the *Fourth Report of the 44th Parliament* and sought further advice noting that many of the key safeguards and procedures for implementing the new disclosure powers were to be contained in a Memoranda of Understanding which was to be negotiated with the federal, state and territory police.[13] The committee reported on the minister's response in its *Seventh Report of the 44th Parliament* and noted the minister's commitment to provide the committee with a copy of the Memoranda of Understanding once finalised.[14] On this basis the committee noted it would conclude its examination of the instruments once it had received and considered a copy of the final Memoranda of Understanding.[15]

1.510 Schedule 3 to this current regulation further amends section 5.34F to authorise the disclosure of personal information of BVE visa holders and community detainees to the CrimTrac Agency.

1.511 This regulation also amends section 5.34F of the Migration Regulations to allow the disclosure of a unique identifier to prevent misidentification (the Central Names Index (CNI) Number, an identifier used by the National Automated Fingerprint Identification System) and the disclosure of the departmental Client ID reference number.

Right to privacy

1.512 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 encompasses 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.

1.513 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.

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12 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 124.

13 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (20 March 2013) 75.

14 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 97-98.

15 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 97.

Compatibility of the measure with the right to privacy

1.514 The committee considers that the measures engage and may limit the right to privacy as the measures facilitate the sharing of personal information of BVE visa holders and community detainees with CrimTrac as well as the disclosure of unique identifiers. The statement of compatibility acknowledges that the measures engage and may limit the right to privacy[16] but argues that the measures are compatible with human rights because 'those limitations are reasonable, necessary and proportionate'.[17]

1.515 The statement of compatibility notes that the committee has previously reported on the disclosure powers under section 5.34F of the Migration Regulations and that the further amendments to the regulations only add 'specificity to the previous amendment'.[18] Accordingly, whether the further amendments to section 5.34F of Migration Regulations may be regarded as compatible with the right to privacy will firstly depend on a foundational assessment of whether the disclosure of personal information for BVE holders is compatible with the right to privacy. Measures which limit human rights will be permissible where they address a legitimate objective, where they are rationally connected to that objective and where they are a proportionate means of achieving that objective.

1.516 The committee acknowledges that disclosure requirements in support of the Department of Immigration and Border Protection's compliance activities could be capable of constituting a legitimate objective for the purpose of international human rights law. The committee further acknowledges that minimising the risks associated with misuse of information and misidentification of individuals may also be considered to be a legitimate objective in respect of the further amendments to section 5.34F of the Migration Regulations.[19] However, it is unclear, on the basis of the information provided in the statement of compatibility, whether each of the measures may be regarded as proportionate to these objectives.

1.517 The committee welcomes the advice in the statement of compatibility that the Privacy Commissioner provided a number of suggestions to limit privacy risks as a result of the amendments and that these have been incorporated into the amendments to section 5.34F to this regulation.[20] However, as noted above, the committee had previously concluded that it was unable to complete its foundational assessment of whether the disclosure requirements in section 5.34F were compatible with human rights until it could consider the specific content of the

16 ES, Attachment B.

17 ES, Attachment B 5.

18 ES, Attachment B 3.

19 ES, Attachment B 3.

20 ES, Attachment B 5.

memorandum of understanding which was relied upon by the minister as setting out key safeguards and procedures for implementing disclosure requirements. The minister advised the committee that the memorandum of understanding had not been finalised at that time but committed to providing the committee with a copy setting out the arrangements for information sharing once finalised.[21]

1.518 Similarly, the statement of compatibility to the current regulation relies on the terms of the yet to be finalised memorandum of understanding between the department, federal, state and territory police and CrimTrac to justify the further amendment of the section 5.34F disclosure requirements as a proportionate limitation on the right to privacy. The statement of compatibility explains the memorandum of understanding will set out a range of safeguards in order to prevent the misuse of information:

> The department is in the process of putting in place formal arrangements through a memorandum of understanding with the Police services to cover the disclosure of the specific information and the Minister's expectations about how information will be used. To ensure protection of information, CrimTrac will also sign this single memorandum of understanding for information sharing. Provision of personal information will not commence until memorandum of understanding arrangements have been formally put in place.
>
> Access to this information is only to be undertaken in relation to legitimate law enforcement activities. The memorandum of understanding will specify that lawful access within relevant police organisations is limited to those with a need to know…
>
> The memorandum of understanding will also specify that compliance with information disclosure and storage requirements contained within Commonwealth, State and Territory laws, along with applicable internal governance remain in effect. The memorandum of understanding will address privacy and security requirements and that further dissemination of information not authorised by law is prohibited…
>
> This regulation change ensures that the disclosure is required or authorised by law, ensuring that such disclosures are consistent with the *Privacy Act 1988*.[22]

1.519 The committee notes that many of the arrangements to be set out in the memorandum of understanding are likely to provide important safeguards against the misuse of information and may assist to ensure the proportionality of the disclosure requirements with the right to privacy.

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21 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 98.

22 ES, Attachment B 5.

1.520 Additionally, the arrangements in the proposed memorandum of understanding may provide safeguards in relation to the further amendments to section 5.34F in this current regulation. However, the committee notes that administrative safeguards are generally likely to be less stringent than the protection of statutory processes in guarding against disproportionate limitations on human rights.

1.521 **The committee considers that the further amendments to the disclosure requirements in section 5.34F of the Migration Regulations engage and may limit the right to privacy. The statement of compatibility relies on the terms of a yet to be finalised memorandum of understanding to justify the proportionality of this limitation.**

1.522 **In accordance with its previous conclusions, the committee notes that as many of the key safeguards and procedures for implementing the disclosure powers are to be contained in the relevant memorandum of understanding being negotiated with the federal, state and territory police and CrimTrac, the committee is unable to complete its assessment of whether the amendments to section 5.34F are compatible with human rights until it can consider the specific content of the memorandum of understanding.**

1.523 **Similarly, the committee notes that it previously concluded that it would be unable to complete a foundational assessment of whether the disclosure of personal information for BVE holders was compatible with the right to privacy until it could consider the specific content of the memorandum of understanding.**

1.524 **Noting the minister's previous commitment to provide the committee with a copy of the memorandum of understanding, the committee will conclude its examination of the disclosure powers and the further amendments to those powers in section 5.34F once it has received and considered a copy of this memorandum of understanding. The committee looks forward to receiving a copy of the memorandum of understanding as soon as it is finalised.**

Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 [F2015L00336]

Portfolio: Employment
Authorising legislation: Seafarers Rehabilitation and Compensation Act 1992
Last day to disallow: 13 August 2015

Purpose

1.525 The Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 (the instrument) declares that a certain type of ship which is only engaged in intra-state trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act).

1.526 Currently, the Seafarers Act provides workers compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The effect of the instrument is that workers on ships engaged in intra-state voyages are no longer covered by the Seafarers Act and so will no longer be entitled to compensation under that Act.

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

Background

1.528 In February 2015 the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the bill) was introduced into the House of Representatives. The bill seeks to amend the Seafarers Act to ensure workers on ships engaged in intra-state voyages are not covered by the Seafarers Act (or by specific maritime occupational health and safety legislation).[1] The bill passed the House of Representatives in February 2015 and passed the Senate with amendments on 13 May 2015.

1.529 Both the bill and the instrument have been introduced following a decision of the Full Court of the Federal Court[2] which held that the coverage provisions in the Seafarers Act apply to all seafarers employed by a trading, financial or foreign corporation, including ships engaged in purely intra-state trade.

1.530 The committee commented on this bill in its *Twentieth Report of the 44th Parliament*.[3]

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1 Namely the *Occupational Health and Safety (Maritime Industry) Act 1993*. See also the Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit—Intra-State Trade) Declaration 2015 [F2015L00335] which prescribes ships or vessels only engaged in intra-state trade as non-prescribed ships or units for the purposes of that Act.

2 *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182.

3 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 36.

Alteration of coverage of persons eligible for workers' compensation

1.531 The committee considers that the instrument, in removing ships engaged in intra-state voyages from the coverage of the Seafarers Act and thereby removing an entitlement to compensation for workers injured on such ships, engages and may limit the right to social security.

Right to social security

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

1.533 Specific situations and statuses which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support. It also includes the protection of workers injured in the course of employment.

Compatibility of the measure with the right to social security

1.534 The statement of compatibility states that as the instrument may result in some individuals who have entitlements to workers compensation under the Seafarers Act no longer having this entitlement, this could be said to limit the right to social security. However, the statement of compatibility states that such a limitation is reasonable and proportionate as affected employees will retain entitlements to compensation under state legislation.

1.535 The committee notes that the proposed changes in the instrument appear to be aimed at achieving part of the same outcome as that which would be achieved if the bill were passed by both Houses of Parliament and became law.[4] As the committee noted in its consideration of the bill, to the extent that the state schemes are less generous than the scheme under the Seafarers Act, the measure in the instrument may be regarded as a retrogressive measure. Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to social security. A reduction in compensation available to an injured worker may be a retrogressive measure for human rights purposes. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified. That is, it addresses a legitimate objective, it is rationally connected to that objective and it is a proportionate means of achieving that objective.

4 Noting that the bill would make the changes both retrospective and prospective while the instrument would make the changes prospectively only.

1.536 The statement of compatibility states that the objective of the instrument is to ensure the long-term viability of maritime industry employers and the sustainability of the scheme. While the committee notes that this is likely to 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.

1.537 The statement of compatibility characterises the measure as proportionate on the basis that 'affected employees will retain entitlements to compensation', and noting that every workers' compensation scheme does provide protection and support to injured employees as required by the right to social security.[5] However, the statement of compatibility also states that workers' compensation premiums under the federal scheme are, on average, significantly more expensive than those of the state and territory schemes, which could suggest that those schemes provide for lesser coverage or entitlements. Given this, the committee considers, as with the bill, that specific information on the extent of any differences in levels of coverage and compensation between the scheme under the Seafarers Act and the state and territory schemes is needed to fully assess the proportionality of the measure.

1.538 The committee is notes that its request for this information in relation to the bill has not been provided to the committee before the instrument was introduced.

1.539 **The committee considers that as the instrument excludes ships engaged in intra-state voyages from the Seafarers Act, the instrument engages and may limit the right to social security and may be regarded as a retrogressive measure under international human rights law. As set out above, the statement of compatibility does not provide sufficient information to establish that the measure may be regarded as proportionate to its stated objective, in particular that it is the least rights restrictive way to achieve the stated objective. The committee therefore seeks the advice of the Minister for Employment as to the extent of differences in levels of coverage and compensation between the scheme under the Seafarers Act and state and territory workers' compensation schemes.**

5 Explanatory Statement 4.

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.

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

Portfolio: Attorney-General
Introduced: Senate, 29 October 2014; passed both Houses 2 December 2014

Purpose

2.3 The *Counter-Terrorism Legislation Amendment Bill (No. 1)* 2014 (the bill) sought to amend the *Criminal Code Act 1995* (Criminal Code) to:

- expand the objects of the control order regime to include prevention of the provision of support for, or the facilitation of, a terrorist act or engagement in a hostile activity in a foreign country;
- replace the current requirement for the Australian Federal Police (AFP) to provide all documents to the Attorney-General that will subsequently be provided to the issuing court, with a requirement that the AFP provide the Attorney-General with a draft of the interim control order, information about the person's age and the grounds for the request, when seeking the Attorney-General's consent to apply for a control order;
- permit a senior AFP member to seek the Attorney-General's consent to an interim control order where the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country;
- expand the grounds on which an issuing court can make a control order to include circumstances where the court is satisfied on the balance of probabilities that making the order would substantially assist in preventing the provision of, support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country;
- replace the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied;

- replace the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects in section 104.1 of the Criminal Code with a requirement to be satisfied on the balance of probabilities that 'the control order' (as a whole) to be made or varied 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects; and
- extend the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court.

2.4 Schedule 2 of the bill sought to make a number of amendments to the *Intelligence Security Act 2001* (ISA) including:

- making it a statutory function of the Australian Secret Intelligence Service (ASIS) to provide assistance to the Defence Force in support of military operations, and to cooperate with the Defence Force on intelligence matters;
- enabling the issuing of ministerial authorisations for ASIS to undertake activities in relation to classes of Australian persons, for the purpose of performing this function;
- enabling the Attorney-General to specify classes of Australian persons who are, or who are likely to be, involved in activities that are, or are likely to be, a threat to security, and to give his or her agreement to the making of a ministerial authorisation in relation to any Australian person in that specified class; and
- amending the emergency authorisation powers to enable authorisations by security agency heads (rather than ministerial authorisations) in limited circumstances.

Background

2.5 The committee previously considered the bill in its *Sixteenth Report of the 44th Parliament*.[1] The bill passed both Houses of Parliament on 2 December 2014 and received Royal Assent on 12 December 2014.

2.6 The bill proposed to further amend the control order regime under Division 104 of the Criminal Code. This is in addition to the recent extension and amendment of control orders that was part of the Counter-Terrorism Legislation Amendment

1 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7-21.

(Foreign Fighters) Bill 2014 (Foreign Fighters bill). The committee considered the human rights compatibility of the Foreign Fighters bill in its *Fourteenth Report of the 44th Parliament*.[2] In that report, the committee noted that the control order regime involves very significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without needing to follow the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. The Foreign Fighters bill passed both Houses of Parliament and received Royal Assent on 3 November 2014.

2.7 Essentially, the control order regime under the Criminal Code is coercive in nature. The control order regime grants the Federal Court the power to impose a control order on a person at the request of the AFP with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person the subject of the order.[3]

Committee view on compatibility

Schedule 1

Multiple rights

2.8 The control order regime, and the amendments to that regime proposed by the bill, engage a number of human rights, including:

- right to equality and non-discrimination;[4]
- right to security of the person and freedom from arbitrary detention;[5]
- right to freedom of movement;[6]

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2 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3-69.

3 These include: requiring a person to stay in a certain place at certain times, preventing a person from going to certain places; preventing a person from talking to or associating with certain people; preventing a person from leaving Australia; requiring a person to wear a tracking device; prohibiting access or use specified types of telecommunications, including the internet and telephones; preventing a person from possessing or using specified articles or substances; and preventing a person from carrying out specified activities (including in respect to their work or occupation).

4 Articles 2, 16 and 26, ICCPR. Related provisions are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

5 Article 9, ICCPR.

- right to a fair trial and the presumption of innocence;[7]
- right to privacy;[8]
- right to freedom of expression;[9]
- right to freedom of association;[10]
- right to the protection of family;[11]
- prohibition on torture and cruel, inhuman or degrading treatment;[12]
- right to work;[13] and
- right to social security and an adequate standard of living.[14]

Amendments to the control order regime

2.9 Schedule 1 of the bill proposed significant changes to the control order regime. As the committee noted in its assessment of the Foreign Fighters bill, providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia may properly be regarded as a legitimate objective for the purposes of international human rights law. The committee, however, was concerned that the limits on human rights imposed by the amendments as drafted may not be reasonable, necessary and proportionate.

2.10 As the committee previously noted, these amendments would significantly expand the circumstances in which control orders could be sought against individuals, and significantly alter the purpose of control orders. As a result, control orders are likely to be used more widely and, as such, circumvent ordinary criminal proceedings as set out in paragraph [2.6] above.

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6 Article 12, ICCPR.

7 Article 14, ICCPR.

8 Article 17, ICCPR.

9 Article 19, ICCPR.

10 Article 22, ICCPR.

11 Article 23 and 24, ICCPR.

12 Article 7, ICCPR, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

13 Article 6, International Covenant on Economic, Social and Cultural Rights (ICESCR).

14 Article 9 and 11, ICESCR.

2.11 The current grounds for seeking and issuing a control order, including those introduced by the Foreign Fighters bill, are directed at serious criminal activity (namely, participation in terrorism, terrorist training or hostile activities). The amendments in Schedule 1 of the bill are not attached to any particular criminal offence. By extending the grounds to acts that 'support' or 'facilitate' terrorism, the bill allows a control order to be sought in circumstances where there is not necessarily an imminent threat to personal safety.[15] The protection from imminent threats has been a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes. Further, there are a range of offences that cover preparatory acts to terrorism offences currently prescribed by the Criminal Code, which allow police to detect and prosecute terrorist activities at early stages. Accordingly, the committee considered that the amendments to control orders impose limits on the human rights (set out above at [2.8]) that are neither necessary nor reasonable.

2.12 In addition, currently when requesting the court to make an interim control order under existing sections 104.2(d)(i) and (ii) and 104.3(a) of the Criminal Code, a senior AFP member is required to provide the court with an explanation of 'each' obligation, prohibition and restriction sought to be imposed by the control order as well as information regarding why 'any of those' obligations, prohibitions or restrictions should not be imposed. The amendments in the bill proposed to reduce this obligation by requiring the AFP member to provide an explanation only as to why the proposed obligations, prohibitions or restrictions generally should be imposed and, to the extent known, a statement of facts as to why the proposed obligations, prohibitions or restrictions—as a whole rather than individually—should not be imposed.

2.13 The committee therefore considered that these amendments would result in control orders not being proportionate because they are not appropriately targeted to the specific obligation, prohibition or restriction imposed on a person. As a control order is imposed in the absence of a criminal conviction, it is critical that the individual measures comprising the control order are demonstrated in each individual instance to be proportionate (that is, only as restrictive as is strictly necessary to achieve the stated objective of the measure with respect to imminent threats). As a result, the committee considered that these amendments were not proportionate to the stated legitimate objective.

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15 For example, the Law Council warns in its submission to the PJCIS inquiry into the bill that control orders could be sought against persons to prevent online banking, online media or community and/or religious meetings. See, Law Council of Australia, *Submission 16,* Parliamentary Joint Committee on Intelligence and Security, Inquiry into report on the *Counter-Terrorism Legislation Amendment Bill (No.1) 2014.*

2.14 The committee considered that the amendments in Schedule 1 to the control order regime were likely to be incompatible with the rights set out in paragraph [2.8], and sought the Attorney-General's advice on how the limits it imposes on human rights are reasonable, necessary or proportionate to achieving the legitimate aim of responding to threats of terrorism.

Attorney-General's response

The committee has requested my advice on how the limits imposed on human rights by the amendments to the control order regime in Schedule 1 of the Counter-Terrorism Legislation Amendment Bill (No. 1) (CTLA Bill) are reasonable, necessary and proportionate to achieving the legitimate aim of responding to threats of terrorism. The Australian Federal Police (AFP), in their submission to the inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the CTLA Bill, note that 'individuals engaging in behaviours that support or facilitate terrorism or foreign incursions pose as great a risk as those directly engaging in terrorist acts or foreign incursions'. As such, the legitimate aim of the control order regime, responding to threats of terrorism, must include preventing or disrupting persons who provide critical support to those activities (without whom the terrorist act or hostile activity could not occur). The amendments to the purposes of the control order regime and the grounds for seeking and issuing a control order reflect this assessment.

The amendments do not, however, change the threshold for issuing a control order. A court cannot issue a control order unless satisfied that the obligations, prohibitions and restrictions proposed to be imposed on the person, and which may impose limits on their human rights, are 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. In response to the PJCIS report on the CTLA Bill, the Government amended the CTLA Bill in the Senate to retain the existing requirement in the Criminal Code that the AFP provide an explanation as to why *each* of the proposed obligations, prohibitions and restrictions should be imposed on the person and that the court should be satisfied that *each* obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. This amendment, in addition to responding to the recommendation of the PJCIS, also addresses issues raised by the Committee in paragraphs 1.37 and 1.38 about the proportionality of the limits imposed on a person's human rights.

I note the Committee's assessment of the control order amendments in Schedule 1 of the Bill also raises issues from the Committee's Fourteenth Report of the 44th Parliament in relation to the control order amendments made by the Counter-Terrorism Legislation Amendment (Foreign Fighters)

Bill 2014 (Foreign Fighters Bill). Contrary to the Committee's statement at paragraph 1.28, I would like to reassure the Committee that the PJCIS completed its inquiry into the Foreign Fighters Bill before passage of that Bill.

The Foreign Fighters Bill was referred to the PJCIS on 24 September 2014, the day it was introduced into the Senate. The PJCIS made 37 recommendations in its Advisory Report on the Foreign Fighters Bill tabled in Parliament on 17 October 2014. The Government supported all 37 and introduced amendments in the Senate, as necessary, to implement these recommendations. Specifically, and as noted in my response to the Committee's Fourteenth Report, in implementing the recommendations of the PJCIS, the Foreign Fighters Bill was amended to require the Independent National Security Legislation Monitor (INSLM) to review the entire control order regime by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. Given the urgent requirement to ensure the control order regime can respond to the current threat environment, the Parliament's decision to pass the control order amendments in the Foreign Fighters Bill but also require a comprehensive review of the whole control order regime by both the INSLM and PJCIS, is a responsible balance of protecting both Australia's national security and its human rights obligations. The timing specified for these further reviews will allow for both the INSLM and the PJCIS to consider the operation of the control order regime as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the regime beyond 2018.

The heightened security environment, noted in the decision to raise the National Terrorism Public Alert System to 'high-terrorist attack is likely' in September 2014, and the operational activity undertaken by police following passage of both the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* and the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* has demonstrated the need for law enforcement agencies to have the tools necessary to disrupt terrorist activities and planning.[16]

Committee response

2.15 **The committee thanks the Attorney-General for his response.** The committee welcomes the Attorney-General's advice that amendments were made to the bill following a recommendation of the PJCIS to retain the existing requirement in the Criminal Code that the AFP provide an explanation as to why *each* of the

16 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 11 February 2015) 3-4.

proposed obligations, prohibitions and restrictions of the proposed control order should be imposed and that the court should be satisfied that *each* obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime.

2.16 The committee's central concern with the amendments in Schedule 1 was that the amendments would allow control orders to be imposed on individuals in circumstances that extend to allegations that an individual may 'support' or 'facilitate' terrorism. The committee accepted the legitimate objective of the measures was protecting national security, and further noted the recent raising by ASIO of the current threat level to 'High'.

2.17 The committee nevertheless did not consider that the amendments were likely to be proportionate. As a result of the amendments in this bill, a control order can be sought in circumstances where there is not necessarily an imminent threat to personal safety, as it covers acts that 'support' or 'facilitate' terrorism. Protection from imminent threats of harm has been a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal justice processes.

2.18 In the Attorney-General's response, reference is made to an AFP submission to the inquiry of the PJCIS into this bill, that 'individuals engaging in behaviours that support or facilitate terrorism or foreign incursions pose as great a risk as those directly engaging in terrorist acts or foreign incursions'. The committee accepts that the support or facilitation of terrorism or foreign incursion is a serious offence. However, the Attorney-General's response provides no analysis or evidence as to why control orders, rather than the ordinary criminal law, is necessary to address this threat. Australian law has previously sought to address threats to national security and law and order through the criminal justice system which provides for arrest and charging of individuals planning illegal acts. The committee notes there are a range of offences that cover preparatory acts to terrorism offences currently prescribed by the Criminal Code, which allow police to detect and prosecute terrorist activities at early stages. The Attorney-General's advice provides no additional information or evidence as to why the current approach is not sufficient to deal with these situations.

2.19 **In relation to the preceding legal analysis, some members of the committee considered that the changes to the control order regime in Schedule 1 are necessary and proportionate and are therefore compatible with the human rights identified above.**

2.20 **In relation to the preceding legal analysis, other members of the committee considered that the limits control orders impose on human rights have not been justified, in that there would appear to be other, less rights restrictive, ways to**

achieve the same aim available through the ordinary criminal law (e.g. arrest, charge and remand). Accordingly, those committee members considered that the changes to the control order regime in Schedule 1 are not proportionate and are therefore incompatible with the human rights identified above.

Schedule 2

Right to life

2.21 The right to life is protected by article 6(1) of the 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 by identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

Providing for ASIS to support the Australian Defence Force (ADF)

2.22 The bill provided that ASIS may 'provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters'.

2.23 In its previous analysis the committee noted that military operations are not defined in the bill and accordingly could include all forms of military operations. While ASIS is prohibited by the ISA from planning or undertaking violence against the person by ASIS officers, ASIS is not prohibited by the ISA from assisting the ADF from undertaking such acts or for assisting other nation states to undertake such acts with cooperation from the ADF.

2.24 In this respect, the committee noted that the measures in question are drafted so broadly as to allow ASIS to support the ADF in activities that may include militarily targeting Australians and other persons overseas (including targeted killings as an alternative to arrest and trial).

2.25 The committee therefore considered that this aspect of the bill engages, and may limit, the rights to life and to a fair trial. The committee considered that breadth of the measures is such that the limitation is not proportionate to achieving the legitimate objective.

2.26 The committee therefore sought the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to life, in particular whether the limits imposed on human rights by the amendments are proportionate to achieving the legitimate objective of ensuring Australia's national security.

Attorney-General's response

The Committee has suggested (at paragraph 1.67 of its report) that the ISA may authorise the 'targeted killing' of Australian persons overseas and thereby engage and limit the right to life. It has also asserted that the Statement of Compatibility does not explain the necessity or proportionality of any such limitations. The Government does not accept any suggestion that the ISA engages and limits the right to life. This issue was examined in detail by the PJCIS in its inquiry into the (then) Bill. Consistent with the evidence of AGD [Attorney-General's Department] and agencies to that inquiry, the PJCIS rejected the suggestion that the ISA authorises any agency to engage in, or provide support for, the targeted killing of Australian citizens. The PJCIS stated (at p. 47 of its report):

> *The Committee acknowledges the concerns raised by some submitters that the proposed amendments will facilitate so-called 'targeted killings'. The Committee does not accept this evidence, noting that the proposed amendments do not change the role of ASIS in any way that would enable ASIS to kill, use violence against people, or participate in so-called 'targeted killings'. The Committee also notes that the ADF must abide by its Rules of Engagement at all times during its overseas engagements*.[17]

Subsection 6(4) of the ISA prohibits ASIS staff members or agents from planning for, or undertaking, activities that involve violence against the person. The ordinary meaning of the term 'violence' clearly extends to any targeted killing of an individual.[18] While the note to subsection 6(4) clarifies that this provision does not prevent ASIS from being involved with the planning or undertaking of such activities by other organisations, it is important to note that ASIS's cooperation with other organisations is subject to the limitations in sections 13 and 13A of the ISA, as well as the limitations on the functions and activities of ASIS in sections 11 and 12.

These limitations are additional to the authorisation criteria in section 9 of the ISA, particularly those in subsection 9(1), which require the Minister to be satisfied that the activity or activities will be necessary for the proper performance of the agency's functions, and that there are satisfactory

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17 See also the PJCIS's summary of AGD's and ASIS's evidence at pp. 44-46 of its report (and AGD's and ASIS's submissions to that inquiry-submissions 5, 5.1 and 5.2, and submission 17). The Committee also implied (at paragraph 1.67 of its report) that ASIS could use 'targeted killings' as an alternative to arrest or trial. The Government does not accept this view, as the ADF remains bound by its Rules of Engagement and there is no support for the practice of 'targeted killing' within the ISA.

18 For example, the term 'violence' is defined by the Macquarie Dictionary to cover 'rough or injurious action or treatment': Macquarie Dictionary (Sixth Edition, October 2013).

> arrangements in place to ensure that any activities will not exceed those which are necessary, and the nature and consequences of any such activities will be reasonable.
>
> In addition, in the specific context of ASIS providing support to the ADF in accordance with authorised activities for the proper performance of ASIS's functions under paragraph 6(1)(ba) of the ISA, any use that the ADF may make of intelligence provided by ASIS are governed by the ADF's rules of engagement. These rules are developed in consultation with the Office of International Law within AGD to ensure their consistency with international law, including international humanitarian law.
>
> The amendments enacted by Schedule 2 do not expand the functions of ASIS or any other ISA agency, nor do they change the longstanding prohibition on ASIS participating in violence under subsection 6(4). All that is changed is the method by which the Minister is able to authorise ASIS to undertake activities which relate to their functions.[19]

Committee response

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

Engagement of the right to life

2.28 The committee notes the Attorney-General is of the view that the ISA does not engage or limit the right to life. The committee notes that the ISA provides the legal basis for intelligence sharing between Australian intelligence agencies, the ADF and certain foreign agencies. That information may be used by the ADF and other military agencies in the context of armed conflict or other military activities. Accordingly, the committee is of the view that the ISA does engage and limit the right to life. As noted above, the committee's initial analysis agreed that ASIS itself is prohibited by the ISA from engaging in violence causing death but may nevertheless provide information and intelligence to agencies such as the ADF, that do have the power to use force against the person, including force that may result in the death of an individual. It is on that basis that the committee was of the view that the right to life was engaged and limited.

2.29 This analysis is consistent with analysis prepared by the Attorney-General's Department in analogous situations. The guidance material prepared by the Attorney-General's Department on international human rights law suggests that the right to life may be engaged by mutual assistance in criminal matters legislation:

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19 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 5-6.

if the provision of the assistance may have implications for the imposition of the death penalty in the foreign country.[20]

2.30 In the case of mutual assistance in criminal matters there is no suggestion that Australia would directly be involved in the imposition of the death penalty. Instead the engagement of the right to life is assessed as arising because the information shared by Australia may lead to an individual in another country being tried and convicted of a criminal offence that carries the death penalty. Similarly, in this case the committee considers that the right to life is engaged as information and intelligence shared by ASIS with other agencies may lead to military operations that could lead to a loss of life.

2.31 The committee also notes that its initial analysis was not solely focused on targeted killings, but on the use of information and intelligence provided by ASIS to the ADF and other foreign agencies in the course of military activities. Accordingly, the committee considers that the bill's engagement with the right to life goes beyond the issue of targeted killings and includes the consequences of all military activities that may be undertaken based on intelligence provided by ASIS.

2.32 The committee notes that these issues raised in the initial analysis and the Attorney-General's response engage more broadly with the ISA and not just the specific amendments in Schedule 2 of the bill. In this respect, the committee agrees with the Attorney-General's analysis that amendments enacted by Schedule 2 do not expand the functions of ASIS or any other ISA agency. Instead the bill changed the method by which the minister is able to authorise ASIS to undertake activities which relate to their functions. Nevertheless, noting that the ISA has never been subject to a human rights assessment,[21] the committee considers that an examination of ISA provisions is necessary in so far as they relate to the amendments in the bill that need to be examined by this committee.

Information shared by ASIS to the ADF

2.33 In relation to information shared by ASIS to the ADF, the response notes that the ADF must abide by its rules of engagement. The response states that the rules of engagement are 'developed in consultation with the Office of International Law within AGD to ensure their consistency with international law, including international humanitarian law'. The committee notes that international humanitarian law (IHL) only applies in the context of armed conflict and that Australia's military

20 Attorney-General's Department, List Of Guidance Sheets And Policy Triggers available at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/PolicyTriggers.pdf.

21 ISA predates the establishment of this committee.

engagements overseas are broad and not confined exclusively to situations of active armed conflict. In addition, IHL does not contain the same level of human rights protections as that contained in international human rights treaties, as detailed below. It is unclear from the response how information and intelligence on Australian's activities overseas is managed and shared in a manner consistent with Australia's international human rights obligations.

2.34 As set out above, the right to life is protected by international human rights law which prohibits arbitrary killing and requires that force be used as a matter of last resort.[22] The use of deadly force can be lawful only if it is strictly necessary and proportionate, aimed at preventing an immediate threat to life and there is no other means of preventing the threat from materialising.[23]

2.35 In contrast, IHL is structured to serve as a floor, delineating a minimum standard of conduct. IHL does not, however, impose many of the positive human rights obligations guaranteed by the international human rights law. For example, the positive duty to investigate, as an aspect of the right to life under international human rights law, applies to all deaths where the state is involved. By contrast IHL is more circumscribed and requires only that governments investigate alleged or suspected war crimes.

2.36 In a situation of armed conflict, the prohibition on arbitrary killing continues to apply, but the question whether a killing is arbitrary is generally determined by applying the rules of IHL. Adopting a list of pre-identified individual military targets is not necessarily unlawful under IHL, provided it is based upon reliable intelligence and the targets selected are members of a State's armed forces, have a continuous combat function or directly participate in hostilities. The principle of proportionality applies, prohibiting 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. Avoiding excessive losses requires taking 'all feasible precautions to prevent or minimize incidental loss of civilian lives and information-gathering relating to possible civilian casualties and military gains'.[24]

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22 See, for example, Christ of Heyns, Extrajudicial, summary or arbitrary executions, UN GAOR, 69th sess, Agenda Item 69(b) of the provisional agenda, UN Doc A/69/265 (6 August 2014) [24].

23 Ben Emmerson, *Promotion and protection of human rights and fundamental freedoms while countering terrorism,* UN GAOR, 68th sess, Agenda Item 69(b) of the provisional agenda, UN Doc A/68/389 (18 September 2013) [60].

24 ICRC, Customary International Humanitarian Law, available from www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14.

2.37 The committee acknowledges that the extent to which international human rights law fully applies in the context of armed conflict is not settled as a matter of international law. The committee also notes that it is no longer accepted that human rights obligations do not apply to an army acting in an overseas operations. Rather, an army acting overseas will have obligations under international human rights law where they are exercising jurisdiction or 'effective control'. What constitutes 'jurisdiction' or 'effective control' has been the subject of continuing development through international jurisprudence. Jurisdiction is important as it determines the extent to which soldiers 'take with them' the obligations of international human rights law that apply in their country to country of the operation.

2.38 In the case of *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715, the English High Court found that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) applies to situations where Iraqi civilians were shot during security operations conducted by British soldiers. This follows the earlier case of *Al - Skeini v United Kingdom* in which the European Court of Human Rights issued a landmark judgment on the extraterritorial application of the ECHR and the duty to investigate deaths caused by British soldiers in Iraq as an aspect of the right to life.

2.39 The committee notes that these cases are not binding on Australia. Nevertheless the committee notes that international jurisprudence is developing in a manner which is increasing the application of international human rights law to overseas military operations. The development of this jurisprudence is relevant to considerations of Australia's military actions overseas and Australia's obligations under international human rights law.

Information shared by ASIS to overseas agencies

2.40 The committee notes that the response does not explain how Australia ensures that intelligence shared by ASIS will only be used by third parties in a manner that is consistent with Australia's human rights obligations. Whilst this issue is not specifically addressed in the Attorney-General's response it is relevant in analysing the conclusion in that response that the ISA does not engage the right to life.

2.41 Under section 13 of the ISA a security agency, including ASIS may cooperate with:

> ….(c) authorities of other countries approved by the Minister as being capable of assisting the agency in the performance of its functions;
>
> so far as is necessary for the agency to perform its functions, or so far as facilitates the performance by the agency of its functions.

2.42 In addition, under section 11 (2AA):

> An agency may communicate incidentally obtained intelligence to appropriate …. authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:
>
> (a) activities that present a significant risk to a person's safety;
>
> (b) acting for, or on behalf of, a foreign power;
>
> (c) activities that are a threat to security;
>
> (d) activities related to the proliferation of weapons of mass destruction…..;
>
> (e) committing a serious crime.

2.43 The committee notes that the activities and functions of ASIS are subject to a number of safeguards including ministerial oversight and authorisation. However, there is no information in the statement of compatibility or the Attorney-General's response to support a conclusion that the ISA does not engage the right to life. The committee considers that sharing information with foreign governments who could potentially then act on this information, including through the use of lethal force, clearly engages the right to life.

2.44 The committee considers that the ISA engages and limits the right to life. This is because the ISA provides the legal basis for intelligence sharing between Australian intelligence agencies, the Australian Defence Force and certain foreign agencies. That information may be used by the Australian Defence Force and other military agencies in the context of armed conflict or other military activities. As the Attorney-General is of the view that the ISA does not engage and limit the right to life, no analysis is provided as to how the limitation on the right to life is nevertheless necessary and proportionate.

2.45 **In relation to the preceding legal analysis, some members of the committee considered that the ISA is a necessary and proportionate measure and is therefore compatible with the right to life.**

2.46 **In relation to the preceding legal analysis, other members of the committee considered that the ISA may be incompatible with the right to life.**

Right to privacy

2.47 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

2.48 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.

Providing for ASIS to support the Australian Defence Force (ADF)

2.49 The bill would make it a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters. This includes using a range of covert surveillance powers available to ASIS under ISA.

2.50 The committee noted that the statement of compatibility asserted, without explaining, the necessity of these amendments.

2.51 The committee sought the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to privacy and, in particular why the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.

Attorney-General's response

> The amendments in Schedule 2 to the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (CTLA Act) concerning the *Intelligence Services Act 2001* (ISA) relate to the gathering of intelligence in relation to Australian persons overseas. To the extent that such activities could limit the right to privacy, the amendments are permissible limitations because they are necessary and proportionate to addressing the national security concerns and pressing operational requirements faced by the Australian Secret Intelligence Service (ASIS) and the Australian Defence Force (ADF).
>
> In particular, new paragraph 6(1)(ba) of the ISA makes explicit that it is a function of ASIS to provide assistance to the ADF in support of military operations. The express recognition of this function will ensure appropriate transparency and will facilitate the authorisation process for ASIS to provide such support in time critical circumstances.
>
> As noted at paragraph 9 of the Explanatory Memorandum, ASIS intelligence has proved invaluable to ADF operations in the past, pursuant to its general statutory functions under paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA:
>
> > *ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces.*
>
> The necessity of the measures in Schedule 2 to the CTLA Act, to deal with the nature of current ADF operations in Iraq (and potential future

operations of similar character), was considered in detail by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its advisory report on the (then) Bill, tabled on 20 November 2014.

In its submission to the PJCIS, ASIS indicated (at p. 7):

> *In light of the rapidly changing and dangerous environment faced by the ADF in undertaking operations against the ISIL terrorist organisation in Iraq, as well as the wider threat posed by organisations such as ISIL*[Islamic State of Iraq and the Levant terrorist organisation]*, the proposed changes would position ASIS well to provide timely assistance to the ADF, minimise loss of life and to assist others in responding to the threat.*

It also noted (at p. 4):

> *Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL.*.

The PJCIS accepted the evidence of ASIS, Attorney-General's Department (AGD) and the Australian Security Intelligence Organisation (ASIO) that new paragraph 6(1)(ba) – together with the ability of the Foreign Minister to issue class authorisations in relation to such activities under paragraphs 8(1)(a)(ia) and (ib) and subsection 9(1A) - is necessary to ensure that ASIS can provide support to the ADF in such operations in a timely way. The PJCIS concluded, at p. 47 of its report:

> *The Committee supports the proposed amendments to the IS Act to explicitly provide for ASIS support to ADF military operations and to enable ASIS to support these operations with greater agility. The Committee recognises that the situation in Iraq, where it is known that there are a large number of Australians either fighting for or providing support to terrorist organisations, has significant implications for the ADF*.[25]

Any engagement of the right to privacy is proportionate to the legitimate security objective to which the measures are directed. AGD and agencies gave evidence of the extensive, applicable safeguards to the PJCIS, which concluded that these measures are appropriate. In particular, before authorising ASIS support for ADF operations, the Minister must be satisfied under subsection 9(1) that there are satisfactory arrangements in place to

25 Further analysis of the need for a class authorisation power in relation to ASIS's activities in support of the ADF is documented extensively in the PJCIS's advisory report at pp. 30-32 and pp. 47-48. The PJCIS accepted the evidence of ASIS (submission 17), AGD (submissions 5, 5.1 and 5.2) and ASIO (submission 10) on this issue. The Committee may wish to consult this evidence.

ensure that ASIS only engages in activities relating to its statutory functions and that the nature and consequences of those activities are reasonable. The PJCIS acknowledged (at pp. 41-42) the evidence of AGD and agencies that the consideration of privacy impacts of a proposed activity or activities forms part of the authorisation criteria under this provision.

In addition, under subsection 9(1A), the Minister can only issue an authorisation if satisfied that the Australian person or class of Australian persons is, or is likely to be, involved in one or more of the activities set out in paragraph 9(1A)(a), which includes activities that are or, are likely to be, a threat to security, per subparagraph 9(1A)(a)(iii). The term 'security' is defined in subsection 9(7) by reference to the meaning of that term under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). These requirements ensure that Ministerial authorisations are limited to the collection of intelligence in relation to activities that are of a serious nature.

Further, ASIS is subject to privacy rules made by the Foreign Minister under section 15 of the ISA, which regulate the communication and retention of intelligence information concerning Australian persons.[26] ASIS's activities in requesting and undertaking activities in accordance with a Ministerial authorisation issued under section 9 of the ISA are also subject to the independent oversight of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Subsection 10A of the ISA further requires ASIS to provide reports to the Minister on activities undertaken in accordance with an authorisation issued under section 9 within three months of the authorisation ceasing to have effect or being renewed. The PJCIS concluded that these measures are appropriate.

The conclusions of the PJCIS support the Government's view that these measures are necessary and proportionate.[27]

Committee response

2.52 **The committee thanks the Attorney-General for his response. On the basis of the information provided, and having regard to the terms of the ISA and the Australian Secret Intelligence Service Privacy Rules, the committee has concluded**

26 These rules are publicly available on ASIS's website: http://www.asis.gov.au/Privacy-rules.html.

27 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 1-3.

its examination of this aspect of the bill and concludes it is likely to be compatible with the right to privacy.

Right to an effective remedy

2.53 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 appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

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

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

Legal immunities provided to ASIS

2.56 Under section 14 of the ISA, intelligence agencies and their staff and agents are covered by an immunity from civil and criminal liability in the course of their duties. The bill would make it a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the Defence Force on intelligence matters. This immunity would extend to activities undertaken pursuant to this new statutory function. This includes using a range of covert surveillance powers available to ASIS under the ISA.

2.57 The statement of compatibility acknowledges that the bill may be considered to engage the right to an effective remedy.

2.58 For the reasons set out above at [2.28]-[2.39] in relation to the right to life, the committee did not consider that the analysis provided in the statement of compatibility and EM has demonstrated that the amendments are necessary.

2.59 The committee sought the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to an effective remedy, in particular why the limits imposed on human rights by the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.

Attorney-General's response

Section 14 of the ISA may impact upon the right to an effective remedy to the extent that it provides members or agents of an ISA agency with an immunity from civil or criminal liability in relation to activities undertaken in the proper performance of their agency's functions. Such activities cannot be the subject of prosecution or civil action in Australia.

The amendments made by Schedule 2 to the CTLA Act do not change the application of section 14 to activities carried out by ASIS, in accordance with a Ministerial authorisation, to support the ADF in a military operation. Contrary to the Committee's suggestion (at pp. 15-16 of its report), the amendments do not confer upon ASIS a "new" statutory function, but rather make explicit that the functions of ASIS include the provision of assistance to the ADF in support of a military operation. As such, the immunity under section 14 has always applied to ASIS's activities in support of the ADF under its functions in paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA. The enactment of an explicit statutory function in paragraph 6(1)(ba) does not change the activities which attract immunity under section 14.

Nonetheless, the Committee has asked why an immunity from legal liability is necessary for staff members and agents of ASIS when undertaking authorised activities for the purpose of providing assistance to the ADF in support of a military operation (at p. 16). Without such an immunity, ASIS could not gain close access to relevant targets, as such access could itself constitute an offence. (For example, associating with a member of a terrorist organisation, or participating in training with a terrorist organisation are offences against Part 5.3 of the *Criminal Code 1995*. Security offences such as the terrorism-specific offences in Part 5.3 of the Criminal Code are of particular relevance in the context of the ADF's current operations against the ISIL terrorist organisation in Iraq, given that this organisation is a listed terrorist organisation under Division 102 of the Criminal Code.) The protection from legal liability conferred by section 14 is therefore essential to ensure that ASIS can provide assistance to the ADF without being exposed to legal liability that would otherwise preclude it from collecting critical intelligence (notwithstanding the existence of a Ministerial authorisation to do so, following receipt of a written request for ASIS's support from the Defence Minister under paragraph 9(1)(d), as well as the agreement of the Attorney-General in accordance with paragraph 9(1A)(b)).

There are also extensive legislative safeguards to ensure that the scope of the legal protection conferred by section 14 is proportionate to the nature of the activities carried out by the relevant staff member or agent of the agency. Section 14 applies only to the actions of an ISA employee or agent

undertaken in the course of the proper performance of their agency's functions.

Activities to produce intelligence on, or which will, or are likely to, have a direct effect on an Australian person undertaken in support of the ADF must be specifically authorised under section 9. In order to issue an authorisation, the Minister must be satisfied that the activity is necessary for the proper performance by ASIS of its functions. The Minister must be further satisfied that satisfactory arrangements are in place to ensure that the activity does not extend beyond what is necessary for the proper performance by the agency of its functions, and that satisfactory arrangements are in place to ensure that the consequences of the proposed activities are reasonable.

The actions of a staff member or an agent of an ISA agency are also subject to independent oversight by the Inspector-General of Intelligence and Security under the IGIS Act. Under subsection 14(2B) of the ISA, the IGIS may give a written certificate, certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency. Subsection 14(2C) provides that such a certificate is prima facie evidence of the relevant facts in any proceeding.[28]

Committee response

2.60 **The committee thanks the Attorney-General for his response.** The committee agrees that the immunities from criminal and civil prosecution have the legitimate objective of enabling ASIS to undertake activities in the furtherance of Australia's national security. The committee agrees that the immunities are rationally connected to that objective as the immunities enable ASIS officers and contractors to legitimately engage with terrorist organisations in circumstances where such engagement may otherwise be an offence under Australian law.

2.61 However, the committee remains of the view that the immunities may not be proportionate to the right to an effective remedy. The response suggests that the immunities are 'essential to ensure that ASIS can provide assistance to the ADF.' The committee notes, however, that the immunities in section 14 of the ISA extend to any act done outside Australia if the act is done in the proper performance of a function of the agency. In contrast, activities conducted by ASIO and the AFP within Australia are covered by immunities if those activities are covered by a special intelligence operation (SIO) or a controlled operations scheme (COS).[29] There is no

28 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 3-4.

29 See Report 16 for more information.

blanket immunity provided to officers of those agencies in the course of the proper performance of their duties. The process of authorising a SIO or COS requires the authorising officer (including the minister as appropriate) to turn their minds not just to the necessity of the particular covert operation but the necessity for the immunities that will apply as a result of the authorisation of that operation. That process does not occur with respect to ASIS operations as all activities are covered by immunities.

2.62 Whilst the response does set out the importance of ministerial authorisation as a safeguard and the role of the IGIS in reviewing ASIS actions after the event, the response does not explain why a blanket immunity should be provided for all actions of ASIS properly performed and not just when specific operations require that immunity. In the absence of this information the committee is unable to conclude that the immunities in section 14 of the ISA are proportionate to the right to an effective remedy.

2.63 The committee considers that the immunities engage and limit the right to an effective remedy. The information provided in the statement of compatibility and the Attorney-General's response has demonstrated that the immunities pursue the legitimate objective of national security and are rationally connected to that objective. However, insufficient information has been provided to conclude that the immunities are nevertheless proportionate.

2.64 **In relation to the preceding legal analysis, some members of the committee considered that the immunities in section 14 of the ISA are necessary and proportionate and are therefore compatible with the right to an effective remedy.**

2.65 **In relation to the preceding legal analysis, other members of the committee considered that the immunities in section 14 of the ISA may be incompatible with the right to an effective remedy.**

Right to equality and non-discrimination

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

2.67 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.

2.68 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[30] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[31] 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.[32]

Authorising ASIS to provide information on a 'class of Australians'

2.69 Schedule 2 of the bill would amend the ISA to enable the Minister for Foreign Affairs to give an authorisation to ASIS to undertake activities for a purpose which includes producing intelligence on a specified class of Australian persons or to undertake activities that will, or is likely to, have a direct effect on a specified class of Australian persons. This class authorisation would only apply in relation to ASIS support to the ADF following a request from the Minister for Defence.

2.70 The committee notes that the statement of compatibility did not separately identify this measure as engaging human rights and therefore did not explain why it is necessary in pursuit of a legitimate objective.

2.71 As a result of these proposed amendments ASIS would be able to collect intelligence on an Australian person, including using surveillance techniques on that person, simply because that person belongs to a specified class. The committee is concerned that in the absence of detailed legislative criteria for the determination of a class of persons, a class of persons may include, for example, all Australian persons:

- adhering to certain religious beliefs;
- adhering to certain political or ideological beliefs; or
- who have certain ethnic backgrounds.

30 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.

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

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

2.72 While the committee acknowledged that there are a number of safeguards in the ISA,[33] the committee considered that a class authorisation power has the potential to apply intrusive interrogation powers to a group, which do not apply to the broader community and as such could be indirectly discriminatory because, although neutral on its face, it disproportionately affects people with a particular personal attribute such as religious or political belief, or ethnic background.

2.73 The committee sought the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to equality and non-discrimination, in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, and are proportionate to achieving that objective.

Attorney-General's response

> The amendments in Schedule 2 to the ISA allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation. The Committee has suggested (at paragraph 1.75 of its report) that these amendments may allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or directly affecting, a class of persons in a way that is directly or indirectly discriminatory. This suggestion is incorrect.
>
> I refer the Committee to the PJCIS's Advisory Report on the Bill (now Act) as tabled on 20 November 2014. The PJCIS accepted the evidence of AGD and agencies that the amendments will not permit direct or indirect discrimination against classes of persons. (For example, the amendments will not permit authorisations to be issued for ASIS to undertake activities in support of the ADF in relation to a class of Australian persons, where that class is defined by reference to persons' racial or religious affiliation). As the PJCIS acknowledged, there are four main limitations which prevent the class authorisation power from being exercised in a discriminatory fashion (at pp. 36-37 of that Committee's report):
>
> > *First, the Defence Minister must request the authorisation in writing and will set out in this request the class of Australian persons for whom ASIS's assistance is sought in relation to a specified ADF military operation.*

33 For example, the Minister must be satisfied of the preconditions set out in subsection 9(1) of the ISA. The Minister must also be satisfied that: the class relates to support to the Defence Force in military operations as requested by the Defence Minister; and all persons in the class of Australian persons is, or is likely to be, involved in one or more of the activities set out in paragraph 9(1A)(a).

> *Secondly, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied... Further, the Minister must be satisfied that the particular activities of a class of person in relation to whom the authorisation is sought fall within one or more of the activities prescribed in paragraph 9(1A)(a).*
>
> *Thirdly, the agreement of the Attorney-General is required in relation to a class of Australian persons before an authorisation is issued... The Attorney-General's Department noted that at this point, the proposed class of Australian persons will have been scrutinised by three Ministers.*
>
> *Fourthly, a class cannot include anyone who is not engaged in the specified activity or activities.*[34]

These limitations illustrate that classes of Australian persons who are the subject of an authorisation must be defined by reference to the action they have engaged in as prescribed in paragraph 9(1A)(a). The actions in that paragraph do not, in any way, relate to a person's religious, ethnic or ideological status or persuasion. Hence, there is no permissible means by which subsection 9(1A) could enable direct or indirect discrimination because its sole focus is on a person's engagement, or likely engagement, in the activities specified in paragraph 9(1A)(a). As the PJCIS acknowledged, when ASIS assistance is provided to the ADF in support of military operations, the relevant limb of the activity test in paragraph 9(1A)(a) will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security. There is no reasonable basis upon which to draw or infer a connection between a person's racial, religious or ideological status or persuasion and their engagement or likely engagement in activities that are, or are likely to be, a threat to security.

Further, ASIS's actions in requesting a Ministerial authorisation in relation to a class of Australian persons pursuant to its functions under paragraph 6(1)(ba), and in undertaking activities in reliance on that authorisation (including the identification of individual Australian persons within the relevant class), are subject to the independent oversight of the IGIS under the IGIS Act. ASIS must also provide reports to the Minister under section IOA within three months of the authorisation ceasing to have effect or being renewed.[35]

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34 See further: Attorney General's Department, Supplementary Submission 5.1 to the PJCIS at 4-5.

35 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 6-7.

Committee response

2.74 **The committee thanks the Attorney-General for his response.** The committee considers that the response demonstrates clearly that the amendments to the ISA to allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation are not directly discriminatory.

2.75 The committee notes that discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Where a measure impacts on particular groups disproportionality, it establishes prima facie that there may be indirect discrimination.

2.76 The Attorney-General's response states that when ASIS assistance is provided to the ADF in support of military operations, the relevant limb of the activity test in paragraph 9(1A)(a) will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security. Accordingly, the test for a class of individuals is not confined to those who are '*engaged in the specified activity or activities*.' It may include individuals, who on the subjective assessment of ASIS, are likely to be involved in the specified activity or activities. This includes assessments of likely associations and connections.

2.77 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if it pursues a legitimate objective, the measure is rationally connect to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. The Attorney-General's response does not acknowledge the potential for the provisions to be indirectly discriminatory and accordingly does not seek to justify the limitation on the right to equality and non-discrimination. However, the committee nevertheless considers that the potential disproportionate impact on particular groups may have been capable of justification as compatible with the right to equality and non-discrimination. Of particular relevance is that the criteria for the determination of a class of Australians under the provisions are based on objective grounds.

2.78 **The committee considers that the response demonstrates clearly that the amendments to the ISA to allow the Minister for Foreign Affairs to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation, are not directly discriminatory. In terms of indirect discrimination, the provisions may have a disproportionate impact on certain groups of individuals. Where a measure impacts on particular groups disproportionately, it establishes**

prima facie that there may be indirect discrimination. However, as noted above, even where provisions impact on particular groups disproportionately, this may be justifiable under international human rights law. The committee notes that the determination of a class of Australians is based on objective grounds and, accordingly, the provisions are capable of being justified as compatible with the right to equality and non-discrimination.

Prohibition against torture, cruel, inhuman or degrading treatment

2.79 Article 7 of the ICCPR and the Convention against Torture (CAT) provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering. Prolonged solitary confinement, indefinite detention without charge, corporal punishment, and medical or scientific experiment without the free consent of the patient, have all been found to breach the prohibition on torture or cruel, inhuman or degrading treatment.

2.80 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely;
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

Providing for ASIS to support the ADF

2.81 The amendments proposed in Schedule 2 raise broader issues in relation to the ISA and in particular the lack of a specific prohibition on acts that may constitute torture or cruel, inhuman or degrading treatment.

2.82 Under the ISA, ASIS staff are not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.[36] ASIS staff also have civil and criminal immunity in certain circumstances for acts done inside Australia.[37] ASIS staff may be involved in a range

36 Section 14 (1) of the *Intelligence Service Act 2001*.

37 Section 14 (2) of the *Intelligence Service Act 2001*.

of intelligence gathering activities so long as they do not involve planning for, or undertaking paramilitary activities; violence against the person; or the use of weapons (other than the provision and use of weapons or self-defence techniques). However, torture or cruel, inhuman or degrading practices, is not specifically mentioned. A range of techniques may constitute torture or cruel, inhuman or degrading practices, that do not fall within the prohibition of violence against the person. This may include, for example, death threats, hooding, stress positions or deprivation or food or water.

2.83 In addition, the prohibition on ASIS staff undertaking acts that involve violence against the person; or the use of weapons; or planning for or undertaking paramilitary activities, does not preclude ASIS staff being involved in the planning of the activities to be carried out by other organisations.

2.84 Australia's obligation to prohibit torture is absolute. Accordingly, to comply with Australia's obligations under the ICCPR and CAT, when providing for civil and criminal immunities for acts done by ASIS, there should be a clear and explicit prohibition on acts or support for torture or cruel, inhuman or degrading treatment or punishment.

2.85 The committee recommended that, to be compatible with human rights, the ISA be amended to explicitly provide that no civil or criminal immunity will apply to acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.

Attorney-General's response

> Consistent with the conclusions of the PJCIS on this matter in its advisory report on the (then) Bill,[38] there is no intention to amend the ISA in the manner recommended by the Committee.
>
> The Committee appears to assume that the limited protection from legal liability in section 14 of the ISA must expressly exclude conduct constituting torture, or cruel, inhuman or degrading treatment or punishment in order to be compatible with Australia's obligations under the Convention Against Torture. Any express exclusion is, however, not required. The ISA does not, under any circumstances, authorise an agency to engage in such conduct, nor provide any immunity for such conduct. Accordingly, any activities undertaken by a staff member or an agent of an ISA agency that constitute torture or cruel, inhuman or degrading

38 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (November 2014) 47 at [3.67]. See also Attorney-General's Department, Supplementary Submission 5.2 to the PJCIS inquiry 3-4.

treatment or punishment are subject to criminal liability, including under the torture offences in Division 274 of the *Criminal Code 1995*.

The ISA expressly provides that agencies can only undertake activities for the purpose of the proper performance of their statutory functions, and cannot undertake activities that are not necessary for that purpose (per section 12). The relevant responsible Minister can only provide authorisations for agencies to engage in relevant activities where he or she is satisfied of the following requirements under subsection 9(1):

- the activities are necessary for the proper performance of a function of the agency;
- there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for the proper performance of a function of the agency; and
- there are satisfactory arrangements in place to ensure that the nature and consequences of the acts undertaken in reliance on the authorisation will be reasonable, having regard to the purpose for which they are carried out.

Further, the protection from legal liability in section 14 is expressly confined to staff members or agents of an agency who undertake acts in the proper performance of the agency's functions.

As the PJCIS acknowledged in its advisory report on the (then) Bill (at p. 47) and as expressly identified in the Explanatory Memorandum (at p. 29), there can be no sensible suggestion that conduct constituting torture or cruel, inhuman or degrading treatment or punishment is necessary for - or even relevant to - the proper performance of the relevant agencies' functions under the ISA. Such an interpretation is plainly contradicted by the ordinary meaning of the term 'proper' in relation to the performance

of agencies' functions,[39] and the text and wider context of the ISA-having particular regard to the nature of agencies' functions under sections 6, 6B and 7.[40]

Rather, by limiting the scope of agencies' functions and activities (and the attendant protection from legal liability) to acts that are necessary for the proper performance of an agency's functions, the ISA evinces a clear intention that conduct constituting torture or cruel, inhuman or degrading treatment is subject to criminal and civil liability. This includes liability under the specific offences in relation to torture in Division 274 of the

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39 For example, the Macquarie Dictionary (Sixth Edition, October 2013) defines the term 'proper' as meaning "conforming to established standards of behaviour or manners; correct or decorous". In addition, in the unlikely event that the meaning of the phrase 'proper performance of the agency's functions' was considered to be ambiguous *vis a vis* torture, this would engage the presumption that legislation is to be interpreted consistently with Australia's human rights obligations: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 1983 CLR 273 at p. 287 (per Mason CJ and Deane J). There is nothing in the text of the provisions of the ISA concerning the functions of agencies, nor evident in the wider context of the ISA, to suggest that Parliament intended the ISA should be read inconsistently with Australia's international obligations to prohibit torture, including those under the Convention Against Torture. (Such a presumption is additional to the ability to consult extrinsic materials to the legislation in accordance with section 15AB of the *Acts Interpretation Act*. Relevant extrinsic materials include the Explanatory Memorandum to the Bill, which makes specific reference to this matter at p. 29.)

40 Further, the ISA is, like all Australian legislation, subject to the presumption of statutory interpretation that the Parliament did not intend to abrogate fundamental common law rights - including the fundamental and long-established rights to personal inviolability and personal liberty - in the absence of a clear intention on the face of the relevant legislation to displace this presumption. (See, for example: *'Marion's Case'* (1992) 175 CLR 218 at 253 per Mason CJ, Dawson, Toohey and Gaudron JJ concerning personal inviolability; and *R v Bolton; Ex Parte Bean* (1987) 162 CLR 514 at 523 per Brennan CJ concerning personal liberty.) The content of such fundamental rights includes conduct of the kind constituting torture and cruel, inhuman or degrading treatment or punishment, recognising that it is a significant incursion into the integrity and autonomy of a person's physical and mental state. In order for the ISA to be interpreted as abrogating these rights, it would be necessary to identify unambiguous and unmistakable language giving effect to this intention - noting that the more serious the interference, the clearer the requisite expression of intention must be: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 263 (per Black CJ, Sundberg and Weinberg JJ). There is no evidence of such a clear intention on the face of the ISA. There is no inconsistency between these fundamental common law rights (to the extent that they cover conduct constituting torture or cruel, inhuman or degrading treatment or punishment) and the statutory functions or activities of agencies prescribed under the ISA; nor the limited immunity in section 14 for actions done in the proper performance of an agency's functions.

Criminal Code, which give domestic legal effect to Australia's international obligations under the Convention Against Torture. The amendments to the ISA, enacted by Schedule 2 to the CTLA Act, do not change this position in any way.

Secondly, as the PJCIS further observed, paragraph 6(4)(b) of the ISA confers an additional safeguard in relation to the conduct of activities by ASIS in recognition of its role as a human intelligence collection agency. This provision prohibits ASIS from planning for, or undertaking, activities that involve violence against the person. The Committee has asserted (at p. 20 of its report) that the term 'violence' has a narrower meaning than conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. This is contradicted by the ordinary meaning of the term 'violence'. For example, the Macquarie Dictionary defines the term as encompassing "rough or injurious action or treatment",[41] which would clearly extend to the conduct identified by the Committee at page 20 of its report. This ordinary meaning is also confirmed by the Explanatory Memorandum (at p. 29). As conduct constituting torture or other cruel, inhuman or degrading treatment or punishment is outside the proper performance of all ISA agencies' functions, it necessarily falls outside the scope of the limited protection from legal liability in section 14. Accordingly, such conduct is already subject to criminal offences under Australian law, including specific offences in respect of torture in Division 274 of the Criminal Code. An express exclusion of such conduct under section 14 is, therefore, not necessary to give substantive effect to Australia's obligations under the Convention Against Torture. Further, as the PJCIS recognised, the insertion in section 14 of an express statutory exclusion of conduct that is not, in any case, within the scope of the immunity may also have unintended, adverse consequences for the interpretation of that provision (and potentially for the interpretation of agencies' functions). Accordingly, the Government has no intention to implement this recommendation.[42]

Committee response

2.86 **The committee thanks the Attorney-General for his response.** The committee notes that the Attorney-General relies in part on the principle of legality in support of an argument that acts constituting torture, cruel, inhuman or degrading treatment could not be authorised as a matter of law. As set out in the committee's *Sixteenth Report of the 44th Parliament* in relation to the *National Security Legislation*

41 Macquarie Dictionary (Sixth Edition, October 2013).

42 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 8-10.

Amendment No 1 Bill 2014 the committee disagrees with this analysis for the reasons set out in that report.

2.87 The committee further notes that the response explains that there can be no suggestion 'that conduct constituting torture or cruel, inhuman or degrading treatment or punishment is necessary for - or even relevant to - the proper performance of the relevant agencies' functions under the ISA.' The committee does not suggest that a minister would directly authorise an action by an ASIS officer or agent that would constitute torture or cruel, inhuman or degrading treatment.

2.88 However, the committee notes that ASIS officers are required to undertake a broad range of intelligence activities including counter-intelligence activities. The committee notes that Australia's obligations under the CAT are not limited to prohibiting acts of torture. Australia also has responsibility where persons acting in an official capacity acquiesce while others commit acts constituting torture under the CAT. It is not beyond imagination that during a counter-intelligence operation an official may have to turn a blind eye to acts of violence, and cruel, unusual and degrading treatment committed by others.

2.89 The committee further notes that under article 14 of the CAT Australia must ensure that victims of torture (or their dependents) have the ability to obtain civil redress. The response does not suggest how the immunities are consistent with this obligation. The response asserts that the committee's recommendation would have 'unintended adverse consequences' but does not explain those consequences.

2.90 **Accordingly, the committee reiterates its recommendation that, to be compatible with human rights, the ISA be amended to explicitly provide that no civil or criminal immunity will apply to acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.**

Prohibition against torture, cruel, inhuman or degrading treatment

2.91 The committee also recommended that, to be compatible with human rights, the ISA be amended to explicitly provide that ASIS must not provide any planning, support or intelligence where it may result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.

Attorney-General's response

> The Committee has correctly identified that the prohibitions and limitations in subsection 6(4) of the ISA do not prohibit ASIS from being involved with the planning or undertaking of activities of the kind specified in paragraphs 6(4)(a)-(c) by other organisations. This is expressly confirmed in the note to subsection 6(4). However, any such involvement is subject to the requirements of sections 13 and 13A of the ISA. These provisions state that ASIS may only cooperate with another organisation if this cooperation is in connection with the functions of ASIS (section 13), or the functions of the cooperating (Australian) organisation (section 13A).
>
> As mentioned above, the functions of ASIS are not capable of extending to conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. In addition, the functions of the Australian agencies with whom ASIS may cooperate under section 13A are similarly incapable of extending to conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The amendments to the ISA do not, in any way, change this position. For these reasons, the Government will not be amending the ISA to implement this recommendation. To the extent that the Committee appears to have suggested that such amendments are necessary in order for the ISA to be compatible with the Convention Against Torture, the Government does not accept that position.[43]

Committee response

2.92 **The committee thanks the Attorney-General for his response**. The committee however, reconfirms its recommendation that the ISA be amended to explicitly provided that ASIS must not provide any planning, support or intelligence where it may result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the CAT. The committee notes that the response states categorically that the functions of the Australian agencies with whom ASIS may cooperate under section 13A are similarly incapable of extending to conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The committee notes that under section 13 ASIS may cooperate with authorities of other countries approved by the Minister. It is entirely within the proper purpose of ASIS to share relevant intelligence with countries approve by the Minister. What those agencies in other countries is a matter subject to their laws. In this respect, the committee notes the Committee

43 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 10-11.

against Torture's recent conclusions regarding the USA's compliance with the CAT particularly in relation to activities conducted by US agencies extraterritorially.[44]

2.93 **Accordingly, given the range of agencies with which Australia engages and shares information, the committee considers that it is necessary for compliance with the Convention Against Torture that the Australian Secret Intelligence Service must not provide any planning, support or intelligence where it could foreseeably result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.**

44 Committee Against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5, 18 Dec 2014.

Higher Education and Research Reform Amendment Bill 2014

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

Higher Education and Research Reform Bill 2014

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

Purpose

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

2.95 The measures in the bill which are the subject of this entry are measures that would:

- reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent; and
- remove the current maximum student contribution amounts.

2.96 A fuller description of the bills is provided in the committee's previous analysis.[1] Measures raising human rights concerns or issues are set out below.

Background

2.97 The committee reported on the original bill in its *Twelfth Report of the 44th Parliament*,[2] and sought further information from the Minister for Education in relation to a number of measures. The original bill was rejected by the Senate on 2 December 2014 and the new bill was introduced into the House of Representatives the next day.

2.98 The committee then considered the Minister for Education's response to the committee's analysis of the original bill in its *Eighteenth Report of the 44th Parliament*.[3] Due to the similarity of the bills, the committee decided to report on both bills together. The committee sought further information on the removal of the cap on student contribution amounts, and concluded its examination of all other

1 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13; Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64.

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

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64.

measures in light of the minister's response. The new bill was negatived by the Senate on 17 March 2015.

Reduction of subsidies for new Commonwealth supported students at universities

Right to progressively free higher education

2.99 The committee considered that, on the basis of the information available, the reduction in subsidies for new Commonwealth supported students at universities may be incompatible with the right to education. The committee concluded its examination of this aspect of the original bill.

Removal of the cap on student contribution amounts

Right to progressively free higher education

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

Minister's response on both issues

> **HECS loans will protect the right to higher education by ensuring access and affordability**
>
> The right to education will not be negatively affected by the proposed 20 per cent reduction in the subsidy for new Commonwealth supported students or the removal of the cap on student contribution amounts. The Reform Bill does not restrict accessibility and affordability of higher education. The Higher Education Contribution Scheme (HECS) will continue to ensure that Australian students are able to fully defer the cost of their higher education through income-contingent loans. Eligible students will not need to pay a cent up front for the cost of their tuition, and need not commence repayments until they earn over an estimated $50,638 (in 2016-17). In this way, HECS effectively operates as an insurance mechanism to protect borrowers who participate in higher education but do not subsequently earn sufficient income to repay their debt without hardship.
>
> International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries.[4] The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were

4 Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014.

able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.

Previous changes to tuition fee charges in Australia have also not deterred students from lower socio-economic status (SES) backgrounds from undertaking higher education. A 2008 report by Access Economics found that 'the introduction of HECS and subsequent changes in the level of charges have had minimal impact, both in terms of overall applications and on enrolments by students from lower socio-economic status backgrounds.'[5]

Similar observations were made in relation to the recent experience in England. Many institutions elected to raise their tuition fees to the new maximum amount however this did not affect the proportion of low SES students enrolling in higher education courses, and the participation rates for disadvantaged students in England is higher than ever according to a 2014 report by the UK Independent Commission on Fees.[6]

The reforms will reduce fees for some students

The removal of the cap on student contributions will not result in price increases for all students. In fact, the costs of some courses are likely to decrease, as non-university higher education providers gain access to subsidies for the first time. The Council of Private Higher Education Providers (COPHE) stated in its submission to the Senate Education and Employment Legislation Committee which was conducting an inquiry into the Higher Education and Research Reform Amendment Bill (2014) that the benefits of Commonwealth subsidies would be passed on to students through a reduction in their fees.

The Reform Bill's measures include specific benefits targeted at students facing disadvantage

The Usher report also noted that the increase in funding available to universities allowed them to open up more places, and provide more student support such as academic support or cost of living allowances or bursaries. The combined effect is that the proportion of students from low socio-economic backgrounds undertaking higher education has been observed to increase after a rise in the 'sticker price' of the course. According to information gathered, greater access to scholarships, student loans and other financial support may result in students from disadvantaged backgrounds actually paying less, due to the ability of universities to increase their outreach efforts.

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5 Access Economics Pty Limited, 'Future Demand for Higher Education', Report for Department of Education, Employment and Workplace Relations, Australia, November 2008.

6 Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014.

The availability of new scholarships through the proposed new Commonwealth Scholarship Scheme and a new dedicated scholarships fund within the Higher Education Participation Programme (HEPP) is expected to assist many disadvantaged higher education students with the cost of undertaking study. Institutions will be able to provide tailored, individualised support to help disadvantaged students, including help with costs of attending, participating in or succeeding in higher education. These will be allocated to students either as direct scholarship payments or as individualised support, such as assistance with the cost of living, additional tutoring, mentoring or outreach.

Together, the scholarships stream under HEPP and the new Commonwealth Scholarship Scheme are expected to result in additional support, particularly for regional students because all universities will be able to provide support for access and participation through scholarships.

Greater access and success for students through the extension of Government subsidies to sub-bachelor courses

The Review of the Demand Driven Funding System[7] argued that expansion of subsidised places to sub bachelor courses and non-university higher education providers would improve the efficiency of the higher education system by better matching students with courses that suit them and give them the highest chance of success.

The measures in the Reform Bill aim to expand opportunity and choice for students through extension of the demand driven funding system to sub bachelor places at all institutions and bachelor level places at private universities and non-university higher education providers registered by TEQSA. For the first time ever, Commonwealth subsidies will be provided on a demand driven basis for eligible students enrolling in accredited higher education diplomas, advanced diplomas and associate degrees. These qualifications provide effective pathways for disadvantaged students and in many cases are qualifications in their own right (such as engineering technologists, construction managers, and paralegals).

The Review of the Demand Driven Funding System found that the capping of sub-bachelor places, as well as the general restriction on providers that are able to offer sub-bachelor Commonwealth supported places, created incentives for students to enrol in a bachelor degree. This was primarily due to the relative price differential between a (subsidised) bachelor place through a public university and a (non-subsidised) sub-bachelor place through a non-university higher education provider. This occurred even though a sub-bachelor course would better suit their needs and abilities.

Evidence to the review suggested that students who entered via a pathway course often did better than might have been expected, given their original level of academic preparation. At the University of Western

7 Kemp and Norton, 'Review of the Demand Driven Funding System', Australia, April 2014.

> Sydney's UWS College more than 70 per cent of students progress straight into the second year of a bachelor program, often with retention and success results equivalent to their peers who enrol directly into bachelor courses.
>
> In addition, as discussed above, the Council of Private Higher Education (COPHE) has confirmed that their members intend to reduce their tuition fees as a result of access to Government subsidies. An article in The Australian on 24 September 2014 stated that fees for private higher education may halve in some cases as COPHE members pass Government subsidies directly on to students as savings.[8]
>
> Based on the evidence provided, neither measure noted by the Committee can be considered to limit the right to education. The right to access higher education will be preserved by the HECS system, as all available evidence suggests that the presence of an adequate loan scheme preserves the accessibility of higher education. Additionally, the affordability of higher education will be maintained by the downward pressure on fees provided by the introduction of subsidies to sub-bachelor courses and private providers. Costs associated with higher education will also be reduced for many students as a result of the targeted scholarship programmes. The measures in the Reform Bill ensure that the right to education, including its accessibility and affordability, will not be limited.[9]

Committee response

2.101 **The committee thanks the minister for his response.** The committee notes that it had previously concluded its examination of the measure, which would implement a 20 per cent reduction in subsidies for new Commonwealth supported students at universities. The committee had concluded that the measure may be incompatible with the right to progressively free higher education.

2.102 The committee notes that the minister has provided further information on this measure as well as responding to the committee's request for further information regarding the proposed removal of the cap on student contribution amounts. The committee will consider these two measures together in light of the minister's further response.

2.103 The minister's response, which is consistent with the statement of compatibility and the minister's earlier response to the committee, reiterates a view that neither the 20 per cent reduction of subsidies for new Commonwealth supported students at universities nor removal of the cap on student contribution amounts would limit the right to education. The minister argues that this is because

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8 B Lane, The Australian, 'Fees for private college courses could halve', 24 September 2014.

9 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 6 March 2015) 1-4.

the continued availability of HECS will protect access and affordability by ensuring that no upfront fees are payable by students.

2.104 The committee notes at the outset that it has previously concluded that a number of the measures in the bills are compatible with the right to education. The committee further notes that it is required to assess these measures against article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In undertaking that assessment, it provides a technical analysis and does not consider the policy merits of the measure.

2.105 The committee notes that, under article 13 of ICESCR, Australia recognises that, with a view to achieving the full realisation of the right to education:

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

2.106 The committee considers that, with reference to article 13, the proposed 20 per cent reduction in the subsidy for Commonwealth supported students at university may be considered a retrogressive measure for human rights purposes. A retrogressive measure is any measure that directly or indirectly leads to a backwards step being taken in the level of rights protection. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified and has been introduced after careful consideration of all alternatives.

2.107 The 20 per cent subsidy reduction will reduce the current level of government support for higher education students and in this respect represents a limitation on the progressive introduction of free education.

2.108 Similarly, the committee considers that the removal of the cap may be considered a retrogressive measure for human rights purposes as it may increase the total cost of education, and therefore reduce the affordability (and thus accessibility) of higher education, and in this respect represents a limitation on the progressive introduction of free education.

2.109 The Committee on Economic, Social and Cultural Rights (CESCR) has stated that the introduction of fees and increases in existing fees is a deliberate

retrogressive step.[10] The CESCR has made similar conclusions with respect to countries that have deferred payment schemes similar to Australia's HECS arrangements in circumstances where there has been an increase in the fee cap.[11]

2.110 The committee notes that the minister has not provided any information to the committee as to why these conclusions should not be accepted. In the absence of such information, the committee considers that the CESCR conclusions provide useful guidance in interpreting Australia's obligations under article 13 of the ICESCR.

2.111 The committee notes that the minister's response draws on international comparisons to support a view that the measures will not reduce access to university as the HECS system will ensure that any increase in fees does not act as a deterrent to accessing higher education.

2.112 However, the committee considers that a close reading of the sources quoted in the response is more equivocal as to the impact of fee increases on the accessibility of education.

2.113 In particular, the response states that the Usher report 'found no trend of declining enrolments after a fee increase'. However, that report in fact did note a dramatic decline in enrolments in England following fee increases.[12] The report also noted that 'most countries' national statistical systems are weak when it comes to measuring participation by sub-groups such as family background, social class or

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10 Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain. (6 June 2012) UN Doc E/C.12/ESP/CO/5, 6. Concluding observations of the Committee on Economic, Social and Cultural Rights: Germany. (12 July 2011) UN Doc E/C.12/DEU/CO/5, 7. Concluding observations of the Committee on Economic, Social and Cultural Rights: Poland. (2 December 2009) UN Doc E/C.12/POL/CO/5, 7. Concluding observations of the Committee on Economic, Social and Cultural Rights: Luxembourg. (26 June 2003) UN Doc E/C.12/1/Add. 86, 5.Concluding Observations of the CESCR: Germany. UN DOC. E/2002/22 paras 671 and 689, Concluding Observations of the CESCR: Luxembourg. UN DOC. E/2004/22 para 103, Concluding Observations of the CESCR: Bulgaria. UN DOC. E/C.12/1/Add.37, 3, Concluding Observations of the CESCR: Canada UN DOC. E/C.12/1/Add.31, 7.

11 Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. (12 June 2009) UN Doc E/C.12/GBR/CO/5, 6.

Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. (5 June 2002) UN Doc E/C.12/1/Add.79, 11.

12 Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014, 12.

ethnicity' making it difficult to draw conclusions with respect to the impact of fee increases on students from disadvantaged backgrounds.[13]

2.114 The response also states that despite a significant increase in the maximum tuition fee that may be charged by English higher education institutions:

> …participation rates for disadvantaged students in England is higher than ever according to a 2014 report by the UK Independent Commission on Fees.

2.115 However, the committee notes that the report by the UK Independent Commission on Fees, referred to in the minister's response, made a number of conclusions which suggest that the impacts of increased fees, while subject to a level of uncertainty, have been followed by identifiable trends of reduced access. In relation to the uncertainty of impacts, it stated:

> …that average graduates would continue to be indebted for far longer under the new system, with many repaying into their late 40s and early 50s.
>
> …it may [therefore] take many years for the impacts of higher education funding reforms, particularly of these large changes to personal debt, to become fully apparent.

2.116 In relation to entry rates of disadvantaged students it noted:

> The gap in application and entry rates between advantaged and disadvantaged students has narrowed only slightly and remains unacceptably large, particularly for the most selective institutions. Students who are not eligible for Free School Meals remain more than twice as likely as those eligible to apply for university. Students from the least disadvantaged areas are also around 3 times more likely to enter university than those from the most disadvantaged areas.
>
> This gap is particularly large for the most selective universities and has not substantially narrowed.
>
> …[O]f particular concern are the sharp declines in the numbers of mature students applying to and entering higher education…Take-up for applicants aged 20-24 and 25+ was down 9% and 18% in 2013 (relative to 2010).
>
> …[F]igures show a particularly severe decline in the numbers of mature students starting part-time courses in the 2012/13 academic year (the year

13 Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014, 12.

> of fees increase.) 43% fewer mature students started part-time courses in this year than did in 2009/10.[14]

2.117 The minister's response also quotes a 2008 Access Economics study to support the position that changes to the HECS system do not discourage students, particularly students from disadvantaged backgrounds from pursuing higher education studies.

2.118 However, the committee notes that the changes which were the subject of the 2008 Access Economics study have been characterised by Professor Bruce Chapman, the architect of the HECS scheme, as insubstantial, whereas the measures in the bills propose fundamental changes to HECS.[15] Accordingly, the committee considers that it is unclear whether accurate and reliable predictions as to the impact of the current measures on the cost of education can be drawn in reliance on the evidence from the 2008 Access Economics study.

2.119 The minister's response also quotes a submission from the Private Higher Education Providers (COPHE) to a recent Senate committee inquiry which states that COPHE members will pass on the new Commonwealth subsidy to students in the form of lower fees. The response argues that this will put downward pressure on fees across the higher education sector. However, the committee notes that the UK study quoted in the minister's response suggests that universities may in fact compete on prestige rather than price. It noted that, following a decision by the UK government to increase the maximum a university could charge in annual tuition fees in 2012-13 from £3375 to £9000:

> Contrary to the government's hopes that universities would compete on price, the vast majority of universities and courses charge the £9,000 maximum, with the current average fee being £8,507.20.[16]

2.120 The committee notes that a specific measure in the bill would see the cap on fees removed in Australia and, in the absence of a cap, the increase in fees could be greater in Australia than in the UK example referred to by the minister. However, no evidence has been provided to suggest that Australian universities (particularly the

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14 Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014, 31.

15 Julie Hare and Andrew Trounson, 'HECS designer Bruce Chapman class for action to limit fee rises', *The Australian* 3 September 2014 (available from http://www.theaustralian.com.au/higher-education/hecs-designer-bruce-chapman-calls-for-action-to-limit-fee-rises/story-e6frgcjx-1227045452598). See also Matthew Knott, Heath Gilmore, 'Graduates could pay up to $120,000 in debt, HECS architect warns', *Sydney Morning Herald* May 14, 2014 (available at http://www.smh.com.au/federal-politics/political-news/graduates-could-pay-up-to-120000-in-debt-hecs-architect-warns-20140514-zrctv.html).

16 Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014, 5.

elite or 'sandstone' universities) will respond differently in Australia than the 'vast majority' of UK universities as described in the UK study cited by the minister.

2.121 Finally, the minister's response asserts that the proposed changes will not disadvantage students and that, if they were introduced, the continuation of HECS would mean that students (including students from disadvantaged backgrounds) will not be dissuaded from accessing higher education. However, as set out above, the committee considers that the evidence presented to support these claims is equivocal.

2.122 In light of the above, the committee considers it likely that the proposed measures would be considered to be retrogressive under international human rights law, as they appear to represent a backwards step in the level of protection for the right to access education, and in the progressive introduction of free higher education.

2.123 As noted above, a retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified and has been introduced after careful consideration of all alternatives, and the committee's analytical framework may be applied to support an analysis of a retrogressive measure as being justified or permissible for the purpose of international human rights law. In this respect, the committee considers that the minister could have advanced an argument that, notwithstanding their retrogressive nature, the proposed measures are nevertheless justified as they are reasonable, necessary and proportionate to achieve a legitimate aim.

2.124 The committee notes that the statement of compatibility identified a number of the proposed measures as a necessary part of 'contributing to the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system',[17] and such budgetary constraints have been recognised as being capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.

2.125 Further, in justifying the proposed measures as proportionate to a legitimate aim, the minister could have advanced an argument that they are necessary to ensure the long term financial viability of the higher education sector, and in particular to provide financial stability to public universities in the context of declining budget revenue. However, the minister has not sought to advance, or to provide any evidence in support of, such arguments.

2.126 **Accordingly, the committee considers that the 20 per cent reduction in support for Commonwealth funded students and the removal of the cap on student contribution amounts are retrogressive measures with respect to the**

17 Explanatory memorandum 2.

obligation to progressively realise the right to free higher education under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The committee considers that the measure may be incompatible with the obligation to progressively realise the right to free education as defined in article 13 of the ICESCR.

Omnibus Repeal Day (Spring 2014) Bill 2014

Portfolio: Prime Minister and Cabinet
Introduced: House of Representatives, 22 October 2014

Purpose

2.127 The Omnibus Repeal Day (Spring 2014) Bill 2014 (the bill) sought to amend or repeal legislation across nine portfolios. It included 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.

2.128 The bill also abolished the following bodies:

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

Background

2.129 The committee first reported on the bill in its *Nineteenth Report of the 44th Parliament*.[1]

Removal of consultation requirement when changing disability standards

Right to equality and non-discrimination

2.130 The committee considered that repealing consultation requirements under the *Telecommunications Act 1997* (Telecommunications Act) relating to changes to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities. Currently under the Telecommunications Act, the Australian Communications and Media Authority (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). 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.

2.131 The Convention on the Rights of Persons with Disabilities (CRPD) describes the specific elements that state parties are required to take into account to ensure the right to equality and non-discrimination including requirements to consult persons with disabilities.

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 29-41.

2.132 The statement of compatibility provided no assessment of the compatibility of the measure with these rights. The committee therefore sought 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.

Parliamentary Secretary to the Prime Minister's response

> The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. The reason for the removal of bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act) which sets the standard consultation requirements for all Commonwealth legislative instruments.
>
> The provisions proposed for repeal mandate a variety of inconsistent approaches with respect to the time and method of consultation. The various provisions proposed to be repealed are prescriptive rules. The consultation periods in question range from 14 to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. There is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and imposes costs without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.
>
> The standard requirements in section 17 of the LI Act apply across all legislation that does not have separate consultation provisions, not only in the Communications portfolio but across the Commonwealth. In the Communications portfolio, section 17 of the LI Act has been used to ensure that appropriate consultation has been undertaken. The proposed repeal is intended to simplify, shorten and harmonise the law, in accordance with the objectives of the Government's deregulation agenda.
>
> The Communications portfolio has taken a consistent approach to the reform of statutory consultation requirements. The provisions proposed to be amended include many that have no special relevance to persons with disabilities. This standard approach is consistent with the goal of ensuring the right to equality before the law for people with disabilities is on an equal basis with others in the community.
>
> Subsections 382(1) and (5) of the *Telecommunications Act 1997*

In determining whether any consultation is appropriate, the rule-maker would ensure that any persons likely to be affected by the proposed instrument had an adequate opportunity to comment (subsection 17(2) of the LI Act refers).

Accordingly, section 17 of the LI Act, while not identical to the provisions being repealed, provides a statutory mechanism for those with an interest in disability standards, including persons with disabilities, to comment on those standards, notwithstanding the repeal of subsections 382(1) and (5) of the TC Act. For example, the provisions being repealed require the Australian Communications and Media Authority (ACMA), before making a disability standard under 382 of the TC Act, to try to ensure that any interested person has adequate opportunity (of at least 60 days) to make representations about the proposed standard, and for ACMA to give due consideration to these representations. Section 17 of the LI Act provides a separate statutory mechanism for those with an interest in a standard to comment on those standards. Both section 382 of the TC Act and section 17 of the LI Act are framed in terms of "practicable" consultation, meaning that the differences between the two approaches are not as significant as they may appear.

It is also worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if the Parliament is dissatisfied with that consultation, the instrument may be disallowed. [2]

Committee response

2.133 **The committee thanks the Parliamentary Secretary to the Prime Minister for his response.**

2.134 The committee notes that the Convention on the Rights of Persons with Disabilities (CRPD) describes the specific elements that state parties are required to take into account to ensure the right to equality and non-discrimination. In particular, article 4(3) 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.

2.135 In addition, article 9 of the CRPD requires that state parties take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems. The United Nations Committee on the Rights of Persons with Disabilities has noted that access to

2 See Appendix 1, Letter from the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister, to Senator Dean Smith (dated 26/03/2015) 1-2.

information and communications technology (including telephones) is a requirement of the obligation to adopt and monitor national accessibility standards, and has noted that it 'is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (art. 4, para. 3), as well as all other relevant stakeholders'.[3]

2.136 The committee therefore emphasises that the obligation to respect the right to equality and non-discrimination in relation to persons with disabilities includes an obligation to closely consult when reviewing any regulations that affect accessibility, such as national disability standards administered by the Australian Communications and Media Authority (ACMA) under the *Telecommunications Act 1997* (Telecommunications Act). As the bill seeks to repeal consultation requirements under the Telecommunications Act, it is necessary to demonstrate that existing legislation provides for as much, if not more, requirements to consult when any changes are made to disability standards.

2.137 The committee acknowledges the Parliamentary Secretary's advice that the existing provisions of the *Legislative Instruments Act 2003* (LI Act) provides a statutory mechanism for people to comment on those standards, and that the differences between the standards in the LI Act and those repealed by this bill are not as significant as they may appear as they are both framed in terms of 'practicable' consultation.

2.138 However, as the committee noted in its initial consideration of this matter, 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 Telecommunications Act, 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.

2.139 The committee therefore considers that the consultation requirements under the LI Act are not equivalent to the current consultation requirements in the Telecommunications Act. Therefore, the repeal of the consultation requirements in relation to disability standards limits the right to equality and non-discrimination, in particular, the obligation to consult under the CRPD.

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3 Committee on the Rights of Persons with Disabilities, *General Comment No. 2: Article 9: Accessibility* (2014) para 28.

2.140 A limitation on a right can be justified if the measure seeks to achieve a legitimate objective and the limitation is rationally connected to, and is a proportionate way to achieve, its legitimate objective.

2.141 The committee notes the Parliamentary Secretary's advice that the purpose of the amendment is to take a consistent approach to the reform of statutory consultation requirements, is intended to 'simplify, shorten and harmonise the law, in accordance with the objectives of the deregulation agenda' and removes unnecessarily duplicative consultation requirements.

2.142 The committee notes that 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. The committee considers that the simplification of the law in order to achieve the objective of deregulation may not be considered to meet a pressing or substantial concern, such that it would warrant limiting the obligation to closely consult with, and actively involve, persons with disabilities when adopting and monitoring national accessibility standards.

2.143 The committee also notes the Parliamentary Secretary's advice that the reform of statutory consultation requirements is a standard approach, including provisions that have no special relevance to persons with disabilities. This standard approach, the Parliamentary Secretary advised, 'is consistent with the goal of ensuring the right to equality before the law for people with disabilities is on an equal basis with others in the community'. The committee notes that treating persons with a disability exactly the same as others in the community, without taking into account their special needs, does not advance the right to equality before the law under international human rights law. Rather international human rights law recognises that laws and policies may need to take into account the special needs of particular groups in order to comply with the right to equality and non-discrimination. The committee has no comment to make in relation to the broader reform of the statutory consultation requirement—its concern relates solely to the consultation requirements in relation to standards that relate to the accessibility of telephones for persons with a disability and the human rights implications of that requirement.

2.144 **The committee therefore considers that the repeal of the consultation requirements under the Telecommunications Act relating to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities. In light of the information provided by the Parliamentary Secretary and the fact that there is no legislative requirement that consultation be undertaken before a disability standard is made, the committee considers that this measure may be incompatible with these rights.**

Removal of requirement for independent reviews of Stronger Futures measures

Right to equality and non-discrimination

2.145 The committee was concerned that removing legislated requirements for independent review under the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act) and the *Stronger Futures in the Northern Territory Act 2012* (SF Act) may mean certain measures may not be appropriately evaluated. The relevant provisions of these Acts relate to the 'Stronger Futures' measures that were introduced to 'support Aboriginal people in the Northern Territory'. The committee noted that the statement of compatibility relied on these measures being considered 'special measures' under international law. Special measures involve the granting of a benefit or preference to members of a disadvantaged group on the basis of membership of that group, where differential treatment on that ground would generally prohibited as discrimination.[4] Such measures cannot be continued after the objectives for which they were taken have been achieved.[5] The committee does not consider these measures are properly characterised as 'special measures', however, if they are considered to be '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.

2.146 The committee therefore sought 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. The committee also sought advice as to whether repealing the requirement for review of the Stronger Futures measures is compatible with multiple human rights, given the importance of independent review and evaluation of the Stronger Futures measures to questions about justifying limitations on rights.

Multiple rights

2.147 The committee considered 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. The statement of compatibility provided no assessment of the compatibility of the measure with human rights. The committee therefore sought the advice of the Parliamentary Secretary to the Prime Minister as to whether repealing the

4 See, for example, UN Committee on the Elimination of Racial Discrimination General Recommendation No. 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (August 2009).

5 See article 1(4) of the Convention on the Elimination of Racial Discrimination.

requirement for review of the Stronger Futures measures is compatible with human rights.

Parliamentary Secretary to the Prime Minister's response

> The policy objective of these elements of the legislation is to support Indigenous people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy, including reducing alcohol-related harm.
>
> The repeal of review requirements in both the SFNT Act and Part 10 of the Classifications Act is machinery in nature - as such, it does not engage any applicable human rights, including those identified by the Committee at paragraph 1.153 of the Nineteenth Report of the 44th Parliament. The amendment relating to the assessment of licensed premises also does not engage any rights or freedoms, as any changes to licensing arrangements remain a matter for the Northern Territory Government and the Northern Territory Licensing Commission.
>
> The repeal of the legislated review requirements does not mean that Stronger Futures measures will not be closely monitored and assessed. The operation of individual elements, which form part of the Stronger Futures package, is regularly monitored in conjunction with the Northern Territory Government. As the Committee is aware, the Commonwealth is also undertaking a revision of the Stronger Futures National Partnership Agreement in collaboration with the Northern Territory Government. This is currently underway.
>
> The revision process includes a critical assessment of the effectiveness of the Stronger Futures National Partnership Agreement and overtakes the need for the review requirement provisions to remain in legislation.
>
> Further to this, I understand that an inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities is being conducted by the House of Representatives Standing Committee on Indigenous Affairs. Submissions on Northern Territory alcohol laws were provided for the inquiry's consideration, from the Northern Territory Government, private individuals and a range of stakeholder groups. [6]

Committee response

2.148 **The committee thanks the Parliamentary Secretary to the Prime Minister for his response.**

2.149 The committee notes that the advice provided by the Parliamentary Secretary does not address any of the specific questions raised by the committee. Rather, it repeats information that was contained in the statement of compatibility,

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6 See Appendix 1, Letter from the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister, to Senator Dean Smith (dated 26/03/2015) 2-3.

including the assertion that the repeal of the review requirements 'is machinery in nature' and does not engage any applicable human rights.

2.150 As the committee set out in its initial examination of the bill, the committee raised two concerns in relation to the bill. First, it noted that as the statement of compatibility relied on these measures being considered 'special measures' under international law, 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. The Parliamentary Secretary's advice did not provide any information in relation to how repealing a requirement for independent review is consistent with continuing to evaluate whether the Stronger Futures measures remain necessary.

2.151 In addition, the committee considers that the repeal of these review requirements may affect whether the Stronger Futures measures can be considered to justifiably limit human rights. As the committee previously noted, 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 committee considers that removing the requirement for independent review of these measures may affect the proportionality of the Stronger Futures measures.

2.152 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 reviews set out in the Parliamentary Secretary's response do not have such features, and particularly lack any requirement that the review actually take place or that it be independent and transparent.

2.153 **On the basis of the information provided, the committee considers 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 government claims that these measures are 'special measures' designed to meet the objective of reducing Indigenous disadvantage which may otherwise be prohibited as discrimination. However, the committee notes that under international human rights law such 'special measures' cannot be continued after the objectives for which they were taken have been achieved. The committee therefore considers that repealing the legislated requirement for an independent review of the Stronger Futures measures may affect the ability to evaluate whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage or could constitute special measures.**

2.154 **Further, repealing the legislated requirement for an independent review of the Stronger Futures measures may also affect the ability of whether the Stronger Futures measures can be considered to justifiably limit human rights.**

2.155 **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

Purpose

2.156 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.

Background

2.157 The committee first reported on the instrument in its *Nineteenth Report of the 44th Parliament*.[1]

Interim denial of access to university following allegation of misconduct

Right to education

2.158 The committee considered 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. The committee sought 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.

Vice-Chancellor's response

> The report of the Joint Committee queries whether an interim exclusion of a student from some or all of the University's facilities, pending the conclusion of an inquiry into serious academic misconduct derogates from the "right to (higher) education", as outlined in Article 13 of the International Covenant on Economic, Social and Cultural Rights:
>
> > *13(c) Higher education shall be made equally accessible to all, on the **basis of capacity**, by every appropriate means, and in particular by the progressive introduction of free education;*
>
> Following on the reference in Article 26 of the Universal Declaration:
>
> > *26(1)…… and higher education shall be equally accessible to all on the **basis of merit**.*

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 39-41.

I have included a reference to these Articles due to the inclusion of the highlighted phrase – not contained in descriptions of the right to education at non-tertiary levels. Merit, or "capacity" as it is used in the ICESCR, is the antithesis of cheating and is an important focus of the Rules under question.

The complete text of Rule 10 is:

> **10 Interim exclusion by the Deputy Vice-Chancellor**
>
> 10.1 Subject to sub-rule 10.2, the Deputy Vice-Chancellor may, by written notice, deny a student in relation to whom an allegation of academic misconduct has been made access to all or any of the facilities of the University, or to any part of the University premises or to any activities conducted by or on behalf of the University.
>
> 10.2 The Deputy Vice-Chancellor must not deny a student access under subrule 10.1 unless he or she considers that the alleged academic misconduct is of a serious nature.
>
> 10.3 A denial of access under this rule is in force for the period specified in the notice, or until the conclusion of the inquiry process, whichever first occurs.
>
> 10.4 If the Deputy Vice-Chancellor exercises his or her powers under this rule, he or she must, as soon as is practicable, give to the student:
>
> (a) a copy of the notice; and
>
> (b) a written statement setting out the reasons for the action and advising the student that he or she has a right to apply for review of the decision under the Appeals Rules.

I have highlighted "serious" in the above extract because it seems to have been overlooked by the Joint Committee in its reasons. It is mentioned only once – at paragraph 1.166 and not again, including in paragraph 1.177 when the Joint Committee raises the matter upon which they have sought advice from the University. As an example, at paragraph 1.173 in the Joint Committee states:

> *"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 enquiry have taken place, may limit the rights of all persons to access education"*

With respect to the Joint Committee, the right to access higher education is limited to those who demonstrate merit (not all persons) and the operation of the interim suspension can only occur if the allegations of academic misconduct fall into the category of "serious".

In addition, and before considering the reasons why such a power to suspend is required, the Committee did not address the rights of a student

to appeal any interim restrictions that have been applied, before the finalisation of the inquiry. Again, this element of the Rules only received a brief mention in paragraph 1.167 of the Committee's reasons. The appeal right is to provide procedural assurance that the exercise of the power to suspend a student on an interim basis is a proportionate response to the circumstances that have arisen. There is also provision for an appeal to be conducted "on the papers" to allow for the efficient consideration of an appeal that might involve an interim suspension (Appeals Rules 2014, see for eg rules 15 and 18).

The University faces many challenges when dealing with allegations of academic misconduct. For example, the use by a student of IT systems to "hack" into the systems of the University that may contain examination papers or other confidential material that would enable a student to cheat on assessment. Where allegations of that kind are made, suspending the access of the student from the electronic systems of the University is important to preserve the integrity of those systems as well as to gather appropriate evidence.

There are times when students unfortunately become aggressive and threaten witnesses (staff or students) who may be relevant to the inquiry – a student may be excluded entirely from their program or indeed have their academic record at the University completely expunged in certain cases of academic misconduct. Students facing these potential sanctions can seek to influence and harass potential witnesses both "online" and physically, and hence may need to have access to IT facilities suspended or be removed from campus during the inquiry process.

There have also been instances where students have created false identification documents to enable them to enter examination rooms or to inappropriately gain access to parts of the University campus – while allegations of that kind are resolved, it is important for safety and protection of property to remove the student from campus.

These Rules also deal with allegations of research misconduct in doctoral and other programs of higher degree by research. Allegations of research misconduct are quite serious and have the potential to prevent a student from continuing an academic research career. In these cases, evidence needs to be gathered before it is destroyed, removed or disturbed in some way so that the sanctity of the investigation and inquiry process is protected. In some cases this requires the removal of the student alleged to have engaged in misconduct from campus. Such removal can also serve to protect the interests of the student – if there is interference with evidence and they can demonstrate that they were not on campus as a result of obeying the interim suspension thus removing that student from suspicion in relation to the disturbed evidence.

These examples are not exhaustive with experience suggesting that the range of behaviours alters as the circumstances of the study environment change over time. Hence the wide discretion available to the Deputy Vice

Chancellor to preserve the integrity of the inquiry processes in matters of serious academic misconduct

The exercise by the University of the power to suspend a student on an interim basis is also subject to external review by bodies like the Federal Court or the Ombudsman.

For all of the above reasons, the University is satisfied that the measure in the Rules is reasonable and proportionate in relation to its objectives and there is a rational connection between the interim power to suspend and the objectives.[2]

Committee response

2.159 **The committee thanks the Australian National University for its response.**

2.160 The committee notes, in particular, the advice that sets out the challenges the university faces when dealing with allegations of academic misconduct and the potential need to suspend a student from accessing the university while the allegation is investigated.

2.161 **On the basis of the information provided, and given the right for an affected student to appeal the interim suspension, the committee concludes that the measure is likely to be compatible with human rights.**

2 See Appendix 1, Letter from Ken Grime, University Counsel, to the Hon Philip Ruddock MP (dated 24/03/2015) 1-3.

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

2.162 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).

2.163 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.

Background

2.164 The committee first reported on the 2015 directions in its *Nineteenth Report of the 44th Parliament*.[1]

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 45-50.

Use of lethal force

Right to life

2.165 The 2015 directions permit the use of lethal force 'when reasonably necessary to protect life, in accordance with the Use of Force Order (2015) (the Order)'. The committee considered that the use of lethal force engages and may limit the right to life. The committee considered that the limitation on the right to life may be justifiable but as the 2015 directions rely on the Order, it was unable to complete its assessment of the instrument with the right to life without first having reviewed the Order.

2.166 The committee therefore requested a copy of the Order to enable it to complete its assessment, and noted it was willing to receive a copy of the order on an in-confidence basis.

2.167 The committee recommended the Order be published on the ACBPS's website (and redacted if necessary).

Use of handcuffs on children

Rights of the child

2.168 The committee was concerned that the use of handcuffs on children may limit the rights of the child. The committee considered that the statement of compatibility did not provide sufficient justification of the compatibility of the measure with this right. The committee therefore sought 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.

2.169 The committee also requested a copy of the Order to enable it to complete its assessment of the instrument with the rights of the child.

2.170 The Chief Executive Officer provided an 'in confidence' response to the committee which included a copy of the Use of Force Order (2015). On the committee's request, the Chief Executive Officer provided the committee with a revised version of the initial letter for publishing with this report, as set out below.

Customs Chief Executive Officer's response

I refer to the Parliamentary Joint Committee on Human Rights *Nineteenth Report of the 44th Parliamen*t and the committee's request for a response.

The Committee specifically expressed concerns that the use of handcuffs on children may limit the rights of a child, and that the statement of compatibility does not provide sufficient justification of the compatibility of the measure with this right. Accordingly, the Committee requested advice on:

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

In response to the Committee's concerns, I wish to assure the Committee that any situation that would necessitate the handcuffing of a child or young person, would only ever be done so in order to achieve a legitimate objective, and only when reasonable and proportionate to the achievement of that objective, and in accordance with the exercise of statutory powers.

Restraints would only ever be considered in accordance with the Operational Safety Principles and Use of Force Model that states officers will only use the minimum amount of force reasonable and appropriate for the effective exercise of their statutory powers. At its core, the Model requires the use of communications (including negotiation and conflict de-escalation) as the primary consideration in interactions between ACBPS officers and members of the public.

ACBPS has a stringent program of training and annual recertification where it appropriately trains all officers who are required to hold a Use of Force permit.

Operational safety training and competency assessment are conducted in accordance with the Use of Force Order (2015) and delivered only by qualified Operational Safety Trainers. Restraints may only be applied by officers who hold a current Use of Force permit and only in the exercise of statutory powers.[2]

2 See Appendix 1, Letter from Michael Outram, Acting Chief Executive Officer, Australian Customs and Border Protection Service, to the Hon Philip Ruddock MP (dated 17 April 2015) 1-2.

Committee response

2.171 **The committee thanks the Chief Executive Officer of the Australian Customs and Border Protection Service for his detailed response and for providing a copy of the Order to the committee on an 'in confidence' basis.**

2.172 The committee thanks the CEO for his advice that the ACBPS will publish an edited version of the Order on its website following the committee's consideration of this advice.

2.173 Having reviewed the Order, the committee considers that the Order contains sufficient safeguards as it constrains the use of force by customs officers to situations where it is strictly necessary and reasonable.

2.174 **On the basis of the information provided, and having reviewed the Order, the committee concludes that the Order and the 2015 directions are likely to be compatible with human rights.**

Dental Benefits Rules 2014 [F2014L01748]

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

Purpose

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

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

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

Background

2.177 The committee first reported on the instrument in its *Eighteenth Report of the 44th Parliament*.[1]

Cap on benefits

Right to health and the right to social security

2.178 The committee considered that the cap of $1000 for dental services over a two year consecutive calendar period may limit the right to social security and the right to health. The committee considered that the statement of compatibility did not sufficiently justify that limitation for the purpose of international human rights law, so sought the advice of the Minister for Health as to:

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

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 74-78.

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

Minister's response

The Child Dental Benefits Schedule (CDBS) commenced on January 2014, and provides up to $1,000 in benefits, capped over two calendar years, for basic dental services for eligible children 2-17 years of age who satisfy a means test. The CDBS is administered under the *Dental Benefits Act 2008*. Dental Benefits Rules provide for the operational aspects of the programme.

The Dental Benefits Rules 2014 (the 2014 Rules) repeal and replace the Dental Benefits Rules 2013 (the 2013 Rules). Compared with the 2013 Rules, the 2014 Rules make a number of minor amendments to improve the operation of the CDBS.

Cap on Benefits

At paragraph 1.304 of the Report, the Committee notes that it considers the cap on benefits of $1,000 over two consecutive calendar years may limit the rights to social security and health. The Committee asks for further justification of this limitation.

I would like to clarify for the Committee that the cap on dental benefits of $1,000 for the 2015 and 2016 two calendar year period specified in the 2014 Rules does not represent any change from the cap that would have applied for this period had the 2013 Rules remained in force. The 2013 Rules placed a maximum cap on benefits of $1,000 for the 2014 and 2015 two calendar year period and provided for that amount to continue to apply for each two year period into the future unless a new amount was specified (subrule 14 (9)). The 2014 Rules maintain the existing level of access to dental services subsidised through the CDBS; the cap on benefits does not impose any new limitation on human rights.

I note the Committee's comments that the benefits cap could mean that people who need extensive dental work above the $1,000 limit may not have the means to access all necessary dental care. While the cap limits the benefits available under the CDBS, it is not the only means of financial support for dental services. State and territory governments provide free or low cost dental care to people with pensioner concession cards or health care cards. This provides a safety net for people who have limited means to meet the full cost of dental treatment themselves. Additionally, many states provide dental services to all children, regardless of means.

The objective of the limit on benefits is to balance the need for support for the dental treatment needs of children with maintaining the sustainability of government funding. It is my view that the provision for a benefit limit of $1,000 over two consecutive calendar years is a reasonable and

proportionate way to provide sustainable access to an appropriate level of government funding in the context of the broader dental system.[2]

Committee response

2.179 **The committee thanks the Minister for Health for her response**, and in particular her advice that the Child Dental Benefits Schedule is not the only means of financial support for dental services for people on low income.

2.180 **On the basis of the information provided, the committee concludes that this aspect of the measure is likely to be compatible with human rights.**

Eligibility for dental benefits

Right to social security and right to health

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

2.182 The committee noted that if the changes would result in existing patients losing eligibility for dental benefits, this may limit the right to social security and the right to health, which had not been justified in the statement of compatibility. The committee therefore sought the advice of the Minister for Health as to:

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

Minister's response

Eligibility for dental services

At paragraph 1.309 of the Report, the Committee seeks advice as to whether the requirement that patients are eligible for Medicare at the time a dental service is provided is likely to lead to some people no longer being eligible for dental benefits.

In accordance with section 23 of the *Dental Benefits Act 2008*, to be eligible for a voucher for CDBS services in a calendar year a person must, on at least one day of the year:

- be aged at least two years but younger than 18 years;
- meet the means test; and
- be eligible for Medicare.

2 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to Senator Dean Smith (dated 19/03/2015) 1-2.

A person cannot be identified as eligible for a voucher for the CDBS for a particular calendar year until after they have met the means test and have become eligible for Medicare. CDBS vouchers apply in respect of a full calendar year (1 January to 31 December) regardless of the date on which they are issued.

The 2014 Rules introduce a requirement that, for a CDBS benefit to be payable, a patient must be eligible for Medicare at the time a dental service is provided. This means that, for a person who became eligible for Medicare part way through the calendar year, they would not be entitled to receive CDBS benefits for any dental services provided before they became eligible for Medicare.

The Committee notes that it considers changes to the eligibility for CDBS benefits engage the right to health and the right to social security. As this amendment only impacts on dental services that have already been provided and paid for without any anticipation of access to dental benefits, it is my view that, in practice, it does not affect the right to health.

The amendment does engage the right to social security because it removes an entitlement to receive a benefit for that dental service; however, the number of people likely to be affected by this amendment, if any, would be negligible. To be affected, a person would have had to receive a dental service in Australia while visiting and then, later that same year, become Medicare eligible, for example, by becoming an Australian resident.

The objective of this amendment is to create consistency with other Commonwealth programmes (such as the Medicare Benefits Schedule (MBS)) in that a person must be eligible for Medicare on the day of service for which a benefit applies. It is my view that this amendment is the most reasonable way to achieve a consistent application of health benefits to support effective administration of government funding and is compatible with Australia's human rights obligations.[3]

Committee response

2.183 **The committee thanks the Minister for Health for her response.**

2.184 The committee appreciates the minister's explanation that this amendment only impacts on dental services that have already been provided and that the number of people likely to be affected by the amendment would be negligible. It considers that the objective of creating consistency with other Commonwealth programs is a legitimate objective.

3 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to Senator Dean Smith (dated 19/03/2015) 2-3.

2.185 **On the basis of the information provided, the committee concludes that this aspect of the measure is likely to be compatible with human rights.**

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

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

Purpose

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

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

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

Background

2.188 The committee first reported on the instrument in its *Eighteenth Report of the 44th Parliament*.[1]

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

Right to health

2.189 The committee considered that the reduction in MBS fees for optometry services and the removal of the charging cap for optometry services limits the right to health and social security. As set out previously, the statement of compatibility

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 83-85.

does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore sought the advice of the Minister for Health as to whether the reduction in the MBS fees for optometry services and removal of the charging cap on optometrists is compatible with the right to health, and particularly:

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

Minister's response

> At paragraph 1.346 of the Report, the Committee notes that it considers that the reduction in MBS fees for optometry services and the removal of the charging cap for optometry services limits the right to health and social security. The Committee seeks further justification for these limitations.
>
> In the last decade, spending on Medicare has more than doubled from $8 billion in 2004 to around $20 billion today, yet the Australian Government raised only around $10 billion from the Medicare levy in 2013-14. Ten years ago, the Medicare levy covered 67 per cent of the cost of Medicare, but it now covers only 54 per cent. Medicare spending is projected to climb to $34 billion in the next decade to 2024. I consider that this projected increase in spending represents a pressing concern for Australia and the Australian Government is working to make Medicare sustainable for the future and responsibly managing Australia's Budget is a legitimate objective for the Australian Government. The reduction in Medicare fees for optometric services and the removal of the cap will achieve a savings of $89.6 million over four years. These savings will contribute to an overall reduction in Medicare spending into the future.
>
> The reduction in the rebate reflects efficiencies gained within the optometry profession over the years due to new technologies and techniques which support more cost-effective services. The reduction in the Medicare fees result in a decrease of only a few dollars per service. For the most common service, a comprehensive eye examination which is claimed when clinically necessary, this means a reduction in the rebate of about $3.55 for the service. I consider that reducing the Medicare fees for optometric services is a reasonable and proportionate way to assist in achieving an overall reduction in Medicare expenditure into the future.
>
> Removing the charging cap for optometrists also means that individual optometrists can make their own business decisions according to their own and their patients' circumstances, including whether to continue bulk-billing patients. This will align the rules governing charging by optometrists with those applying for other health professions in the Medicare scheme. The Government believes that it is not unreasonable for patients who can afford it to contribute a modest amount to their service.

The optometry sector is highly commercialised and competitive. In 2013-14, 97 per cent of Medicare rebateable optometric services were bulk-billed and this rate has been relatively stable over the years. To identify whether these measures would significantly increase out-of-pocket costs for optometry services, my Department commissioned ACIL Allen Consulting to undertake an analysis of optometry services in Australia. The report *Optometry Market Analysis* found that the market is extremely competitive even in regional areas, with 75 per cent of all practices having at least one competitor within 500 metres and 95 per cent having competitors within 10 kilometres.

The strong competitive market means that the reduction in the fees and the removal of the cap is unlikely to increase patient contributions significantly or reduce access to Medicare rebateable optometric services. It is expected that the majority of optometry services will continue to be bulk-billed, including in regional areas. A full copy of the report is available at www.acilallen.com.au/projects/14/health-care/124/optometry-market-analysis.

The MBS also provides additional benefits for people with high out-of-pocket costs for out-of-hospital services through the Medicare safety nets. Services provided by optometrists are eligible for Medicare safety net benefits.[2]

Committee response

2.190 **The committee thanks the Minister for Health for her response. On the basis of the information provided, the committee concludes that the measure is likely to be compatible with human rights.**

The Hon Philip Ruddock MP

Chair

2 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to Senator Dean Smith (dated 19/03/2015) 3-4.

Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC14/23329

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

11 FEB 2015

Dear Senator Dean,

Thank you for your letter of 25 November 2014 providing the report of the Parliamentary Joint Committee on Human Rights (the Committee), the Sixteenth Report of the 44th Parliament, concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the CTLA Bill). I apologise for the delay in responding.

The CTLA Bill was passed by the Senate on 26 November 2014 and the House of Representatives on 2 December 2014. It received Royal Assent on 12 December 2014.

I thank the Committee for its robust consideration of the compatibility of the CTLA Bill with Australia's human rights obligations and provide the enclosed additional information in response to the Committee's questions. This information reflects the measures as enacted in the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* (the CTLA Act).

The Committee may wish to note that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its report on the CTLA Bill made 16 recommendations. The Government accepted, or accepted-in-principle, all the recommendations in the PJCIS report, thirteen of which resulted in minor amendments to the CTLA Bill and Explanatory Memorandum and two of which resulted in small changes to administrative arrangements to enhance operational and administrative safeguards and oversight mechanisms. The final recommendation of the PJCIS was that the CTLA Bill be passed. The amendments included in the CTLA Act, as passed, and the additional information provided in the Explanatory Memorandum may address some of the issues raised by the Committee in its report.

Copies of the PJCIS report and the Government's response to the report are attached for your information. I also attach copies of submissions to the PJCIS inquiry into the CTLA Bill made by my Department, ASIO and ASIS for your information.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Encl: Response to the Parliamentary Joint Committee on Human Rights' *Sixteenth Report of the 44th Parliament*: Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (pp 7-21)

Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, Parliamentary Joint Committee on Intelligence and Security, 20 November 2014

Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014: Attorney-General's Department Submission, November 2014

Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014: Attorney-General's Department Supplementary Submission 1, November 2014

Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment Bill (No. 1) 2014: Attorney-General's Department Supplementary Submission 2, November 2014

ASIO Submission to the Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014, 10 November 2014

ASIS submission to the Inquiry into Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, 13 November 2014

Response to the Parliamentary Joint Committee on Human Rights' *Sixteenth Report of the 44th Parliament*, concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (pp 7-21)

Schedule 1 – *Criminal Code Act 1995* amendments

The committee has requested my advice on how the limits imposed on human rights by the amendments to the control order regime in Schedule 1 of the Counter-Terrorism Legislation Amendment Bill (No. 1) (CTLA Bill) are reasonable, necessary and proportionate to achieving the legitimate aim of responding to threats of terrorism. The Australian Federal Police (AFP), in their submission to the inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the CTLA Bill, note that 'individuals engaging in behaviours that support or facilitate terrorism or foreign incursions pose as great a risk as those directly engaging in terrorist acts or foreign incursions'. As such, the legitimate aim of the control order regime, responding to threats of terrorism, must include preventing or disrupting persons who provide critical support to those activities (without whom the terrorist act or hostile activity could not occur). The amendments to the purposes of the control order regime and the grounds for seeking and issuing a control order reflect this assessment.

The amendments do not, however, change the threshold for issuing a control order. A court cannot issue a control order unless satisfied that the obligations, prohibitions and restrictions proposed to be imposed on the person, and which may impose limits on their human rights, are 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. In response to the PJCIS report on the CTLA Bill, the Government amended the CTLA Bill in the Senate to retain the existing requirement in the Criminal Code that the AFP provide an explanation as to why *each* of the proposed obligations, prohibitions and restrictions should be imposed on the person and that the court should be satisfied that *each* obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. This amendment, in addition to responding to the recommendation of the PJCIS, also addresses issues raised by the Committee in paragraphs 1.37 and 1.38 about the proportionality of the limits imposed on a person's human rights.

I note the Committee's assessment of the control order amendments in Schedule 1 of the Bill also raises issues from the Committee's Fourteenth Report of the 44th Parliament in relation to the control order amendments made by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill). Contrary to the Committee's statement at paragraph 1.28, I would like to reassure the Committee that the PJCIS completed its inquiry into the Foreign Fighters Bill before passage of that Bill.

The Foreign Fighters Bill was referred to the PJCIS on 24 September 2014, the day it was introduced into the Senate. The PJCIS made 37 recommendations in its Advisory Report on the Foreign Fighters Bill tabled in Parliament on 17 October 2014. The Government supported all 37 and introduced amendments in the Senate, as necessary, to implement these recommendations. Specifically, and as noted in my response to the Committee's Fourteenth Report, in implementing the recommendations of the PJCIS, the Foreign Fighters Bill was amended to require the Independent National Security Legislation Monitor (INSLM) to review the entire control order regime by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. Given the urgent requirement to ensure the control order regime can respond to the current threat environment, the Parliament's decision to pass the control order amendments in the Foreign Fighters Bill but also require a comprehensive review of the whole control order regime by both the INSLM and PJCIS, is a responsible balance of protecting both Australia's national security and its human rights

obligations. The timing specified for these further reviews will allow for both the INSLM and the PJCIS to consider the operation of the control order regime as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the regime beyond 2018.

The heightened security environment, noted in the decision to raise the National Terrorism Public Alert System to 'high—terrorist attack is likely' in September 2014, and the operational activity undertaken by police following passage of both the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* and the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* has demonstrated the need for law enforcement agencies to have the tools necessary to disrupt terrorist activities and planning.

Schedule 2 – *Intelligence Services Act 2001* amendments

The Committee has sought my advice on the compatibility of measures in Schedule 2 to the Act, amending the *Intelligence Services Act 2001*. I intend to provide the Committee with a response in advance of the Autumn 2015 sittings. In the interim, the Committee may wish to examine the detailed consideration by the PJCIS in its Advisory Report on the CTLA Bill tabled in Parliament on 20 November 2014, together with the public submissions of my department, the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service to that inquiry. The matters raised in the Committee's Sixteenth Report of the 44th Parliament were also considered by the PJCIS, and the information provided to the PJCIS may usefully address a number of your Committee's questions.

ATTORNEY-GENERAL

CANBERRA

14/11487

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

Dear Chair Dean,

Counter-Terrorism Legislation Amendment Act (No 1) 2014

I refer to your Committee's Sixteenth Report of the 44th Parliament, as tabled on 25 November 2014, which included comments on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014. That Bill was passed by the Parliament on 2 December 2014 and received Royal Assent on 12 December 2014.

My letter dated 11 February 2015 enclosed my response to your Committee's request for my advice about measures in Schedule 1 to the Act, concerning amendments to Division 104 of the *Criminal Code 1995* (control orders). As foreshadowed in that letter, I now enclose my responses to your Committee's request for my advice about some of the measures in Schedule 2 to the Act, which amends the *Intelligence Services Act 2001*.

I trust that this information will be of assistance to your Committee.

Yours faithfully

(George Brandis)

Encl: Responses to matters raised in the Sixteenth Report of the 44th Parliament, 25 November 2014 (Schedule 2, *Counter-Terrorism Legislation Amendment Act (No 1).*)

05 MAR 2015

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Response to the Parliamentary Joint Committee on Human Rights
Sixteenth Report of the 44th Parliament

Counter-Terrorism Legislation Amendment Act (No 1) 2014:
Schedule 2 – amendments to the Intelligence Services Act 2001

Right to privacy

Committee comment (p. 15)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to privacy and, in particular, why the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.

Attorney-General's response

The amendments in Schedule 2 to the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (CTLA Act) concerning the *Intelligence Services Act 2001* (ISA) relate to the gathering of intelligence in relation to Australian persons overseas. To the extent that such activities could limit the right to privacy, the amendments are permissible limitations because they are necessary and proportionate to addressing the national security concerns and pressing operational requirements faced by the Australian Secret Intelligence Service (ASIS) and the Australian Defence Force (ADF).

In particular, new paragraph 6(1)(ba) of the ISA makes explicit that it is a function of ASIS to provide assistance to the ADF in support of military operations. The express recognition of this function will ensure appropriate transparency and will facilitate the authorisation process for ASIS to provide such support in time critical circumstances.

As noted at paragraph 9 of the Explanatory Memorandum, ASIS intelligence has proved invaluable to ADF operations in the past, pursuant to its general statutory functions under paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA:

> *ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces.*

The necessity of the measures in Schedule 2 to the CTLA Act, to deal with the nature of current ADF operations in Iraq (and potential future operations of similar character), was considered in detail by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its advisory report on the (then) Bill, tabled on 20 November 2014.

In its submission to the PJCIS, ASIS indicated (at p. 7):

> *In light of the rapidly changing and dangerous environment faced by the ADF in undertaking operations against the ISIL terrorist organisation in Iraq, as well as the wider threat posed by organisations such as ISIL, the proposed changes would position ASIS well to provide timely assistance to the ADF, minimise loss of life and to assist others in responding to the threat.*

It also noted (at p. 4):

> *Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL.* [Islamic State of Iraq and the Levant terrorist organisation].

The PJCIS accepted the evidence of ASIS, Attorney-General's Department (AGD) and the Australian Security Intelligence Organsation (ASIO) that new paragraph 6(1)(ba) – together with the ability of the Foreign Minister to issue class authorisations in relation to such activities under paragraphs 8(1)(a)(ia) and (ib) and subsection 9(1A) – is necessary to ensure that ASIS can provide support to the ADF in such operations in a timely way. The PJCIS concluded, at p. 47 of its report:

> *The Committee supports the proposed amendments to the IS Act to explicitly provide for ASIS support to ADF military operations and to enable ASIS to support these operations with greater agility. The Committee recognises that the situation in Iraq, where it is known that there are a large number of Australians either fighting for or providing support to terrorist organisations, has significant implications for the ADF.*[1]

Any engagement of the right to privacy is proportionate to the legitimate security objective to which the measures are directed. AGD and agencies gave evidence of the extensive, applicable safeguards to the PJCIS, which concluded that these measures are appropriate. In particular, before authorising ASIS support for ADF operations, the Minister must be satisfied under subsection 9(1) that there are satisfactory arrangements in place to ensure that ASIS only engages in activities relating to its statutory functions and that the nature and consequences of those activities are reasonable. The PJCIS acknowledged (at pp. 41-42) the evidence of AGD and agencies that the consideration of privacy impacts of a proposed activity or activities forms part of the authorisation criteria under this provision.

In addition, under subsection 9(1A), the Minister can only issue an authorisation if satisfied that the Australian person or class of Australian persons is, or is likely to be, involved in one

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1 Further analysis of the need for a class authorisation power in relation to ASIS's activities in support of the ADF is documented extensively in the PJCIS's advisory report at pp. 30-32 and pp. 47-48. The PJCIS accepted the evidence of ASIS (submission 17), AGD (submissions 5, 5.1 and 5.2) and ASIO (submission 10) on this issue. The Committee may wish to consult this evidence.

or more of the activities set out in paragraph 9(1A)(a), which includes activities that are or, are likely to be, a threat to security, per subparagraph 9(1A)(a)(iii). The term 'security' is defined in subsection 9(7) by reference to the meaning of that term under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). These requirements ensure that Ministerial authorisations are limited to the collection of intelligence in relation to activities that are of a serious nature.

Further, ASIS is subject to privacy rules made by the Foreign Minister under section 15 of the ISA, which regulate the communication and retention of intelligence information concerning Australian persons.[2] ASIS's activities in requesting and undertaking activities in accordance with a Ministerial authorisation issued under section 9 of the ISA are also subject to the independent oversight of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Subsection 10A of the ISA further requires ASIS to provide reports to the Minister on activities undertaken in accordance with an authorisation issued under section 9 within three months of the authorisation ceasing to have effect or being renewed. The PJCIS concluded that these measures are appropriate.

The conclusions of the PJCIS support the Government's view that these measures are necessary and proportionate.

Right to an effective remedy

Committee comment (p. 16)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to an effective remedy, and in particular why the limits imposed on human rights by the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.

Attorney-General's response

Section 14 of the ISA may impact upon the right to an effective remedy to the extent that it provides members or agents of an ISA agency with an immunity from civil or criminal liability in relation to activities undertaken in the proper performance of their agency's functions. Such activities cannot be the subject of prosecution or civil action in Australia.

The amendments made by Schedule 2 to the CTLA Act do not change the application of section 14 to activities carried out by ASIS, in accordance with a Ministerial authorisation, to support the ADF in a military operation. Contrary to the Committee's suggestion (at pp. 15-16 of its report), the amendments do not confer upon ASIS a "new" statutory function, but rather make explicit that the functions of ASIS include the provision of

2 These rules are publicly available on ASIS's website: http://www.asis.gov.au/Privacy-rules.html

assistance to the ADF in support of a military operation. As such, the immunity under section 14 has always applied to ASIS's activities in support of the ADF under its functions in paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA. The enactment of an explicit statutory function in paragraph 6(1)(ba) does not change the activities which attract immunity under section 14.

Nonetheless, the Committee has asked why an immunity from legal liability is necessary for staff members and agents of ASIS when undertaking authorised activities for the purpose of providing assistance to the ADF in support of a military operation (at p. 16). Without such an immunity, ASIS could not gain close access to relevant targets, as such access could itself constitute an offence. (For example, associating with a member of a terrorist organisation, or participating in training with a terrorist organisation are offences against Part 5.3 of the *Criminal Code 1995*. Security offences such as the terrorism-specific offences in Part 5.3 of the Criminal Code are of particular relevance in the context of the ADF's current operations against the ISIL terrorist organisation in Iraq, given that this organisation is a listed terrorist organisation under Division 102 of the Criminal Code.) The protection from legal liability conferred by section 14 is therefore essential to ensure that ASIS can provide assistance to the ADF without being exposed to legal liability that would otherwise preclude it from collecting critical intelligence (notwithstanding the existence of a Ministerial authorisation to do so, following receipt of a written request for ASIS's support from the Defence Minister under paragraph 9(1)(d), as well as the agreement of the Attorney-General in accordance with paragraph 9(1A)(b)).

There are also extensive legislative safeguards to ensure that the scope of the legal protection conferred by section 14 is proportionate to the nature of the activities carried out by the relevant staff member or agent of the agency. Section 14 applies only to the actions of an ISA employee or agent undertaken in the course of the proper performance of their agency's functions.

Activities to produce intelligence on, or which will, or are likely to, have a direct effect on an Australian person undertaken in support of the ADF must be specifically authorised under section 9. In order to issue an authorisation, the Minister must be satisfied that the activity is necessary for the proper performance by ASIS of its functions. The Minister must be further satisfied that satisfactory arrangements are in place to ensure that the activity does not extend beyond what is necessary for the proper performance by the agency of its functions, and that satisfactory arrangements are in place to ensure that the consequences of the proposed activities are reasonable.

The actions of a staff member or an agent of an ISA agency are also subject to independent oversight by the Inspector-General of Intelligence and Security under the IGIS Act. Under subsection 14(2B) of the ISA, the IGIS may give a written certificate, certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency. Subsection 14(2C) provides that such a certificate is prima facie evidence of the relevant facts in any proceeding.

Right to life

Committee comment (p. 18)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to life, and in particular whether the limits imposed on human rights by the amendments are proportionate to achieving the legitimate objective of ensuring Australia's national security.

Attorney-General's response

The Committee has suggested (at paragraph 1.67 of its report) that the ISA may authorise the 'targeted killing' of Australian persons overseas and thereby engage and limit the right to life. It has also asserted that the Statement of Compatibility does not explain the necessity or proportionality of any such limitations. The Government does not accept any suggestion that the ISA engages and limits the right to life. This issue was examined in detail by the PJCIS in its inquiry into the (then) Bill. Consistent with the evidence of AGD and agencies to that inquiry, the PJCIS rejected the suggestion that the ISA authorises any agency to engage in, or provide support for, the targeted killing of Australian citizens. The PJCIS stated (at p. 47 of its report):

> *The Committee acknowledges the concerns raised by some submitters that the proposed amendments will facilitate so-called 'targeted killings'. The Committee does not accept this evidence, noting that the proposed amendments do not change the role of ASIS in any way that would enable ASIS to kill, use violence against people, or participate in so-called 'targeted killings'. The Committee also notes that the ADF must abide by its Rules of Engagement at all times during its overseas engagements.*[3]

Subsection 6(4) of the ISA prohibits ASIS staff members or agents from planning for, or undertaking, activities that involve violence against the person. The ordinary meaning of the term 'violence' clearly extends to any targeted killing of an individual.[4] While the note to subsection 6(4) clarifies that this provision does not prevent ASIS from being involved with the planning or undertaking of such activities by other organisations, it is important to note that ASIS's cooperation with other organisations is subject to the limitations in sections 13 and 13A of the ISA, as well as the limitations on the functions and activities of ASIS in sections 11 and 12.

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3 See also the PJCIS's summary of AGD and ASIS's evidence at pp. 44-46 of its report (and AGD's and ASIS's submissions to that inquiry – submissions 5, 5.1 and 5.2, and submission 17). The Committee also implied (at paragraph 1.67 of its report) that ASIS could use 'targeted killings' as an alternative to arrest or trial. The Government does not accept this view, as the ADF remains bound by its Rules of Engagement and there is no support for the practice of 'targeted killing' within the ISA.

4 For example, the term 'violence' is defined by the Macquarie Dictionary to cover "rough or injurious action or treatment": Macquarie Dictionary (Sixth Edition, October 2013).

These limitations are additional to the authorisation criteria in section 9 of the ISA, particularly those in subsection 9(1), which require the Minister to be satisfied that the activity or activities will be necessary for the proper performance of the agency's functions, and that there are satisfactory arrangements in place to ensure that any activities will not exceed those which are necessary, and the nature and consequences of any such activities will be reasonable.

In addition, in the specific context of ASIS providing support to the ADF in accordance with authorised activities for the proper performance of ASIS's functions under paragraph 6(1)(ba) of the ISA, any use that the ADF may make of intelligence provided by ASIS are governed by the ADF's rules of engagement. These rules are developed in consultation with the Office of International Law within AGD to ensure their consistency with international law, including international humanitarian law.

The amendments enacted by Schedule 2 do not expand the functions of ASIS or any other ISA agency, nor do they change the longstanding prohibition on ASIS participating in violence under subsection 6(4). All that is changed is the method by which the Minister is able to authorise ASIS to undertake activities which relate to their functions.

Rights to equality and non-discrimination

Committee comment (p. 19)

The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to equality and non-discrimination, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, and are proportionate to achieving that objective.

Attorney-General's response

The amendments in Schedule 2 to the ISA allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation. The Committee has suggested (at paragraph 1.75 of its report) that these amendments may allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or directly affecting, a class of persons in a way that is directly or indirectly discriminatory. This suggestion is incorrect.

I refer the Committee to the PJCIS's Advisory Report on the Bill (now Act) as tabled on 20 November 2014. The PJCIS accepted the evidence of AGD and agencies that the amendments will not permit direct or indirect discrimination against classes of persons. (For example, the amendments will not permit authorisations to be issued for ASIS to undertake activities in support of the ADF in relation to a class of Australian persons, where that class is defined by reference to persons' racial or religious affiliation). As the PJCIS

acknowledged, there are four main limitations which prevent the class authorisation power from being exercised in a discriminatory fashion (at pp. 36-37 of that Committee's report):

> *First, the Defence Minister must request the authorisation in writing and will set out in this request the class of Australian persons for whom ASIS's assistance is sought in relation to a specified ADF military operation.*
>
> *Secondly, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied... Further, the Minister must be satisfied that the particular activities of a class of person in relation to whom the authorisation is sought fall within one or more of the activities prescribed in paragraph 9(1A)(a).*
>
> *Thirdly, the agreement of the Attorney-General is required in relation to a class of Australian persons before an authorisation is issued... The Attorney-General's Department noted that at this point, the proposed class of Australian persons will have been scrutinised by three Ministers.*
>
> *Fourthly, a class cannot include anyone who is not engaged in the specified activity or activities.*[5]

These limitations illustrate that classes of Australian persons who are the subject of an authorisation must be defined by reference to the action they have engaged in as prescribed in paragraph 9(1A)(a). The actions in that paragraph do not, in any way, relate to a person's religious, ethnic or ideological status or persuasion. Hence, there is no permissible means by which subsection 9(1A) could enable direct or indirect discrimination because its sole focus is on a person's engagement, or likely engagement, in the activities specified in paragraph 9(1A)(a). As the PJCIS acknowledged, when ASIS assistance is provided to the ADF in support of military operations, the relevant limb of the activity test in paragraph 9(1A)(a) will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security. There is no reasonable basis upon which to draw or infer a connection between a person's racial, religious or ideological status or persuasion and their engagement or likely engagement in activities that are, or are likely to be, a threat to security.

Further, ASIS's actions in requesting a Ministerial authorisation in relation to a class of Australian persons pursuant to its functions under paragraph 6(1)(ba), and in undertaking activities in reliance on that authorisation (including the identification of individual Australian persons within the relevant class), are subject to the independent oversight of the IGIS under the IGIS Act. ASIS must also provide reports to the Minister under section 10A within three months of the authorisation ceasing to have effect or being renewed.

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5 See further: Attorney General's Department, *Supplementary Submission 5.1* to the PJCIS at pp. 4-5.

Prohibition against torture and cruel, inhuman or degrading treatment or punishment

Committee comment (p. 21)

The committee therefore recommends that, to be compatible with human rights, the ISA be amended to explicitly provide that no civil or criminal immunity will apply to acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.

Attorney General's response

Consistent with the conclusions of the PJCIS on this matter in its advisory report on the (then) Bill,[6] there is no intention to amend the ISA in the manner recommended by the Committee.

The Committee appears to assume that the limited protection from legal liability in section 14 of the ISA must expressly exclude conduct constituting torture, or cruel, inhuman or degrading treatment or punishment in order to be compatible with Australia's obligations under the Convention Against Torture. Any express exclusion is, however, not required. The ISA does not, under any circumstances, authorise an agency to engage in such conduct, nor provide any immunity for such conduct. Accordingly, any activities undertaken by a staff member or an agent of an ISA agency that constitute torture or cruel, inhuman or degrading treatment or punishment are subject to criminal liability, including under the torture offences in Division 274 of the *Criminal Code 1995*.

The ISA expressly provides that agencies can only undertake activities for the purpose of the proper performance of their statutory functions, and cannot undertake activities that are not necessary for that purpose (per section 12). The relevant responsible Minister can only provide authorisations for agencies to engage in relevant activities where he or she is satisfied of the following requirements under subsection 9(1):

- the activities are necessary for the proper performance of a function of the agency;
- there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for the proper performance of a function of the agency; and
- there are satisfactory arrangements in place to ensure that the nature and consequences of the acts undertaken in reliance on the authorisation will be reasonable, having regard to the purpose for which they are carried out.

Further, the protection from legal liability in section 14 is expressly confined to staff members or agents of an agency who undertake acts in the proper performance of the agency's functions.

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6 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (November 2014), p. 47 at [3.67]. See also Attorney-General's Department, Supplementary Submission 5.2 to the PJCIS inquiry, pp. 3-4.

As the PJCIS acknowledged in its advisory report on the (then) Bill (at p. 47) and as expressly identified in the Explanatory Memorandum (at p. 29), there can be no sensible suggestion that conduct constituting torture or cruel, inhuman or degrading treatment or punishment is necessary for – or even relevant to – the proper performance of the relevant agencies' functions under the ISA. Such an interpretation is plainly contradicted by the ordinary meaning of the term 'proper' in relation to the performance of agencies' functions,[7] and the text and wider context of the ISA – having particular regard to the nature of agencies' functions under sections 6, 6B and 7.[8]

Rather, by limiting the scope of agencies' functions and activities (and the attendant protection from legal liability) to acts that are necessary for the proper performance of an agency's functions, the ISA evinces a clear intention that conduct constituting torture or cruel, inhuman or degrading treatment is subject to criminal and civil liability. This includes liability under the specific offences in relation to torture in Division 274 of the Criminal Code, which give domestic legal effect to Australia's international obligations under the Convention Against Torture. The amendments to the ISA, enacted by Schedule 2 to the CTLA Act, do not change this position in any way.

Secondly, as the PJCIS further observed, paragraph 6(4)(b) of the ISA confers an additional safeguard in relation to the conduct of activities by ASIS in recognition of its role as a human intelligence collection agency. This provision prohibits ASIS from planning for, or

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7 For example, the Macquarie Dictionary (Sixth Edition, October 2013) defines the term 'proper' as meaning "conforming to established standards of behaviour or manners; correct or decorous". In addition, in the unlikely event that the meaning of the phrase 'proper performance of the agency's functions' was considered to be ambiguous *vis a vis* torture, this would engage the presumption that legislation is to be interpreted consistently with Australia's human rights obligations: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 1983 CLR 273 at p. 287 (per Mason CJ and Deane J). There is nothing in the text of the provisions of the ISA concerning the functions of agencies, nor evident in the wider context of the ISA, to suggest that Parliament intended the ISA should be read inconsistently with Australia's international obligations to prohibit torture, including those under the Convention Against Torture. (Such a presumption is additional to the ability to consult extrinsic materials to the legislation in accordance with section 15AB of the *Acts Interpretation Act*. Relevant extrinsic materials include the Explanatory Memorandum to the Bill, which makes specific reference to this matter at p. 29.)

8 Further, the ISA is, like all Australian legislation, subject to the presumption of statutory interpretation that the Parliament did not intend to abrogate fundamental common law rights – including the fundamental and long-established rights to personal inviolability and personal liberty – in the absence of a clear intention on the face of the relevant legislation to displace this presumption. (See, for example: *'Marion's Case'* (1992) 175 CLR 218 at 253 per Mason CJ, Dawson, Toohey and Gaudron JJ concerning personal inviolability; and *R v Bolton; Ex Parte Bean* (1987) 162 CLR 514 at 523 per Brennan CJ concerning personal liberty.) The content of such fundamental rights includes conduct of the kind constituting torture and cruel, inhuman or degrading treatment or punishment, recognising that it is a significant incursion into the integrity and autonomy of a person's physical and mental state. In order for the ISA to be interpreted as abrogating these rights, it would be necessary to identify unambiguous and unmistakable language giving effect to this intention – noting that the more serious the interference, the clearer the requisite expression of intention must be: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 263 (per Black CJ, Sundberg and Weinberg JJ). There is no evidence of such a clear intention on the face of the ISA. There is no inconsistency between these fundamental common law rights (to the extent that they cover conduct constituting torture or cruel, inhuman or degrading treatment or punishment) and the statutory functions or activities of agencies prescribed under the ISA; nor the limited immunity in section 14 for actions done in the proper performance of an agency's functions.

undertaking, activities that involve violence against the person. The Committee has asserted (at p. 20 of its report) that the term 'violence' has a narrower meaning than conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. This is contradicted by the ordinary meaning of the term 'violence'. For example, the Macquarie Dictionary defines the term as encompassing "rough or injurious action or treatment",[9] which would clearly extend to the conduct identified by the Committee at page 20 of its report. This ordinary meaning is also confirmed by the Explanatory Memorandum (at p. 29). As conduct constituting torture or other cruel, inhuman or degrading treatment or punishment is outside the proper performance of all ISA agencies' functions, it necessarily falls outside the scope of the limited protection from legal liability in section 14. Accordingly, such conduct is already subject to criminal offences under Australian law, including specific offences in respect of torture in Division 274 of the Criminal Code. An express exclusion of such conduct under section 14 is, therefore, not necessary to give substantive effect to Australia's obligations under the Convention Against Torture. Further, as the PJCIS recognised, the insertion in section 14 of an express statutory exclusion of conduct that is not, in any case, within the scope of the immunity may also have unintended, adverse consequences for the interpretation of that provision (and potentially for the interpretation of agencies' functions). Accordingly, the Government has no intention to implement this recommendation.

Committee comment (p. 21)

The committee also recommends that, to be compatible with human rights, the ISA be amended to explicitly provide that ASIS must not provide any planning, support or intelligence where it may result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.

Attorney General's Response

The Committee has correctly identified that the prohibitions and limitations in subsection 6(4) of the ISA do not prohibit ASIS from being involved with the planning or undertaking of activities of the kind specified in paragraphs 6(4)(a)-(c) by other organisations. This is expressly confirmed in the note to subsection 6(4). However, any such involvement is subject to the requirements of sections 13 and 13A of the ISA. These provisions state that ASIS may only cooperate with another organisation if this cooperation is in connection with the functions of ASIS (section 13), or the functions of the cooperating (Australian) organisation (section 13A).

As mentioned above, the functions of ASIS are not capable of extending to conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. In addition, the functions of the Australian agencies with whom ASIS may cooperate under section 13A are similarly incapable of extending to conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The amendments to the ISA do not, in any way, change this position. For these reasons, the Government will not be amending the ISA to implement

9 Macquarie Dictionary (Sixth Edition, October 2013).

this recommendation. To the extent that the Committee appears to have suggested that such amendments are necessary in order for the ISA to be compatible with the Convention Against Torture, the Government does not accept that position.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION AND TRAINING
LEADER OF THE HOUSE
MEMBER FOR STURT

05 MAR 2015

Our Ref MC15-000575

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

Dear Senator

Thank you for the opportunity to respond to the Committee's *Eighteenth Report of the 44th Parliament* insofar as it relates to the Higher Education and Research Reform Bill 2014 (the Reform Bill).

I note that the Committee has agreed that, for the most part, the measures in the Bill do not limit the right to education, and in some cases the measures in the Bill make a positive contribution to human rights.

However, I note the Committee's concerns about two measures: the reduction in Commonwealth subsidies for new Commonwealth supported students and the removal of the cap on student contribution amounts, which it considers may impact the affordability and accessibility of higher education. The Committee has requested further information that supports the Australian Government's assessment that removing the cap on student contributions will not reduce access to education. The information requested by the Committee is attached.

In summary, the Government does not consider that either measure will limit the right to education or impact negatively on affordability and accessibility. Access to, and affordability of, higher education will continue to be protected by the Higher Education Contribution Scheme (HECS) which will allow students to defer the full cost of their study. Further, there is no requirement to repay any of the student loan debt until their income reaches the minimum repayment threshold of more than $50,638 per year.

The Reform Bill will increase student choice and greatly expand opportunity for many thousands of Australians. The measures to extend Commonwealth subsidies to all eligible students studying undergraduate qualifications at any approved higher education provider will see more than 80,000 additional students per year receiving Commonwealth subsidies. This includes 35,000 bachelor students and 48,000 diploma, advanced diploma and associate degree students. Inclusion of sub-bachelor places in the demand driven funding system will also provide better pathways for students who may not be prepared for higher education, allowing them a greater chance of success.

In addition, the Reform Bill provides for two new scholarships programs: the Commonwealth Scholarship scheme, and a dedicated scholarships fund within the Higher Education Participation Programme. Together, these are expected to assist many disadvantaged higher education students with the cost of undertaking study.

It should be noted that the costs of some courses are likely to decrease as non-university higher education providers gain access to subsidies for the first time. The Council of Private Higher Education Providers stated in its submission to the Senate Education and Employment Legislation Committee that the benefits of Commonwealth subsidies would be passed on to students.

Nevertheless, the loans available to Australian students through HECS will continue to ensure that no student will need to pay upfront for the higher education course of their choice. Evidence from previous changes to Australia's higher education system as well as recent evidence from England shows increased student participation, including of low-SES students, alongside fee rises. The experience in England has been that at the same time as fee caps were increased three-fold the number and proportion of low-SES students undertaking higher education has increased significantly. Further, a large international study prepared by Alex Usher for the European Commission found that where an income contingent loan scheme, such as Australia's HECS, existed there was no negative impact on participation as a result of higher fees.

I thank the Committee for its consideration of the Reform Bill.

Yours sincerely

Christopher Pyne MP

Encl. Response to the Parliamentary Joint Committee on Human Rights

The Higher Education and Research Reform Bill 2014

Concerns of the Joint Parliamentary Committee on Human Rights

The Committee has raised concerns about two of the measures contained in the *Higher Education and Research Reform Bill 2014* (the Reform Bill).

The Committee expressed concern in paragraphs 1.216 and 1.218 of its 18th Report of the 44th Parliament (the Report) that the total cost of education would rise directly as a result of the proposed 20 percent reduction in the subsidy for new Commonwealth supported students and consequently considered that this measure may be incompatible with the right to education.

The Committee also raised concern in paragraphs 1.221 and 1.223 of its Report that the removal of the cap on student contribution amounts may result in a rise in fees and is therefore incompatible with the right to education to the extent that it reduces the affordability (and accessibility) of higher education and, more generally, is inconsistent with the International Covenant on Economic, Social and Cultural Rights (ICESCR) goal for progressive realisation of free higher education. In response to these concerns the Committee sought further information from the Minister about any relevant modelling, case studies or analysis in support of the assessment that removing the cap on student contributions will not reduce access to education.

The concerns of the Committee are addressed below.

Response to the Joint Parliamentary Committee on Human Rights

HECS loans will protect the right to higher education by ensuring access and affordability

The right to education will not be negatively affected by the proposed 20 per cent reduction in the subsidy for new Commonwealth supported students or the removal of the cap on student contribution amounts. The Reform Bill does not restrict accessibility and affordability of higher education. The Higher Education Contribution Scheme (HECS) will continue to ensure that Australian students are able to fully defer the cost of their higher education through income-contingent loans. Eligible students will not need to pay a cent up front for the cost of their tuition, and need not commence repayments until they earn over an estimated $50,638 (in 2016-17). In this way, HECS effectively operates as an insurance mechanism to protect borrowers who participate in higher education but do not subsequently earn sufficient income to repay their debt without hardship.

International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries.[1] The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.

[1] Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014.

Previous changes to tuition fee charges in Australia have also not deterred students from lower socio-economic status (SES) backgrounds from undertaking higher education. A 2008 report by Access Economics found that 'the introduction of HECS and subsequent changes in the level of charges have had minimal impact, both in terms of overall applications and on enrolments by students from lower socio-economic status backgrounds.'[2]

Similar observations were made in relation to the recent experience in England. Many institutions elected to raise their tuition fees to the new maximum amount however this did not affect the proportion of low SES students enrolling in higher education courses, and the participation rates for disadvantaged students in England is higher than ever according to a 2014 report by the UK Independent Commission on Fees.[3]

The reforms will reduce fees for some students

The removal of the cap on student contributions will not result in price increases for all students. In fact, the costs of some courses are likely to decrease, as non-university higher education providers gain access to subsidies for the first time. The Council of Private Higher Education Providers (COPHE) stated in its submission to the Senate Education and Employment Legislation Committee which was conducting an inquiry into the Higher Education and Research Reform Amendment Bill (2014) that the benefits of Commonwealth subsidies would be passed on to students through a reduction in their fees.

The Reform Bill's measures include specific benefits targeted at students facing disadvantage

The Usher report also noted that the increase in funding available to universities allowed them to open up more places, and provide more student support such as academic support or cost of living allowances or bursaries. The combined effect is that the proportion of students from low socio-economic backgrounds undertaking higher education has been observed to increase after a rise in the 'sticker price' of the course. According to information gathered, greater access to scholarships, student loans and other financial support may result in students from disadvantaged backgrounds actually paying less, due to the ability of universities to increase their outreach efforts.

The availability of new scholarships through the proposed new Commonwealth Scholarship Scheme and a new dedicated scholarships fund within the Higher Education Participation Programme (HEPP) is expected to assist many disadvantaged higher education students with the cost of undertaking study. Institutions will be able to provide tailored, individualised support to help disadvantaged students, including help with costs of attending, participating in or succeeding in higher education. These will be allocated to students either as direct scholarship payments or as individualised support, such as assistance with the cost of living, additional tutoring, mentoring or outreach.

Together, the scholarships stream under HEPP and the new Commonwealth Scholarship Scheme are expected to result in additional support, particularly for regional students because all universities will be able to provide support for access and participation through scholarships.

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[2] Access Economics Pty Limited, 'Future Demand for Higher Education', Report for Department of Education, Employment and Workplace Relations, Australia, November 2008.

[3] Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014.

Greater access and success for students through the extension of Government subsidies to sub-bachelor courses

The Review of the Demand Driven Funding System[4] argued that expansion of subsidised places to sub bachelor courses and non-university higher education providers would improve the efficiency of the higher education system by better matching students with courses that suit them and give them the highest chance of success.

The measures in the Reform Bill aim to expand opportunity and choice for students through extension of the demand driven funding system to sub bachelor places at all institutions and bachelor level places at private universities and non-university higher education providers registered by TEQSA. For the first time ever, Commonwealth subsidies will be provided on a demand driven basis for eligible students enrolling in accredited higher education diplomas, advanced diplomas and associate degrees. These qualifications provide effective pathways for disadvantaged students and in many cases are qualifications in their own right (such as engineering technologists, construction managers, and paralegals).

The Review of the Demand Driven Funding System found that the capping of sub-bachelor places, as well as the general restriction on providers that are able to offer sub-bachelor Commonwealth supported places, created incentives for students to enrol in a bachelor degree. This was primarily due to the relative price differential between a (subsidised) bachelor place through a public university and a (non-subsidised) sub-bachelor place through a non-university higher education provider. This occurred even though a sub-bachelor course would better suit their needs and abilities.

Evidence to the review suggested that students who entered via a pathway course often did better than might have been expected, given their original level of academic preparation. At the University of Western Sydney's *UWSCollege* more than 70 per cent of students progress straight into the second year of a bachelor program, often with retention and success results equivalent to their peers who enrol directly into bachelor courses.

In addition, as discussed above, the Council of Private Higher Education (COPHE) has confirmed that their members intend to reduce their tuition fees as a result of access to Government subsidies. An article in *The Australian* on 24 September 2014 stated that fees for private higher education may halve in some cases as COPHE members pass Government subsidies directly on to students as savings.[5]

Based on the evidence provided, neither measure noted by the Committee can be considered to limit the right to education. The right to access higher education will be preserved by the HECS system, as all available evidence suggests that the presence of an adequate loan scheme preserves the accessibility of higher education. Additionally, the affordability of higher education will be maintained by the downward pressure on fees provided by the introduction of subsidies to sub-bachelor courses and private providers. Costs associated with higher education will also be reduced

[4] Kemp and Norton, 'Review of the Demand Driven Funding System', Australia, April 2014.
[5] B Lane, The Australian, 'Fees for private college courses could halve', 24 September 2014

for many students as a result of the targeted scholarship programmes. The measures in the Reform Bill ensure that the right to education, including its accessibility and affordability, will not be limited.

PARLIAMENTARY SECRETARY
TO THE PRIME MINISTER

Reference: C15/20325

26 MAR 2015

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

Dear ~~Senator Smith~~ Dean

Thank you for your letter dated 3 March 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Omnibus Repeal Day (Spring 2014) Bill 2014 (the Bill). I welcome this opportunity to address the Committee's questions on the Bill as presented in the *Nineteenth Report of the 44th Parliament*.

The Committee seeks advice on the proposed changes to the Telecommunication Act 1997 to remove the consultation requirement when changing disability standards.

The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. The reason for the removal of bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act) which sets the standard consultation requirements for all Commonwealth legislative instruments.

The provisions proposed for repeal mandate a variety of inconsistent approaches with respect to the time and method of consultation. The various provisions proposed to be repealed are prescriptive rules. The consultation periods in question range from 14 to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. There is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and imposes costs without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.

The standard requirements in section 17 of the LI Act apply across all legislation that does not have separate consultation provisions, not only in the Communications portfolio but

across the Commonwealth. In the Communications portfolio, section 17 of the LI Act has been used to ensure that appropriate consultation has been undertaken. The proposed repeal is intended to simplify, shorten and harmonise the law, in accordance with the objectives of the Government's deregulation agenda.

The Communications portfolio has taken a consistent approach to the reform of statutory consultation requirements. The provisions proposed to be amended include many that have no special relevance to persons with disabilities. This standard approach is consistent with the goal of ensuring the right to equality before the law for people with disabilities is on an equal basis with others in the community.

Subsections 382(1) and (5) of the *Telecommunications Act 1997*

In determining whether any consultation is appropriate, the rule-maker would ensure that any persons likely to be affected by the proposed instrument had an adequate opportunity to comment (subsection 17(2) of the LI Act refers).

Accordingly, section 17 of the LI Act, while not identical to the provisions being repealed, provides a statutory mechanism for those with an interest in disability standards, including persons with disabilities, to comment on those standards, notwithstanding the repeal of subsections 382(1) and (5) of the TC Act. For example, the provisions being repealed require the Australian Communications and Media Authority (ACMA), before making a disability standard under 382 of the TC Act, to try to ensure that any interested person has adequate opportunity (of at least 60 days) to make representations about the proposed standard, and for ACMA to give due consideration to these representations. Section 17 of the LI Act provides a separate statutory mechanism for those with an interest in a standard to comment on those standards. Both section 382 of the TC Act and section 17 of the LI Act are framed in terms of "practicable" consultation, meaning that the differences between the two approaches are not as significant as they may appear.

It is also worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if the Parliament is dissatisfied with that consultation, the instrument may be disallowed.

The Committee has also sought advice on the repeal of the review requirements in the Stronger Futures in the Northern Territory Act 2012 (SFNT Act) and in Part 10 of the Classifications (Publications, Films and Computer Games) Act 2005 (Classifications Act).

The policy objective of these elements of the legislation is to support Indigenous people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy, including reducing alcohol-related harm.

The repeal of review requirements in both the SFNT Act and Part 10 of the Classifications Act is machinery in nature – as such, it does not engage any applicable human rights, including those identified by the Committee at paragraph 1.153 of the *Nineteenth Report of the 44th Parliament*. The amendment relating to the assessment of licensed premises also does not engage any rights or freedoms, as any changes to licensing arrangements remain a matter for the Northern Territory Government and the Northern Territory Licensing Commission.

The repeal of the legislated review requirements does not mean that Stronger Futures measures will not be closely monitored and assessed. The operation of individual elements, which form part of the Stronger Futures package, is regularly monitored in conjunction with the Northern Territory Government. As the Committee is aware, the Commonwealth is also undertaking a revision of the Stronger Futures National Partnership Agreement in collaboration with the Northern Territory Government. This is currently underway.

The revision process includes a critical assessment of the effectiveness of the Stronger Futures National Partnership Agreement and overtakes the need for the review requirement provisions to remain in legislation.

Further to this, I understand that an inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities is being conducted by the House of Representatives Standing Committee on Indigenous Affairs. Submissions on Northern Territory alcohol laws were provided for the inquiry's consideration, from the Northern Territory Government, private individuals and a range of stakeholder groups.

Yours sincerely

CHRISTIAN PORTER

Australian National University

24 March 2015

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CRICOS Provider No. 00120C

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
Canberra ACT 2600

via email: human.rights@aph.gov.au

Dear Chair

Academic Misconduct Rules [F2014L01785]

I refer to your letter dated 3 March 2015 to the Vice Chancellor, to which I have been instructed to reply.

The University takes seriously its obligations to provide access to higher education to all students of merit and appreciates the work of the Joint Committee scrutinising Federal legislative instruments.

As a preliminary issue, as I indicated in an e-mail to the Secretariat, the extract of the report of the Joint Committee, included with your letter, makes an incorrect assumption: '*Last day to disallow: 26 March 2015'*. The University's legislation is exempt from disallowance under subsection 44(2) of the *Legislative Instruments Act 2003* – you may wish to correct the Joint Committee's records? The University appreciates this issue is not relevant to the work of the Joint Committee in scrutinising University Statutes and Rules.

The report of the Joint Committee queries whether an interim exclusion of a student from some or all of the University's facilities, pending the conclusion of an inquiry into serious academic misconduct derogates from the "right to (higher) education", as outlined in Article 13 of the International Covenant on Economic, Social and Cultural Rights:

> *13(c) Higher education shall be made equally accessible to all, on the **basis of capacity**, by every appropriate means, and in particular by the progressive introduction of free education;*

Following on the reference in Article 26 of the Universal Declaration:

> *26(1)…….. and higher education shall be equally accessible to all on the **basis of merit**.*

I have included a reference to these Articles due to the inclusion of the highlighted phrase – not contained in descriptions of the right to education at non-tertiary levels. Merit, or "capacity" as it is used in the ICESCR, is the antithesis of cheating and is an important focus of the Rules under question.

The complete text of Rule 10 is:

> **10 Interim exclusion by the Deputy Vice-Chancellor**
>
> 10.1 Subject to sub-rule 10.2, the Deputy Vice-Chancellor may, by written notice, deny a student in relation to whom an allegation of academic misconduct has been made access to all or any of the facilities of the University, or to any part of the University premises or to any activities conducted by or on behalf of the University.
>
> 10.2 The Deputy Vice-Chancellor must not deny a student access under subrule 10.1 unless he or she considers that the alleged academic misconduct is of a **serious** nature.

10.3 A denial of access under this rule is in force for the period specified in the notice, or until the conclusion of the inquiry process, whichever first occurs.

10.4 If the Deputy Vice-Chancellor exercises his or her powers under this rule, he or she must, as soon as is practicable, give to the student:

(a) a copy of the notice; and

(b) a written statement setting out the reasons for the action and advising the student that he or she has a right to apply for review of the decision under the Appeals Rules.

I have highlighted "serious" in the above extract because it seems to have been overlooked by the Joint Committee in its reasons. It is mentioned only once – at paragraph 1.166 and not again, including in paragraph 1.177 when the Joint Committee raises the matter upon which they have sought advice from the University. As an example, at paragraph 1.173 in the Joint Committee states:

> *"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 enquiry have taken place, my limit the rights of all persons to access education"*

With respect to the Joint Committee, the right to access higher education is limited to those who demonstrate merit (not all persons) and the operation of the interim suspension can only occur if the allegations of academic misconduct fall into the category of "serious".

In addition, and before considering the reasons why such a power to suspend is required, the Committee did not address the rights of a student to appeal any interim restrictions that have been applied, before the finalisation of the inquiry. Again, this element of the Rules only received a brief mention in paragraph 1.167 of the Committee's reasons. The appeal right is to provide procedural assurance that the exercise of the power to suspend a student on an interim basis is a proportionate response to the circumstances that have arisen. There is also provision for an appeal to be conducted "on the papers" to allow for the efficient consideration of an appeal that might involve an interim suspension (Appeals Rules 2014, see for eg rules 15 and 18).

The University faces many challenges when dealing with allegations of academic misconduct. For example, the use by a student of IT systems to "hack" into the systems of the University that may contain examination papers or other confidential material that would enable a student to cheat on assessment. Where allegations of that kind are made, suspending the access of the student from the electronic systems of the University is important to preserve the integrity of those systems as well as to gather appropriate evidence.

There are times when students unfortunately become aggressive and threaten witnesses (staff or students) who may be relevant to the inquiry – a student may be excluded entirely from their program or indeed have their academic record at the University completely expunged in certain cases of academic misconduct. Students facing these potential sanctions can seek to influence and harass potential witnesses both "online" and physically, and hence may need to have access to IT facilities suspended or be removed from campus during the inquiry process.

There have also been instances where students have created false identification documents to enable them to enter examination rooms or to inappropriately gain access to parts of the University campus - while allegations of that kind are resolved, it is important for safety and protection of property to remove the student from campus.

These Rules also deal with allegations of research misconduct in doctoral and other programs of higher degree by research. Allegations of research misconduct are quite serious and have the potential to prevent a student from continuing an academic research career. In these cases, evidence needs to be gathered before it is destroyed, removed or disturbed in some way so that the sanctity of the investigation and inquiry process is protected. In some cases this requires the removal of the student alleged to have engaged in misconduct from campus. Such removal can also serve to protect the interests of the student – if there is interference with evidence and they can demonstrate that they were not on campus as a result of obeying the interim suspension thus removing that student from suspicion in relation to the disturbed evidence.

These examples are not exhaustive with experience suggesting that the range of behaviours alters as the circumstances of the study environment change over time. Hence the wide discretion available to the Deputy Vice Chancellor to preserve the integrity of the inquiry processes in matters of serious academic misconduct

The exercise by the University of the power to suspend a student on an interim basis is also subject to external review by bodies like the Federal Court or the Ombudsman.

For all of the above reasons, the University is satisfied that the measure in the Rules is reasonable and proportionate in relation to its objectives and there is a rational connection between the interim power to suspend and the objectives.

If you would like any further information or to discuss these matters in further detail, please not hesitate to contact me.

Yours sincerely

Ken Grime
University Counsel

Australian Government
Australian Customs and Border Protection Service

Chief Executive Officer

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The Honourable Phillip Ruddock MP
Chair, Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Australian Customs and Border Protection Service – Use of Force Order (2015)

I refer to the Parliamentary Joint Committee on Human Rights *Nineteenth Report of the 44th Parliament* and the committee's request for a response.

The Committee specifically expressed concerns that the use of handcuffs on children may limit the rights of a child, and that the statement of compatibility does not provide sufficient justification of the compatibility of the measure with this right. Accordingly, the Committee requested advice on:

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

In response to the Committee's concerns, I wish to assure the Committee that any situation that would necessitate the handcuffing of a child or young person, would only ever be done so in order to achieve a legitimate objective, and only when reasonable and proportionate to the achievement of that objective, and in accordance with the exercise of statutory powers.

Restraints would only ever be considered in accordance with the Operational Safety Principles and Use of Force Model that states officers will only use the minimum amount of force reasonable and appropriate for the effective exercise of their statutory powers. At its core, the Model requires the use of communications (including negotiation and conflict de-escalation) as the primary consideration in interactions between ACBPS officers and members of the public.

ACBPS has a stringent program of training and annual recertification where it appropriately trains all officers who are required to hold a Use of Force permit.

Operational safety training and competency assessment are conducted in accordance with the Use of Force Order (2015) and delivered only by qualified Operational Safety Trainers. Restraints may only be applied by officers who hold a current Use of Force permit and only in the exercise of statutory powers.

I trust the above information is of assistance to the Committee.

Yours sincerely

Michael Outram
A/g Chief Executive Officer

17th April 2015

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC15-002415

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

Dear Chair Dean

Thank you for your correspondence of 13 February 2015 regarding concerns in relation to the Dental Benefits Rules 2014 and the Health Insurance Legislation Amendment (Optometric and Other Measures) Regulation 2014.

The Australian Government believes Australians deserve a world class health system with access to services provided by highly skilled doctors, nurses and allied health professionals.

This must be underpinned by a strong and sustainable Medicare.

The Government believes that the changes to dental services and Medicare rebateable optometric services appropriately balance the rights of consumers to access affordable health services and the responsibility of the Government to manage health expenditure and to ensure that Medicare rebates are reasonable.

As noted in the *Eighteenth Report of the 44th Parliament: Human Rights Scrutiny Report* (the Report), the right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life. The notion of 'the highest attainable standard of health' takes into account both the condition of the individual and the country's available resources.

Dental Benefits Rules 2014

The Child Dental Benefits Schedule (CDBS) commenced on 1 January 2014, and provides up to $1,000 in benefits, capped over two calendar years, for basic dental services for eligible children 2-17 years of age who satisfy a means test. The CDBS is administered under the *Dental Benefits Act 2008*. Dental Benefits Rules provide for the operational aspects of the programme.

The Dental Benefits Rules 2014 (the 2014 Rules) repeal and replace the Dental Benefits Rules 2013 (the 2013 Rules). Compared with the 2013 Rules, the 2014 Rules make a number of minor amendments to improve the operation of the CDBS.

Cap on Benefits

At paragraph 1.304 of the Report, the Committee notes that it considers the cap on benefits of $1,000 over two consecutive calendar years may limit the rights to social security and health. The Committee asks for further justification of this limitation.

I would like to clarify for the Committee that the cap on dental benefits of $1,000 for the 2015 and 2016 two calendar year period specified in the 2014 Rules does not represent any change from the cap that would have applied for this period had the 2013 Rules remained in force. The 2013 Rules placed a maximum cap on benefits of $1,000 for the 2014 and 2015 two calendar year period and provided for that amount to continue to apply for each two year period into the future unless a new amount was specified (subrule 14 (9)). The 2014 Rules maintain the existing level of access to dental services subsidised through the CDBS; the cap on benefits does not impose any new limitation on human rights.

I note the Committee's comments that the benefits cap could mean that people who need extensive dental work above the $1,000 limit may not have the means to access all necessary dental care. While the cap limits the benefits available under the CDBS, it is not the only means of financial support for dental services. State and territory governments provide free or low cost dental care to people with pensioner concession cards or health care cards. This provides a safety net for people who have limited means to meet the full cost of dental treatment themselves. Additionally, many states provide dental services to all children, regardless of means.

The objective of the limit on benefits is to balance the need for support for the dental treatment needs of children with maintaining the sustainability of government funding. It is my view that the provision for a benefit limit of $1,000 over two consecutive calendar years is a reasonable and proportionate way to provide sustainable access to an appropriate level of government funding in the context of the broader dental system.

Eligibility for dental services

At paragraph 1.309 of the Report, the Committee seeks advice as to whether the requirement that patients are eligible for Medicare at the time a dental service is provided is likely to lead to some people no longer being eligible for dental benefits.

In accordance with section 23 of the *Dental Benefits Act 2008*, to be eligible for a voucher for CDBS services in a calendar year a person must, on at least one day of the year:

- be aged at least two years but younger than 18 years;
- meet the means test; and
- be eligible for Medicare.

A person cannot be identified as eligible for a voucher for the CDBS for a particular calendar year until after they have met the means test and have become eligible for Medicare. CDBS vouchers apply in respect of a full calendar year (1 January to 31 December) regardless of the date on which they are issued.

The 2014 Rules introduce a requirement that, for a CDBS benefit to be payable, a patient must be eligible for Medicare at the time a dental service is provided. This means that, for a person who became eligible for Medicare part way through the calendar year, they would not be entitled to receive CDBS benefits for any dental services provided before they became eligible for Medicare.

The Committee notes that it considers changes to the eligibility for CDBS benefits engage the right to health and the right to social security. As this amendment only impacts on dental services that have already been provided and paid for without any anticipation of access to dental benefits, it is my view that, in practice, it does not affect the right to health.

The amendment does engage the right to social security because it removes an entitlement to receive a benefit for that dental service; however, the number of people likely to be affected by this amendment, if any, would be negligible. To be affected, a person would have had to receive a dental service in Australia while visiting and then, later that same year, become Medicare eligible, for example, by becoming an Australian resident.

The objective of this amendment is to create consistency with other Commonwealth programmes (such as the Medicare Benefits Schedule (MBS)) in that a person must be eligible for Medicare on the day of service for which a benefit applies. It is my view that this amendment is the most reasonable way to achieve a consistent application of health benefits to support effective administration of government funding and is compatible with Australia's human rights obligations.

Health Insurance Legislation Amendment (Optometric and Other Measures) Regulation 2014

The changes to the Medicare rebateable optometry arrangements commenced on 1 January 2015. The Health Insurance Legislation Amendment (Optometric and Other Measures) Regulation 2014 (the Regulation) provided, among other things, for the MBS rebate for all optometry services to be reduced by five per cent, and the charging cap that applied to optometrists was removed, enabling optometrists to set their own fees for Medicare rebateable services. The Medicare rebateable optometry services are administered under the *Health Insurance Act 1973*.

The Regulation amends the Health Insurance (General Medical Services Table) Regulations.

<u>Reduction in MBS fees and removal of the charging cap</u>

At paragraph 1.346 of the Report, the Committee notes that it considers that the reduction in MBS fees for optometry services and the removal of the charging cap for optometry services limits the right to health and social security. The Committee seeks further justification for these limitations.

In the last decade, spending on Medicare has more than doubled from $8 billion in 2004 to around $20 billion today, yet the Australian Government raised only around $10 billion from the Medicare levy in 2013-14. Ten years ago, the Medicare levy covered 67 per cent of the cost of Medicare, but it now covers only 54 per cent. Medicare spending is projected to climb to $34 billion in the next decade to 2024. I consider that this projected increase in spending represents a pressing concern for Australia and the Australian Government is working to make Medicare sustainable for the future and responsibly managing Australia's Budget is a legitimate objective for the Australian Government. The reduction in Medicare fees for optometric services and the removal of the cap will achieve a savings of $89.6 million over four years. These savings will contribute to an overall reduction in Medicare spending into the future.

The reduction in the rebate reflects efficiencies gained within the optometry profession over the years due to new technologies and techniques which support more cost-effective services. The reduction in the Medicare fees result in a decrease of only a few dollars per service. For the most common service, a comprehensive eye examination which is claimed when clinically necessary, this means a reduction in the rebate of about $3.55 for the service. I consider that reducing the Medicare fees for optometric services is a reasonable and proportionate way to assist in achieving an overall reduction in Medicare expenditure into the future.

Removing the charging cap for optometrists also means that individual optometrists can make their own business decisions according to their own and their patients' circumstances, including whether to continue bulk-billing patients. This will align the rules governing charging by optometrists with those applying for other health professions in the Medicare scheme. The Government believes that it is not unreasonable for patients who can afford it to contribute a modest amount to their service.

The optometry sector is highly commercialised and competitive. In 2013-14, 97 per cent of Medicare rebateable optometric services were bulk-billed and this rate has been relatively stable over the years. To identify whether these measures would significantly increase out-of-pocket costs for optometry services, my Department commissioned ACIL Allen Consulting to undertake an analysis of optometry services in Australia. The report *Optometry Market Analysis* found that the market is extremely competitive even in regional areas, with 75 per cent of all practices having at least one competitor within 500 metres and 95 per cent having competitors within 10 kilometres.

The strong competitive market means that the reduction in the fees and the removal of the cap is unlikely to increase patient contributions significantly or reduce access to Medicare rebateable optometric services. It is expected that the majority of optometry services will continue to be bulk-billed, including in regional areas. A full copy of the report is available at www.acilallen.com.au/projects/14/health-care/124/optometry-market-analysis.

The MBS also provides additional benefits for people with high out-of-pocket costs for out-of-hospital services through the Medicare safety nets. Services provided by optometrists are eligible for Medicare safety net benefits.

For the reasons outlined above, I believe that these measures are not incompatible with Australia's human rights obligations as they are reasonable and proportionate in achieving a legitimate objective. The Government is committed to protecting Medicare and to ensuring that it continues to provide access to high quality health care.

Yours sincerely

The Hon Sussan Ley MP

19 MAR 2015

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

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

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

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

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

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

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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