Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-third report of the 44th Parliament

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

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Membership of the committee

Members

The Hon Philip Ruddock MP, Chair	Berowra, New South Wales, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Senator Matthew Canavan	Queensland, NAT
Dr David Gillespie MP	Lyne, New South Wales, NAT
Ms Cathy McGowan AO MP	Indi, Victoria, IND
Senator Claire Moore	Queensland, ALP
Senator Dean Smith	Western Australia, LP
Senator Penny Wright	South Australia, AG
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

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Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Ms Zoe Hutchinson, Principal Research Officer
Ms Anita Coles, Principal Research Officer
Ms Jessica Strout, Senior Research Officer
Ms Shu-Fang Wei, Research Officer
Ms Alice Petrie, Legislative Research Officer

External legal adviser

Professor Simon Rice OAM

Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 11 May to 4 June 2015, legislative instruments received from 10 April to 14 May 2015, and legislation previously deferred by the committee.

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

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

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

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

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

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

- Airports Amendment Bill 2015;
- Appropriation (Parliamentary Departments) Bill (No. 1) 2015-2016;
- Crimes Legislation Amendment (Penalty Unit) Bill 2015;
- Energy Grants and Other Legislation Amendment (Ethanol and Biodiesel) Bill 2015;
- Excise Tariff Amendment (Ethanol and Biodiesel) Bill 2015;
- Export Charges (Collection) Bill 2015;
- Export Charges (Imposition—Customs) Bill 2015;

- Export Charges (Imposition—Excise) Bill 2015;
- Export Charges (Imposition—General) Bill 2015;
- Imported Food Charges (Collection) Bill 2015;
- Imported Food Charges (Imposition—Customs) Bill 2015;
- Imported Food Charges (Imposition—Excise) Bill 2015;
- Imported Food Charges (Imposition—General) Bill 2015;
- Iron Ore Supply and Demand (Commission of Inquiry) Bill 2015;
- Medical Research Future Fund (Consequential Amendments) Bill 2015;
- Medical Research Future Fund Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 3) Bill 2015;
- Tax and Superannuation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2015;
- Tax Laws Amendment (Small Business Measures No. 1) Bill 2015;
- Tax Laws Amendment (Small Business Measures No. 2) Bill 2015; and
- Water Amendment Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015;
- Australian Small Business and Family Enterprise Ombudsman Bill 2015;
- Customs Amendment (Australian Trusted Trader Programme) Bill 2015;
- Freedom of Information Amendment (Requests and Reasons) Bill 2015;
- Marriage Amendment (Marriage Equality) Bill 2015;
- National Health Amendment (Pharmaceutical Benefits) Bill 2015;
- Passports Legislation Amendment (Integrity) Bill 2015;
- Private Health Insurance (Collapsed Insurer Levy) Amendment Bill 2015;
- Private Health Insurance (National Joint Replacement Register Levy) Amendment Bill 2015;
- Private Health Insurance (Prudential Supervision) (Consequential Amendments and Transitional Provisions) Bill 2015;
- Private Health Insurance (Prudential Supervision) Bill 2015;

- Private Health Insurance (Risk Equalisation Levy) Amendment Bill 2015;
- Private Health Insurance Supervisory Levy Imposition Bill 2015;
- Renewable Energy (Electricity) Amendment Bill 2015;
- Social Services Legislation Amendment (Fair and Sustainable Pensions) Bill 2015 and
- Superannuation Guarantee (Administration) Amendment Bill 2015.

Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[1] Instruments raising human rights concerns are identified in this chapter.

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

Appropriation bills

1.11 The following appropriation bills were introduced during the relevant period:

- Appropriation Bill (No. 1) 2015-2016;
- Appropriation Bill (No. 2) 2015-2016;
- Appropriation Bill (No. 5) 2014-2015; and
- Appropriation Bill (No. 6) 2014-2015.

1.12 In light of the Minister for Finance's view as to the extent to which appropriation bills may be subject to human rights assessments (see page 13), the committee makes no further comment on these bills.

Deferred bills and instruments

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

- Criminal Code Amendment (Animal Protection) Bill 2015 (deferred 3 March 2015);
- Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015;

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.

- Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015; and
- Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551].

1.14 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.[2]

1.15 The committee also continues to defer a number of instruments in connection with its ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime.[3]

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-second Report of the 44th Parliament* (13 May 2015).

Social Services Legislation Amendment (No. 2) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 28 May 2015

Purpose

1.16 The Social Services Legislation Amendment (No. 2) Bill 2015 (the bill) seeks to amend the current income management programme and continue it for two years and to make amendments in relation to aged care.

1.17 In particular, the bill seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- abolish certain incentive payments relating to income management;
- amend how a person is determined to be a 'vulnerable welfare payment recipient' so that a person will no longer be assessed on a case-by-case basis for referral by a Centrelink worker, but will automatically be subject to income management if they meet certain criteria, which will be specified by the Minister for Social Services in a legislative instrument;
- remove reference to 'dependent child' and substitute reference to the person being 'a child for whom the person is the principal carer';
- amend the basis on which a person can seek an exemption from income management, revising the test from how many hours a person has worked to how much welfare the person has been paid during the relevant period; and
- introduce greater flexibility to deal with persons whose income management account has been credited or debited in error, and provide that in certain circumstances the recipient will owe a debt to the Commonwealth.

1.18 The bill also seeks to amend the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to cease the payment of residential care subsidies for care recipients during a period of leave taken before entering a residential care service. This will mean that during a period of up to seven days before a person enters into residential care (when a spot is being reserved for them) the care recipient will no longer receive government subsidies or supplements during the period when the person is not receiving care. The aged care provider will not be able to recoup any lost residential care subsidy from the care recipient as a result of this measure.

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

Background

1.20 The committee has previously conducted an inquiry into the *Stronger Futures in the Northern Territory Act 2012* and related legislation,[1] including in relation to income management, and is currently undertaking a new examination into the legislation.

Income management

1.21 The income management regime engages multiple human rights, in particular the right to a private life, the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living.[2] In examining the proportionality of the income management measures, the committee is particularly concerned by the proposal in this bill to change the basis on which a person will become subject to income management. The bill proposes moving away from an individual assessment of a person's vulnerabilities towards an automatic application of income management for certain classes of people, to be specified in a legislative instrument. The explanatory memorandum and statement of compatibility do not explain what the criteria is likely to be for the automatic application of income management, nor does the statement of compatibility provide any justification as to whether this change, in moving away from individual assessments, is compatible with a number of human rights.

1.22 **The committee is currently undertaking a broader inquiry: *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and intends to report on this in 2015. The committee will defer its consideration of this bill as part of its broader inquiry.**

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

2 See articles 17 and 26 of the International Covenant on Civil and Political Rights and articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights.

Defence Trade Controls Amendment Bill 2015

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

Purpose

1.23 The Defence Trade Controls Amendment Bill 2015 (the bill) seeks to amend the *Defence Trade Controls Act 2012* (the Act) to:

- delay the commencement of offence provisions by 12 months to ensure that stakeholders have sufficient time to implement appropriate compliance and licensing measures;
- provide for new offences or amend existing offences relating to export controls;
- require approvals only for sensitive military publications and remove controls on dual-use publications;
- require permits only for brokering of sensitive military items and remove controls on most dual-use brokering, subject to international obligations and national security interests; and
- provide for review of the Act, initially two years after the commencement of section 10, and for the minister to table a copy of the review report in each House of Parliament.

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

Background

1.25 The committee previously considered the bill in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the reverse evidential burdens contained within the bill were a proportionate limitation on the right to a fair trial (presumption of innocence).[1]

1.26 The bill finally passed both Houses of Parliament on 18 March 2015, and received Royal Assent on 2 April 2015.

Reverse evidential burdens

1.27 The bill seeks to amend a number of existing offences to introduce statutory exceptions to those offences. 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.

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 10-14.

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

Right to a fair trial (presumption of innocence)

1.29 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. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.30 An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

1.31 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must be reasonable, necessary and proportionate to that aim.

Compatibility of the measure with the right to a fair trial (presumption of innocence)

1.32 The statement of compatibility notes that the bill includes a number of defences that reverse the onus of proof and so limit the right to be presumed innocent.

1.33 In its previous analysis the committee accepted that the offences in the Act and the amendments in the bill seek to achieve the legitimate objective of enhancing the export control regime which supports Australia's defence, security and international obligations. However, it noted concerns that not all of the reverse burden provisions may be proportionate to achieving that objective.

1.34 The committee also noted that while some aspects of the exceptions appear to be properly characterised as falling within the particular knowledge of the defendant, it is not clear that it is reasonable to impose an evidential burden on the defendant in relation to all of the matters specified in the proposed new defences.

1.35 The committee therefore sought the advice of the Minister for Defence as to whether the limitation on the presumption of innocence is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

> Noting that the Bill requires the defendant to carry an evidential burden of proof with regard to the new exceptions, the Report queries whether the Bill is consistent with Article 14(2) of the International Covenant on Civil and Political Rights which protects the right of the defendant to be presumed innocent. The Bill's explanatory memorandum justifies these reversals on the grounds that the evidence that would need to be raised would either be solely within the defendant's knowledge or it would be

more reasonable, more practical and less burdensome for the defendant to establish the facts. Although the Committee agrees that this explanation holds true in some circumstances, it has asked for my further advice as to whether the limitation is reasonable and proportionate to achieve the Bill's stated objective.

While I acknowledge that the Bill does reverse the onus of proof for the introduced exceptions, these reversals are within reasonable limits, considering the importance of the Bill's objective, the lower standard of proof that the defendant bears, and that the defendant's right to a defence is maintained. The objective of the legislation, to stop proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs, will be strengthened by exceptions that shift the onus to the defendant. To discharge the onus, a defendant need only produce evidence that suggests a reasonable possibility that the exception applies. Noting that a defendant who wishes to rely on an exception should have conducted compliance checks to satisfy themselves that their activity falls within the exception, it is reasonable to expect the defendant to produce evidence of these checks to discharge the onus.

Reversing the onus for the defences within the Bill does not erode the defendant's right to a defence, is within reasonable limits and, given the important counter-proliferation objective of the Bill, is a proportionate measure to achieve the Bill's stated objective.[2]

Committee response

1.36 **The committee thanks the Minister for Defence for his response.** The committee notes that its original request for further information was focused on the construction of the offence provision and in particular whether the applicable exceptions could be characterised as falling within the particular knowledge of the defendant (such as whether the defendant made the supply orally). It was not clear to the committee that it is reasonable to impose an evidential burden on the defendant in relation to all of the matters specified in the proposed new defences. In particular, it was not apparent that the following would be particularly within the knowledge of the defendant, to such an extent, as to make it reasonable in all the circumstances to reverse the burden of proof. Rather, such matters would appear more likely to be within the government's particular knowledge and expertise:

- that the supply is within the scope of Part 2 of the Defence and Strategic Goods List, which is a list formulated by the minister;[3]

2 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (dated 21 April 2015) 1.

3 See item 21 of the bill.

- that there is no notice in force in relation to the supplier and the technology;[4]
- that a country is a participating state for the purposes of the Wassenaar Arrangement; a participant in the Australia Group; a partner in the Missile Technology Control Regime; and a participant in the Nuclear Suppliers Group;[5]
- that a country is specified in a legislative instrument;[6] and
- that the supply is made under or in connection with a contract specified in a legislative instrument.[7]

1.37 In addition, reversing the burden of proof in the following instances would appear to require the defendant to prove an element of the offence, which should more properly fall on the prosecution:

- proving that the supply of DGSL technology is not the provision of access to that technology;[8] and
- proving that the supply is not for a military end-use nor for use in a Weapons of Mass Destruction Program.[9]

1.38 Unfortunately, the minister's response does not deal with the specifics of the exceptions and therefore doesn't provide specific information to support a conclusion that they are justified. Instead the response deals with the offence provision more generally and reiterates how a reverse burden offence works in practice. The committee also notes the minister's comment regarding a defendant having a responsibility to satisfy themselves that their activity falls within an exception. While this may appear reasonable in itself, it doesn't address why the requirement to undertake due diligence is sufficient to warrant reversing the burden of proof and it doesn't support a conclusion that such matters are within the particular knowledge of the defendant.

1.39 **The committee considers that the measures reversing the burden of proof in relation to the proposed new statutory exceptions (defences) limit the right to be presumed innocent. As set out above, the minister's response does not justify that limitation for the purposes of international human rights law, in particular that it is reasonable to reverse the burden of proof in relation to all elements of the**

4 See item 21 of the bill.

5 See item 41 of the bill, proposed new subsection 15(4).

6 See item 41 of the bill, proposed new subsection 15(4).

7 See item 41 of the bill, proposed new subsection 15(4B).

8 See item 17 of the bill.

9 See item 17 of the bill.

defence. Accordingly, the committee seeks further information from the Minister for Defence as to why it is necessary and proportionate to reverse the burden of proof in the cases outlined at paragraph [1.36] to [1.37] above.

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.

Appropriation Bill (No. 3) 2014-2015

Appropriation Bill (No. 4) 2014-2015

Portfolio: Finance
Introduced: House of Representatives, 12 February 2014

Purpose

2.2 The Appropriation Bill (No. 3) 2014-2015 proposed appropriations from the Consolidated Revenue Fund (CRF) for the ordinary annual services of the government.

2.3 The Appropriation Bill (No. 4) 2014-2015 proposed appropriations from the CRF for services that are not considered to be for the ordinary annual services of the government.

2.4 Together, Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015 are referred to as 'the bills'.

2.5 The amounts proposed for appropriation by the bills were in addition to the amounts appropriated through the Appropriation Acts that implemented the 2014-2015 Budget.

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

Background

2.7 The committee considered the bills in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Finance as to whether the bills were compatible with Australia's international human rights obligations.[1]

2.8 The bills finally passed both Houses of Parliament on 17 March 2015, and received Royal Assent on 2 April 2015.

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 5-9.

Potential engagement and limitation of human rights by appropriations Acts

2.9 The committee noted in its previous analysis that each of the bills was accompanied by a brief and substantially identical statement of compatibility which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[2] The statements of compatibility concluded that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[3] They also stated that '[d]etailed information on the relevant appropriations, however, is contained in the portfolio [Budget] statements'.[4] No further assessment of the bills' compatibility with human rights was provided.

2.10 The committee also noted that substantially identical statements of compatibility were provided for previous appropriations bills considered by the committee.[5]

Multiple rights

2.11 In accordance with its previous assessment of appropriations bills, the committee noted in its previous analysis that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.[6]

Assessment of the compatibility of the bills with human rights

2.12 The committee previously considered that the High Court case which held that appropriations Acts do not create rights or duties as a matter of Australian law does not fully address the fact that appropriations bills may nevertheless engage rights according to Australia's obligations under international human rights law.

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2 Explanatory memorandum, Appropriation Bill (No. 3) 2014-2015 (EM A) 4; Explanatory memorandum, Appropriation Bill (No. 4) 2014-2015 (EM B) 4.

3 EM A, 4; EM B, 4.

4 EM A, 4; EM B, 4.

5 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

6 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

2.13 First, the committee noted that compliance with Australia's obligations to progressively realise economic, social and cultural rights using the maximum of resources available is reliant on government allocation of budget expenditure.

2.14 Second, it noted that specific appropriations may involve reductions in expenditure which amount to retrogression or limitations on rights.

2.15 The committee thus noted that the appropriation of funds facilitates the taking of actions which both effect the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.16 Therefore, as noted in previous reports, the committee considered that, where there is a sufficiently close connection between a particular appropriations bill and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program, that may engage human rights, the statement of compatibility for that bill should provide an assessment of any limitations of human rights that may arise from that engagement.[7]

2.17 The committee acknowledged that such bills may present particular difficulties given their technical and high-level nature, and because they generally include appropriations for a wide range of programs and activities across many portfolios. The committee therefore also acknowledged that the approach to human rights assessment of appropriations bills for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011* may not generally be possible at the level of individual measures.

2.18 However, the committee considered that the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

2.19 The committee noted that there are some precedents in the Australian context for assessments of this nature in relation to budgetary measures by government and indicated its willingness to assist with the development of a template and approach to preparing statements of compatibility for appropriations bills that would support the assessment and examination of appropriations bills as required by the *Human Rights (Parliamentary Scrutiny) Act 2011*. The committee also noted that there are a range of international resources to assist in preparing assessments of budgets for human rights compatibility.

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7 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 7.

2.20 The committee considered that the appropriation of funds via annual and additional appropriations Acts may engage and potentially limit or promote a range of human rights that fall under the committee's mandate. The committee considered that, where there is a sufficiently close connection between a particular appropriations bill and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program that may engage human rights, the statement of compatibility for that bill should provide an assessment of any limitations of human rights that may arise from that engagement. In order to assist the Minister for Finance in assessing any limitations on human rights in relation to these bills, the committee considered that attention should be given to the following questions in assessing whether the bills are compatible with Australia's human rights obligations: whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and whether the allocations are compatible with the rights of vulnerable groups (such as children, women, Aboriginal and Torres Strait Islander Peoples, persons with disabilities and ethnic minorities).

Minister's response

> Thank you for your letter of 18 March 2015 drawing my attention to comments relating to *Appropriation Bill (No. 3) 2014-2015* and *Appropriation Bill (No. 4) 2014-2015* in the *Twentieth Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights (the Committee). In particular I note the Committee considers that appropriation bills may engage rights according to Australia's obligations under international human rights law.
>
> My view remains however, that given the extremely limited legal effect of the appropriation bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011*. This is consistent with the position I have previously expressed to the Committee on the adequacy of the statements of compatibility with human rights within the explanatory memoranda of appropriation bills.
>
> I have noted and carefully considered the suggestions the Committee has made to assess whether the appropriation bills are compatible with human rights obligations. It is the government's view, however, that there are already extensive opportunities within the existing legislative process for the adequate scrutiny of these bills, and changes are not required.
>
> As my predecessor, Senator the Hon Penny Wong, replied on 10 May 2013 the detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the relevant Minister. This detail allows

> the examination of proposed expenditure and budgetary processes through the Senate Estimates process.
>
> The policy development process does however by its nature require an assessment of all factors that might relate to the relevant policies, including environmental, legal, economic, social and moral factors. The Attorney General's Department has developed an assessment tool and educational materials for use by policy officers to strengthen the capacity to develop policies, programs and legislation consistent with human rights.[8]

Committee response

2.21 **The committee thanks the Minister for Finance for his response and his thoughtful consideration of the committee's previous suggestions.**

2.22 **However, the committee remains of the view that, while it may not be possible to undertake a measure by measure analysis for compatibility with human rights, the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.**

2.23 **Nevertheless, in light of the minister's response, the committee has concluded its consideration of these bills.**

8 See Appendix 1, Letter from Senator the Hon Mathias Cormann, Minister for Finance, to the Hon Philip Ruddock MP (received 30 April 2015) 1.

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

Portfolio: Defence
Introduced: Senate, 3 December 2014

Purpose

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

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

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

Background

2.26 The committee considered the bill in its *Nineteenth Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the proposed measures were compatible with Australia's international human rights obligations.[1]

2.27 The bill finally passed both Houses of Parliament on 14 May 2015, and received Royal Assent on 20 May 2015.

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

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

2.29 The bill includes a use and derivative use immunity provision, which provides that any statement or disclosure made by the person in the course of giving evidence (or anything obtained as an indirect consequence of making the statement or disclosure) is not admissible in evidence against the witness.

2.30 However, there is an exception that would permit the statement or disclosure to be used against the person in a prosecution for giving false testimony.

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 4-6.

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

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

2.32 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.

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

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

2.34 The statement of compatibility stated that the provision granting use and derivative use immunity promotes the right to a fair trial.

2.35 In its previous analysis, the committee noted that measures which enable regulations to be made requiring a witness to answer a question, even if it may tend to incriminate themselves, limit the right not to incriminate oneself.

2.36 The right not to incriminate oneself can be limited if it can be demonstrated that the measure supports a legitimate objective, is rationally connected to that objective and is a reasonable and proportionate way to achieve that objective.

2.37 The statement of compatibility identified the measure's objective as being the government's legitimate interest in ascertaining 'the true circumstances and events subject to inquiry by Defence'. However, it provided no information or evidence as to how inquiries are currently conducted and why the existing provisions are insufficient.

2.38 The committee considered that, while the inclusion of the use and derivative use immunity alleviated the impact of this measure, the immunity provided an exception to permit a statement or disclosure made by a witness to be used against them in a prosecution for giving false testimony. No information was given in the statement of compatibility as to the need for this exception to the immunity provisions and what effect this has on the right not to incriminate oneself.

2.39 The committee therefore sought the advice of the Minister for Defence 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.

Minister's response

The Department of Defence has long regarded ascertaining the true causes of significant events involving its personnel as being more important than possible prosecution of, or civil suit against, individuals. Such information enables actions to be undertaken to prevent the reoccurrence of adverse events - for example, you may recall that the Sea King Board of Inquiry led to major changes in the Navy's helicopter maintenance practices.

Experience suggests that individuals may be reluctant to provide evidence that could be used against them. This can make it difficult to investigate and ascertain the true causes of significant events, which are often systemic or cultural rather than solely the fault of individuals. Compelling individuals to provide information, even though it may implicate them in wrongdoing, and protecting the information from use in subsequent criminal or civil proceedings, will sometimes be the only way to determine the true causes of significant events. This is demonstrated in cases where witnesses have refused to cooperate with disciplinary investigations, but have provided information when compelled in an administrative inquiry.

Under the new arrangements made possible by the Bill, the Inspector-General of the Australian Defence Force be responsible for inquiring into service-related deaths and other matters directed by the Minister or the Chief of the Defence Force, in addition to a military justice oversight role. These functions will frequently involve ascertaining the true causes of significant events in order to prevent reoccurrence, often in situations where individuals could be implicated and, accordingly, where they could be reluctant to provide all relevant information. In these circumstances, limiting the abrogation against self-incrimination to compel witnesses to provide information to the Inspector-General ADF that may incriminate them, while also protecting witnesses from having information they have provided used against them, supports the legitimate objective of ascertaining the true causes of significant events.

Under current arrangements, the privilege against self-incrimination is abrogated by the Defence (Inquiry) Regulations 1985 (the Regulations) which have been made under paragraph 124(1)(gc) of the *Defence Act 1903* (the Act). The abrogation is also governed by sub-sections 124(2A), (28) and (2C) of the Act. The privilege is abrogated for all types of inquiry under the Regulations, including Chief of the Defence Force Commissions of Inquiry (Part 8 of the Regulations), Boards of Inquiry (Part 3), and to a lesser extent in Inquiry Officer inquiries (Part 6) and inquiries by the Inspector-General ADF (Part 7).

Currently, unless I direct otherwise, a Chief of the Defence Force Commission of lnquiry must be held into all service-related deaths. These Commissions have the ability to require witnesses to answer questions in

abrogation of their right against self-incrimination. For consistency of approach and to ensure quality outcomes, it is proposed that similar powers should apply to the Inspector-General ADF, who will take over responsibility for inquiring into service-related deaths under the new arrangements.

In these circumstances, it is considered that allowing for the privilege against self-incrimination to be abrogated, while protecting information collected from subsequent use in criminal and civil proceedings, is a reasonable and proportionate measure to achieve the objective of ascertaining the true causes of significant events in Defence.

It should also be noted that the abrogation of the privilege against self-incrimination can only have an extremely limited scope due to the limitations imposed by the new sub-section 110C(4) of the Act on the functions of the Inspector-General ADF.

Finally, Defence regrets not including this information in the explanatory material, which may have alleviated the Committee's concerns on these matters. A replacement explanatory memorandum addressing these concerns was tabled in the Senate on 5 March 2015.[2]

Committee response

2.40 **The committee thanks the Minister for Defence for his response.**

2.41 The committee notes the minister's advice that the Inspector-General of the Australian Defence Force will assume responsibility for inquiring into service-related deaths instead of a Chief of Defence Force Commission of Inquiry, and that the limitation on the right not to incriminate oneself is consistent with current legislative arrangements under the Defence (Inquiry) Regulations 1985.

2.42 The committee also appreciates the minister's advice that the above further information was contained within the replacement explanatory memorandum.

2.43 **On the basis of the information provided by the Minister for Defence and the existence of the use and deriviative use immunities, the committee considers that the measure is likely to be compatible with the right to a fair trial (right not to incriminate oneself).**

2 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (received 19 May 2015) 1-2.

Fair Work Amendment (Bargaining Processes) Bill 2014

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

Purpose

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

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

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

Background

2.46 The committee previously considered the bill in its *Nineteenth Report of the 44th Parliament*, and requested further information from the Minister for Employment as to whether measures in the bill were compatible with human rights.[1]

Industrial action—protected action ballot order

2.47 Currently, section 443 of the FWA sets out when the FWC must make a protected action ballot order in relation to the negotiation of a proposed enterprise agreement. A protected ballot order allows a ballot to occur so that employees can decide whether to engage in protected industrial action, which is permitted by the *Fair Work Act 2009* if certain requirements are satisfied.[2] The current requirements are that an application must have been made and that the FWC must be satisfied that each applicant has been, and is, genuinely trying to reach an agreement.

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

- are manifestly excessive, having regard to the conditions at the workplace or industry; or

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 7-12.

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

- would have a significant adverse impact on productivity at the workplace.[3]

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

Freedom of association

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

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

The right to form trade unions (right to strike)

2.52 Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also guarantees the right of everyone to form trade unions and to join the trade union of his or her choice; and sets out the rights of trade unions, including the right to function freely and the right to strike.[4]

2.53 Limitations on these rights are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'. As with article 22 of the ICCPR, article 8 also provides that limitations on these rights are not permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[5]

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3 See item 4 of Schedule 1 to the bill.

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

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

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

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

2.55 The statement of compatibility acknowledges that the proposed changes engage the right to freedom of association and the right to form trade unions (right to strike), but states that the restrictions are reasonable, necessary and proportionate to 'achieving the legitimate objectives of encouraging sensible and realistic bargaining claims'.[6]

2.56 In its previous analysis the committee noted that this stated objective only applies to the claims of an applicant (being claims made by unions and employees) and not to claims made by employers, and that Australia already has in place substantial regulation of industrial action. The FWA currently places a number of restrictions on the right to strike, making it an exception to the rule, rather than prescribing a right to strike with restrictions.

2.57 Accordingly, the committee considered that the statement of compatibility did not demonstrate that the objective of the measure may be considered a legitimate objective for the purposes of international human rights law.

2.58 The committee therefore sought 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.

Minister's response

> The Government's clear position set out in *The Coalition's Policy to Improve the Fair Work Laws* (the Policy), released in May 2013, was that it would legislate to 'encourage meaningful, genuine negotiations during enterprise bargaining' and 'change the laws to ensure that protected industrial action can only happen after there have been genuine and meaningful talks'.[7]
>
> As the Committee is no doubt aware, protected industrial action does not occur in a vacuum. Rather, protected industrial action is taken in support of *bargaining claims*. It is therefore wholly unexceptional to expect that

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7 *The Coalition's Policy to Improve the Fair Work Laws* 32.

parties have had, or at least attempted to have had, genuine and meaningful talks *in bargaining* before they resort to industrial action.

It is approaching the absurd to suggest that employees' right to take industrial action in support of a bargaining position is limited by an expectation that there has at least been an attempt to engage meaningfully on the bargaining position or that this requirement has human rights implications that warrant the attention of a Parliamentary Committee.

The Policy also stated that 'it is important to ensure that claims made by parties when negotiating for an enterprise agreement are sensible and realistic'[8] and that the Government 'will change the laws so that the Fair Work Commission must be satisfied that claims are realistic and sensible before they approve an application to take industrial action'.[9] In support of the above statements, the Policy sets out examples where 'fanciful, exorbitant or excessive' enterprise bargaining claims were, in effect, undermining the operation of Australia's enterprise bargaining and industrial action framework.[10]

The Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) seeks to implement these commitments and respond to these concerns by providing that the independent Fair Work Commission must not make a protected action ballot order if it is satisfied that the bargaining claims of an applicant are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates, or, if acceded to, would have a significant adverse impact on productivity at the workplace.

The Committee, at 1.33 of its report, refers to the permissible limitations on rights where a limitation is 'necessary ... for the protection of the rights and freedoms of others'. It appears the Committee has inexplicably overlooked the potentially significant and disproportionate damage that protected industrial action can cause not only to an employer, but to other employees and workers not engaging in industrial action as well as on innocent third parties. Remembering also that those engaged in protected industrial action are provided with a statutory immunity over the loss or damage they cause to others by their industrial action, it is appropriate and entirely unexceptional that, for the protection of the rights of others, the powerful tool of protected industrial action is not used capriciously and in support of claims that are *manifestly* excessive or would have a *significant adverse impact* on productivity.

The Committee also comments that this same standard is not applied to claims by an employer. Whilst this is correct, the Committee's analysis

8 Ibid 33.

9 Ibid 34.

10 Ibid 34.

> embarrassingly ignores the reality that employers have no right to unilaterally commence protected industrial action in support of its bargaining claims. An employer's recourse to protected industrial action depends entirely on whether employees engage in industrial action first.
>
> The critical points are that these amendments do not limit the right to form trade unions by limiting the right to strike and the Committee's assertion to the contrary would be quite laughable if it didn't trivialise genuine human rights issues. The Committee's bland assertion without supportive evidence undermines the credibility of the Committee.[11]

Committee response

2.59 **The committee thanks the Minister for Employment for his response.**

2.60 The committee notes that the right to strike is derived from article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), a binding multilateral treaty which Australia has been a party to since 1976, and which is included in the definition of 'human rights' in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.61 The committee is therefore required to assess bills and legislation for compatibility with the right to strike, and to report its findings to the Parliament, in accordance with section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.62 Assessments of the compatibility of legislation by the committee involve the application of its analytical framework to, first, identify if a measure engages a human right (that is, whether in the broadest sense the measure may interact with a right); second, identify if a measure limits any right that is engaged; and third, assess whether any limitation is legally justified (that is, pursues a legitimate objective, is rationally connected to that objective and is proportionate).

2.63 Since its inception, the committee's approach is to apply the above analytical framework in undertaking a routine and technical examination of legislation, which therefore necessarily does not encompass consideration of its policy merits, or broader arguments which may be advanced in support of or against a proposed measure.

2.64 With reference to this context, while the minister's response provides a significant exposition of the policy rationale underpinning the bill, such matters fall outside the scope of the committee's examination bill as guided by the routine application of its analytical framework to the provisions of the bill.

2.65 Turning to the committee's analysis of the measure in question, the committee's initial report noted that the proposed amendment to subsection 443(2) of the FWA clearly engages and limits the right to strike because it would add a

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11 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 14 April 2015) 1-2.

further restriction on taking protected industrial action (that is, on exercising the right to strike) in accordance with Australian law.[12]

2.66 The committee's conclusion in this respect directly supports the analysis in the statement of compatibility for the bill, which also noted that the measure 'may limit access to protected industrial action over certain claims.'[13]

2.67 However, the committee notes that, in his response, the minister strongly rejects this analysis in stating that the measures:

> …do not limit the right to form trade unions by limiting the right to strike and the Committee's assertion to the contrary would be quite laughable if it didn't trivialise genuine human rights issues.

2.68 While noting this contradiction between the minister's own view and the statement of compatibility for the bill (which the member of Parliament introducing the bill must cause to be prepared), the committee restates its support for the proposition that the placing of restrictions on the right to strike represents a limitation of that right and, accordingly, must be justified as pursuing a legitimate objective, being rationally connected to that objective and proportionate.

2.69 In this respect, as set out in the committee's initial analysis, the measures in question must be assessed with reference to the content of the right to strike as defined and understood as a matter of international human rights law, and taking into account the extent to which Australia's domestic law already limits the right against those international standards.

2.70 It is therefore important to recognise that the right to strike is not provided for under Australian law but derives from article 8 of ICESCR (with article 22 of the ICCPR also protecting some aspects of the right). Under Australian law, taking strike action or protected industrial action is not provided for as a right but as an exceptional event that requires a lengthy process be followed, including prior approval from the Fair Work Commission followed by a secret ballot of union members administered by the Australian Electoral Commission.[14]

2.71 As noted above (at footnote 5), the committee's usual practice is to draw on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate.

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12 The *Fair Work Act 2009* provides that a strike or the ability take 'protected industrial action' is available in limited prescribed circumstances. Persons taking 'protected industrial action' are given legislative protection from proceedings against them for breach of contract or industrial tort in respect of the protected action. The FWC can make an order to prohibit industrial action which is not 'protected.'

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14 See Fair Work Act, Part 3-3.

2.72 The committee therefore must take into account the fact that the absence of a general right to strike under Australian domestic law has been criticised by the Committee for Economic, Cultural and Social Rights (CESCR), which in 2009 recommended that Australia:

> …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.[15]

2.73 Similarly, the committee must also take into account that the ILO has previously observed, in relation to Australia and strike action that may impact on the economy:[16]

> …a broad range of legitimate strike action could be impeded by linking restrictions on strike action to interference with trade and commerce. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service "essential" and thus do not justify restrictions on the right to strike.[17]

2.74 The committee also notes ILO guidance that:

> The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike.[18]

2.75 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[19]

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15 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia*, Australia E/C.12/AUS/CO/4 12 June 2009.

16 As noted above (at footnote 5), International Labour Organisation (ILO) standards, as a specialised body of law, may inform the related rights set out in the ICCPR and the ICESCR; and both article 8 of the ICESCR and article 22 of the ICCPR explicitly refer to obligations under the ILO conventions.

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

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

19 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

2.76 To apply these considerations to the present bill, the measures in the bill would impose further conditions on the approval of strike action, including that such action must not be approved by the FWC if it is satisfied that the applicant's claims:

- are manifestly excessive, having regard to the conditions at the workplace or industry; or
- would have a significant adverse impact on productivity at the workplace.[20]

2.77 Accordingly, it is without doubt that the measure limits the right to strike by providing additional circumstances in which the FWC must not permit strike action. Further, those additional circumstances, at least in part, relate to economic impacts (in terms of productivity), which the ILO has unequivocally stated are not, in and of themselves, legitimate restrictions on the right to strike.

2.78 The minister's view that the measure does not impose any limitation on the right to strike is therefore at odds with the committee's application of its analytical framework to the measure, as well as the assessment provided by the statement of compatibility for the bill.

2.79 As identified in the committee's initial analysis, the statement of compatibility for the bill did not provide sufficient evidence to justify the proposed limitation on the right to strike, and in particular did not provide any research or evidence to demonstrate that the measure would address a pressing and substantial concern (that is, would address a legitimate objective as understood in the terms of international human rights law).

2.80 The minister's response has not sought to provide any additional information to establish the measure pursues a legitimate objective, with reference to the committee's legal analytical framework and the extensive guidance provided by the Attorney-General's Department on providing assessments of legislation for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.81 The committee notes the absence of any justification for the measure as pursuing a legitimate objective, and particularly the persuasive commentary of the CESCR and ILO on existing restrictions on the right in Australia and the impermissibility of restrictions related to economic impacts.

2.82 **Some committee members considered that the measure pursued a legitimate objective and did not impose an unreasonable restriction on the right to form trade unions (right to strike) and, accordingly, is compatible with those rights.**

2.83 **Other committee members consider that the proposed additional requirements that must be met before the FWC can make a protected action ballot order is a limitation on the right to freedom of association and the right to form trade unions (right to strike). As set out above, the minister has not justified that**

20 See item 4 of Schedule 1 to the bill.

limitation for the purposes of international human rights law. Those committee members therefore consider that the measure is likely to be incompatible with those rights.

Enterprise agreement approval process—requirement to discuss workplace productivity

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

2.85 Currently, sections 186 and 187 of the FWA provide that an enterprise agreement must be approved by the FWC if certain requirements are met. This requires the FWC to be satisfied that the agreement has been genuinely agreed to, the terms of the agreement generally comply with the National Employment Standards and the agreement passes the 'better off overall' test.[21] The FWC must also be satisfied that the agreement would not be inconsistent with, or undermine, good faith bargaining and be satisfied of certain procedural matters.

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

Freedom of association (right to organise and bargain collectively)

2.87 The right to organise and bargain collectively is a part of the right to freedom of association and the right to form trade unions as set out in article 22 of the ICCPR and article 8 of the ICESCR: see [2.50] to [2.54] above.

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

2.88 The statement of compatibility acknowledges that the bill engages rights protected by the ILO Convention No. 87, which protects the right to organise, and the ILO *Right to Organise and Collective Bargaining Convention 1949* (No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment. It goes on to state that the requirement to discuss productivity before an enterprise agreement is approved is 'reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill'.[22]

2.89 In its previous analysis the committee considered that the measure engages and limits the right to organise and bargain collectively, as it imposes additional requirements on what must be discussed during enterprise agreement bargaining

21 Although, section 189 of the *Fair Work Act 2009* allows the FWC to approve an enterprise agreement that does not pass the better off overall test if satisfied, because of exceptional circumstances, that the approval of the agreement would not be contrary to the public interest. The better off overall test is set out in section 193 of the *Fair Work Act 2009*.

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negotiations. The statement of compatibility states that the measure is intended to put productivity improvements on the agenda of negotiations, but does not explain why this is necessary or how this is a legitimate objective for human rights purposes.

2.90 The committee therefore sought 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.

Minister's response

> The Government was very clear in the Policy that it intended to 'put productivity back on the agenda' by requiring that 'before an enterprise agreement is approved, the Fair Work Commission will have to be satisfied that the parties have at least discussed productivity as part of their negotiation process'.[23]
>
> The Bill seeks to implement this commitment by requiring that before the Fair Work Commission approves an agreement, it must be satisfied that improvements to productivity at the workplace were discussed during bargaining for the agreement. That is all. All this amendment requires is that there has been a discussion about productivity at some point in bargaining.
>
> The Government reiterates (as noted in the Explanatory Memorandum to the Bill) that this amendment is not intended to require the Fair Work Commission to consider the merit of the improvements to productivity that were discussed, the detail of the matters that were discussed, the outcome of those discussions or whether it would be reasonable for certain provisions to be included in an enterprise agreement. All that is required is that there is a discussion. This is hardly onerous on either the employer, employees or bargaining representatives.
>
> It was ludicrous and unsustainable for the Committee to have concluded in its report, at 1.45, that a requirement to have a discussion about productivity at some point during bargaining "limits the right to organise and bargaining collectively". Many objective observers would disagree that the need to have a discussion 'limits' in any substantive way the right to freedom of association and the right to organise and bargaining collectively.
>
> The Committee's approach to whether the requirement to have a discussion constitutes a substantive limitation is, with respect, narrow, impractical and ignores the realities of bargaining and again, regrettably,

23 *The Coalition's Policy to Improve the Fair Work Laws* 33.

only trivialises the work of the Committee and genuine human rights issues.

The Government does not consider that the proposed amendment limits the right to freedom of association.[24]

Committee response

2.91 **The committee thanks the Minister for Employment for his response.** The committee notes that collective bargaining is recognised under international human rights law as a fundamental aspect of the right to form trade unions, which is protected under article 8 of the ICESCR.[25]

2.92 The committee notes that the right is properly understood as procedural: a right to access a process of collective bargaining. The process of collective bargaining involves voluntary negotiation between the parties, which relies on the autonomy of the parties to the negotiation, and also encompasses the principle that parties should be free to reach their own settlement as the outcome of bargaining processes. Generally, the role of the state is to refrain from interfering in the conduct of negotiation between parties, as such interference would conflict with the principle of autonomy in the bargaining process.

2.93 As noted above, the bill would introduce a requirement that, before approving an enterprise agreement, the FWC must be satisfied that improvements to productivity at the workplace were discussed during the bargaining process. As set out above at [2.84] to [2.85], this is a new requirement in the context where collective bargaining is already heavily regulated by the FWA.

2.94 While the minister has stated his view (and that of 'many objective observers') that the requirement to discuss improvements to productivity at the workplace would not be onerous and would not be a 'substantive limitation on the right to organise and bargain collectively, the committee notes that its examination of legislation does not strictly encompass the weight of individual or majority opinion, and is restricted to the routine application of its legal analytical framework to the provisions of the legislation being examined.

2.95 In this regard, the committee notes that the measure imposes a requirement on the content of discussions between parties to a collective bargain. As such, it limits the autonomy of the parties to determine the scope and nature of the bargain. It is therefore unequivocal that, as a matter of law, the measure limits the right to organise and bargain collectively. On the application of the committee's analytical framework, it follows that the question is whether this limitation is justified as a matter of international law.

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24 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 14 April 2015) 2.

25 CESCR, *General comment No. 18: The Right to Work*, E/C.12/GC/18, 24 November 2005.

2.96 The statement of compatibility for the bill acknowledged that the measure may limit the right to collectively bargain but nevertheless asserted that it was justified:

> To the extent that requiring bargaining parties to hold a discussion over productivity improvement is said to limit the right to collectively bargain, the requirement is reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill.[26]

2.97 As the statement of compatibility did not provide any further information to support the assertion that the limitation was nevertheless justified, the committee sought, with reference to the elements of its analytical framework, further information from the minister as to the legitimate objective of the measure, whether the measure was rationally connected to that objective and whether the limitation was proportionate to that objective.

2.98 The minister in response does not seek to justify the limitation on the right to collectively bargain identified in the statement of compatibility other than on the on the basis that the limitation in question is not 'onerous' or 'substantive'. In not seeking to address the questions set out above at [2.57], the response does not assess the compatibility of the measure with human rights in the form or substance suggested by the Attorney-General's Department or as set out in the committee's Guidance Note 1. The minister states that:

> The Committee's approach to whether the requirement to have a discussion constitutes a substantive limitation is, with respect, narrow, impractical and ignores the realities of bargaining and again, regrettably, only trivialises the work of the Committee and genuine human rights issues.

2.99 The committee is required to assess bills and legislation for compatibility with the right to strike, and to report its findings to the Parliament, in accordance with section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.100 Assessments of the compatibility of legislation by the committee involve the application of its analytical framework to, first, identify if a measure engages a human right (that is, whether in the broadest sense the measure may interact with a right); second, identify if a measure limits any right that is engaged; and third, assess whether any limitation is legally justified (that is, pursues a legitimate objective, is rationally connected to that objective and is proportionate).

2.101 In this respect, the committee notes that the minister's response attempts only to address the first step in assessing the human rights compatibility of the measure. Noting the minister's view that the measure would not impose an onerous or significant limitation on the right to collectively bargain, it appears that it may

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26 EM v.

have been possible to justify the limitation as compatible with human rights through the application of the committee's longstanding analytical framework (as explained in Guidance Note 1).

2.102 The committee notes the measure must be considered in the context of the existing regulatory regime for collective bargaining.

2.103 **Some committee members considered that the proposed mandated discussion of workplace productivity during the bargaining process is not unduly onerous and, accordingly, is compatible with the right to collectively bargain.**

2.104 **Other committee members consider that the proposed requirement that workplace productivity must be discussed before an enterprise agreement can be approved is a limitation on the right to organise and bargain collectively. As set out above, the response does not justify that limitation for the purposes of international human rights law. Accordingly, those committee members consider that the measure is likely to be incompatible with the right to collectively bargain.**

National Vocational Education and Training Regulator Amendment Bill 2015

Portfolio: Education and Training
Introduced: House of Representatives, 25 February 2015

Purpose

2.105 The National Vocational Education and Training Regulator Amendment Bill 2015 (the bill) amends the *National Vocational Education and Training Regulator Act 2011* (the Act) and the *National Vocational Education and Training Regulator (Transitional Provisions) Act 2011* to:

- extend registration periods from five to seven years;
- require any person advertising or representing a nationally recognised training course to clearly identify the provider responsible for the qualification in their marketing material;
- establish the capacity of the minister to make standards in relation to quality in the vocational education and training sector;
- clarify the National Vocational Education and Training (VET) Regulator's (the regulator) ability to share information collected in the course of its operations; and
- make minor administrative amendments and include transitional provisions.

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

Background

2.107 The committee considered the bill in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Education and Training as to whether the bill was compatible with Australia's international human rights obligations.[1]

2.108 The bill finally passed both Houses of Parliament on 16 March 2015, and received Royal Assent on 2 April 2015.

Disclosure of information by the regulator

2.109 Part 4 of the bill amended the definition of 'VET information' to include all information and documents collected by the regulator in the course of exercising its functions or powers under the Act or in administering the Act.

2.110 The bill also widened information disclosure provisions to allow the regulator to disclose VET information to a Commonwealth or state or territory authority if

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 32-35.

necessary to enable that authority to perform or exercise its functions or powers, or to a royal commission. The bill provided that if personal information is disclosed to a royal commission the regulator must advise the person whose information is disclosed of the details of the information disclosed.

2.111 The committee considered in its previous analysis that the disclosure of personal information engages and limits the right to privacy.

Right to privacy

2.112 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; and
- the right to control the dissemination of information about one's private life.

2.113 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

2.114 The statement of compatibility acknowledged that the bill engaged the right to privacy by enabling the regulator to disclose information.[2]

2.115 The committee noted in its previous analysis that the definition of 'VET information' is very broad and captures all information and documents collected by the regulator in the performance of its functions. Under the Act the regulator's functions include, in addition to registering and accrediting courses and organisations, the issuing of VET qualifications to students.[3] It also provides that VET student records are to be provided to the regulator,[4] including a document or object that has been kept because of its connection to a current or former VET student.[5]

2.116 The committee also noted that the information able to be disclosed by the regulator could include information about students, including personal information, and as such the committee considered that the bill limited the right to privacy.

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2 Explanatory memorandum (EM) 4-5.

3 Section 55 of the *National Vocational Education and Training Regulator Act 2011.*

4 Section 211 of the *National Vocational Education and Training Regulator Act 2011.*

5 See definition of 'VET student records' in section 3 of the *National Vocational Education and Training Regulator Act 2011.*

2.117 While the committee noted that improving the ability of the regulator to cooperate with other government entities to remove dishonest providers is likely to be a legitimate objective for the purposes of international human rights law, it found it unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

2.118 In particular, the statement of compatibility listed only one safeguard in the legislation – namely, that if personal information is disclosed to a royal commission the regulator must advise the affected person that the information has been disclosed and give details of the information disclosed. However, this requirement does not apply when personal information is disclosed to a Commonwealth, state or territory authority.

2.119 The committee also noted that the definition of a Commonwealth or state or territory authority in the Act includes any Commonwealth department, the state or territory (as a whole) or a body established under law. This is extremely broad, and could include hundreds of bodies or entities. The statement of compatibility did not explain why it is necessary to enable disclosure to all Commonwealth, state or territory authorities, rather than to a specified list of relevant authorities.

2.120 In addition, the statement of compatibility did not describe the specific types of personal information that might be disclosed under the bill.

2.121 The committee therefore required further information on the specific types of personal information subject to the disclosure scheme, and why it is regarded as proportionate to enable the disclosure of information to any Commonwealth, state or territory authority.

2.122 The committee considered that disclosure of VET information limits the right to privacy. The statement of compatibility for the bill did not provide sufficient information to establish that the breadth of the measure may be regarded as proportionate to its stated objective of improving the regulator's ability to cooperate with other government entities to remove dishonest VET providers.

2.123 The committee therefore sought the advice of the Minister for Education and Training as to whether the limitation on the right to privacy imposed by the breadth of the measure is proportionate to the measure's stated objective.

Assistant Minister's response

> I note the Committee is concerned with the amendments to the definition of 'VET information' and the disclosure provisions, in particular in relation to the potential for disclosure of students' personal information held by the national training regulator, the Australian Skills Quality Authority (ASQA).
>
> Under the provisions of the *National Vocational Education and Training Regulator Act 2011* (the Act), ASQA may, in the course of regulating registered training organisations (RTOs), collect vocational education and training (VET) information. After the amendments in the Bill commence,

VET information will be defined to mean information that is held by ASQA and relates to the performance of ASQA's functions, including information and documents collected by ASQA in the course of administering the Act, or in the exercise or performance of a function under the Act.

I have been advised that ASQA does collect some personal information relating to individual students and l agree, this information will be VET information under the Act.

As the Committee notes, one of the purposes of amending the definition of VET information is to assist ASQA in removing dishonest providers from the VET sector. It is envisaged that this objective will be predominantly achieved by means of ASQA providing other (not personal) types of VET Information, such as marketing materials to the Australian Competition and Consumer Commission.

The amended provision allows for the possibility that there may be circumstances where it is necessary for ASQA to disclose personal information to another agency for the purposes of, among other things, identifying and removing unscrupulous providers from the VET sector.

While such a circumstance may not be a common occurrence, it is important that ASQA is able to respond in a timely and efficient manner, and to ensure that the relevant receiving agency has the information necessary to perform its functions or exercise its powers. I note the Committee's concerns that this measure may limit an individual's right to privacy. There are a number of safeguards in place to ameliorate that risk.

ASQA will only be permitted to disclose an individual's personal information to a Commonwealth authority or state or territory authority if it is reasonably satisfied that disclosure is necessary to enable or assist the authority to perform or exercise any of its functions or powers. Under Part 9 Division 2 of the Act, which governs the disclosure and sharing of information (including any personal student information), it is an offence for a person to make an unauthorised disclosure of VET information, with a penalty of two years imprisonment. In addition, ASQA is bound by the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs include rules around the collection, use and disclosure of personal information. The Office of the Australian Information Commissioner can investigate potential breaches of the APPs.

The amended provision, when combined with the existing privacy safeguards, is an effective way of ensuring that the right to privacy is balanced with the need to protect the interests of VET students, as well as to protect and enhance Australia's reputation for VET nationally and internationally.[6]

6 See Appendix 1, Letter from Senator the Hon Simon Birmingham, Assistant Minister for Education and Training, to the Hon Philip Ruddock MP (dated 20 May 2015) 1-2.

Committee response

2.124 **The committee thanks the Assistant Minister for Education and Training for his response.**

2.125 The committee notes, in particular, the assistant minister's advice regarding the information that will be shared under the provisions, such as marketing materials to the Australian Competition and Consumer Commission.

2.126 The committee further notes the assistant minister's advice regarding the safeguards that will apply to these provisions, including unauthorised disclosure offences under the *National Vocational Education and Training Regulator Act 2011*.

2.127 **On the basis of the information provided, the committee considers that the measure is compatible with the right to privacy and has concluded its examination of the bill.**

Omnibus Repeal Day (Autumn 2015) Bill 2015

Portfolio: Prime Minister and Cabinet
Introduced: House of Representatives, 18 March 2015

Purpose

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

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

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

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

Background

2.132 The committee first reported on the bill in its *Twenty-first Report of the 44th Parliament*, and requested further information from the Parliamentary Secretary to the Prime Minister as to whether the bill was compatible with Australia's international human rights obligations.[1]

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

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

2.134 The Act contains a range of protections against discriminatory treatment of Aboriginal people. The purpose of the Act is stated to be 'preventing Discrimination in certain respects against those Peoples under laws of Queensland'.[2]

2.135 Accordingly, the committee considered in its previous analysis that the repeal of the Act engages the right to equality and non-discrimination.

Right to equality and non-discrimination

2.136 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).

2.137 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

1 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 5-7.

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

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.

2.138 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[3] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[4] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[5]

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

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

2.140 While the statement of compatibility stated that repealing the Act would have no substantive effect, the committee sought further information to help it assess whether repealing the Act could limit the right to equality and non-discrimination. The committee noted in particular that no details were provided in the statement of compatibility as to the Queensland laws the Act was designed to override, or whether the *Racial Discrimination Act 1975* (RDA) provides equivalent and sufficient protection of the right to equality and non-discrimination as is provided by the Act. The committee therefore sought the advice of the Parliamentary Secretary to the Prime Minister as to:

- whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the Act; and
- whether there are any Queensland laws which continue to apply such that the Act may not be redundant.

Parliamentary Secretary's response

> **The Committee seeks advice as to whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the *Aboriginal and Torres Strait***

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

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

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

Islanders (Queensland Discriminatory Laws) Act 1975 **(the Queensland Discriminatory Laws Act).**

The *Racial Discrimination Act 1975* (the Racial Discrimination Act) will continue to provide protection of the rights of Aboriginal persons and Torres Strait Islanders to equality and non-discrimination.

Specifically, section 9 of the Racial Discrimination Act prohibits 'direct' race discrimination, while section 10 provides for a general right to equality before the law. Subsection 10(3) supersedes State or Territory laws that authorise the management of Aboriginal or Torres Strait Islander property without their consent. This subsection is essentially in the same terms as section 5 of the Queensland Discriminatory Laws Act.

The Committee also seeks advice as to whether there are any Queensland laws which continue to apply such that the Queensland Discriminatory Laws Act may not be redundant.

The Queensland Discriminatory Laws Act deals with the *Aborigines Act 1971* (Qld) and *the Torres Strait Islanders Act 1971* (Qld) and, where relevant, their successor Acts.

These Acts imposed a different legal regime on Aboriginal and Torres Strait Islander reserves in Queensland than that which applied to persons in other parts of Queensland.

The laws targeted by the Queensland Discriminatory Laws Act have since been repealed. While the Discriminatory Laws Act continues to have legal effect, it serves no practical purpose. Please refer to Attachment A which traces changes to targeted Queensland laws, including the removal of discriminatory aspects.[6]

2.141 See Appendix 1 for Attachment A referred to in the Parliamentary Secretary's response.

Committee response

2.142 **The committee thanks the Parliamentary Secretary to the Prime Minister for his response.**

2.143 The committee notes the Parliamentary Secretary's advice that the RDA provides protection of the right to equality and non-discrimination, for Aboriginal and Torres Strait Islander peoples in Queensland, which appears to be at least equivalent to many of the protections provided under the Act.

2.144 Further, the committee notes the advice regarding Queensland laws which have since been repealed. Attachment A of the Parliamentary Secretary's advice

6 See Appendix 1, Letter from the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister, to the Hon Philip Ruddock MP (dated 13/04/2015) 1-2.

usefully traces changes to those targeted discriminatory Queensland laws, including showing when discriminatory aspects of the laws were repealed or amended.

2.145 **In light of the advice provided by the Parliamentary Secretary, and noting in particular the protections of the *Racial Discrimination Act 1975* and the repeal of certain discriminatory laws in Queensland, the committee considers that the repeal of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* is compatible with the right to equality and non-discrimination.**

Telecommunications Legislation Amendment (Deregulation) Bill 2014

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

Purpose

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

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

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

Background

2.148 The committee first considered the bill in its *Sixteenth Report of the 44th Parliament*, and requested further information from the Minister for Communications as to whether the proposed repeal of Part 9A of the Consumer Protection Act is compatible with the rights of the child.[1]

2.149 The committee considered the minister's response in its *Eighteenth Report of the 44th Parliament*, and sought further information in relation to information provided in the response.[2]

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

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 89-94.

2.150 The bill passed both Houses of Parliament on 25 March 2015 and received Royal Assent on 13 April 2015.

Repeal of Part 9A of the Consumer Protection Act

2.151 The bill repealed Part 9A of the Consumer Protection Act (CPA), which regulates the supply of telephone sex services via a standard telephone service. The explanatory memorandum (EM) stated that Part 9A is outdated and no longer necessary due to changes in technology and consumer behaviour.

2.152 The statement of compatibility for the bill stated that no human rights were engaged by this amendment.

2.153 However, the committee considered in its initial analysis that, as Part 9A was introduced in order to address community concerns that telephone sex services were too easily accessed by children, the deregulation of these services may expose children to a risk of harm currently minimised under Part 9A.

2.154 Accordingly, the committee considered that the measure engages article 19 of the Convention on the Rights of the Child and the obligation to protect children from harm.

Rights of the child

2.155 Children have special rights under human rights law taking into account their particular vulnerabilities. Under a number of treaties, particularly the Convention on the Rights of the Child (CRC), children's rights are protected. All children under the age of 18 years are guaranteed these rights.

2.156 The rights of children includes the right of children to develop to the fullest; protection from harmful influences, abuse and exploitation; family rights; and access to health care, education and services that meet their needs.

2.157 Under article 19 of the CRC, Australia is required to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of harm.

Compatibility of the measure with the rights of the child

2.158 The committee sought the advice of the Minister for Communications as to whether the proposed repeal of Part 9A of the CPA is compatible with the rights of the child, and particularly, whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

2.159 The committee considered the minister's response in its *Eighteenth Report of the 44th Parliament*, and noted the minister's response stated that Part 9A of the CPA

is not required to ensure the protection of children from the harm of telephone sex services because of the existing protections in Schedule 7 of the BSA.[3]

2.160 The committee noted that, in order to ensure no diminution in protection of children from harm as required by the Convention on the Rights of the Child, Schedule 7 of the BSA must provide equivalent protection to Part 9A of the CPA.

2.161 However, as Schedule 7 of the BSA effectively imposes a regulatory regime on telephone sex service providers that is based on industry codes of conduct, it was not clear from the minister's response that the protections in Schedule 7 are equivalent to those proposed to be repealed in Part 9A of the CPA, which imposes mandatory compliance obligations.

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

Minister's response

> In my previous response, I outlined the protections within Schedule 7 of the *Broadcasting Services Act 1992* (BSA) that protect children from accessing R18+ content via a range of platforms, including telephone sex services. I note the Committee's request for further clarification on whether Schedule 7 of the BSA offers a comparable level in terms of protecting children from harm to that which was provided under Part 9A of the TCPSS Act.
>
> It may be useful to outline the background to Part 9A, which was originally made as part of amendments to the Telecommunications Consumer Protection and Service Standards Bill 1998, before it was passed by the Parliament as the TCPSS Act in 1999. Part 9A originally provided a regulatory solution to address community concern that telephone sex services were too easily accessed by children of standard telephone service customers. At that time there had been a steady increase in complaints about telephone sex services since the introduction of premium rate services in 1990-91.
>
> However, since the passage of the *Communications Legislation Amendment (Content Services) Act 2007*, provisions that ensure the protection of children from adult content, including that delivered via telephone sex services, have resided within Schedule 7 of the BSA. The *Communications Legislation Amendment (Content Services) Act 2007* also repealed most of the key provisions previously contained in Part 9A of the TCPSS Act.

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 103-105.

The Committee has sought my advice that Schedule 7 of the BSA offers a comparable or equivalent level of protection for children from the harm of telephone sex services to that which was provided by Part 9A. This seems to be based on an assumption that both Part 9A of the TCPSS Act and Schedule 7 of the BSA worked in parallel to protect children from harm.

However, as I have previously advised the Committee, Schedule 7 of the BSA continues to be the primary regulatory instrument protecting children from accessing telephone sex services or other age restricted materials. I also note that at the time Schedule 7 of the BSA was introduced, Part 9A of the TCPSS Act was substantially amended. Since that time, Part 9A had not contained provisions specifically designed to protect children from harm, instead it only provided certain limited consumer protections by:

- regulating billing arrangements for telephone sex services; and
- prohibiting telephone sex services from being bundled with other goods and services.

Until its recent repeal, section 158B of Part 9A prohibited a carriage service provider from billing a customer in relation to the supply of a telephone sex service unless the telephone sex service was supplied using a specific number range (that is, the 1901 prefix, or another prefix determined by the Minister for Communications or the Australian Communications and Media Authority (ACMA)).

However, the former requirements in Part 9A around billing arrangements were clearly only relevant to the extent that a consumer had access to, and had used a telephone sex service. Fundamentally, Schedule 7 of the BSA has proven to be effective in requiring industry to have a range of mechanisms to prevent children from accessing telephone sex services in the first place. Therefore, I considered the repeal of the billing arrangements for telephone sex services in Part 9A of the TCPSS Act would clearly not in any way reduce the protection from harm already afforded to children.

Secondly, until its recent repeal, Section 158C of Part 9A limited how telephone sex services were marketed and supplied, by preventing telephone sex services from being tied to the supply of any other goods or services. The original Explanatory Memorandum[4] explained this was to:

> "*...prevent suppliers getting customers to 'opt-in' to telephone sex services by requiring them to 'opt-in' as a condition of purchasing certain services, or by giving discounts or special offers if they do 'opt-in'.*"

There is no equivalent or directly comparable provision contained in Schedule 7 of the BSA. However, regardless of how telephone sex services

4 http://www.comlaw.gov.au/Details/C2004B00256/Supplementary Explanatory Memorandum/Text.

are marketed now or into the future, Schedule 7 provides assurances that appropriate age verification requirements are in place to protect children from accessing these types of services in the first instance.

In conclusion, the recent repeal of Part 9A reflects rapid technological developments and consumer usage trends whereby online services and mobile apps have become the preferred means by which consumers access adult content. Further, during consultation on the proposed repeal of Part 9A, the ACMA confirmed it had not received any complaints in recent years about telephone sex services. Accordingly, the Government considered Part 9A of the TCPSS Act was obsolete and notes the repeal was supported by all stakeholders consulted, including the peak consumer and industry representative bodies, namely the Australian Communications Consumer Action Network and the Communications Alliance.[5]

Committee response

2.163 **The committee thanks the Minister for Communications for his response. On the basis of the further information provided, particularly advice that Part 9A does not contain provisions specifically designed to protect children from harm, but instead provides certain limited consumer protections, the committee considers that the measure is compatible with the rights of the child, and has concluded its examination of the bill.**

5 See Appendix 1, Letter from the Hon Malcolm Turnbull MP, Minister for Communications, to Senator Dean Smith (dated 13 May 2015) 1-3.

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

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

Purpose

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

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

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

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

Background

2.168 The committee first reported on the regulation in its *Eighteenth Report of the 44th Parliament*, and requested further information from the Minister for Small Business as to whether the bill was compatible with Australia's international human rights obligations.[1]

Civil penalties provisions

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

Right to a fair trial and fair hearing rights

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

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 68-70.

other rights in relation to legal proceedings contained in article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

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

2.172 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 purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

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

2.173 While the statement of compatibility stated that the new Franchising Code did 'not engage any of the applicable rights or freedoms',[2] the committee observed that civil penalty provisions prescribed in the Franchising Code engaged the right to a fair trial and a fair hearing. 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.

2.174 However, the committed noted that 'civil' penalty provisions under Australian domestic law may be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), such as the right to be presumed innocent. The right to be presumed innocent requires, for example, that the case against a person be demonstrated on the criminal standard of proof, that is, be proven beyond reasonable doubt.

2.175 The committee's expectations in relation to assessing the human rights compatibility of civil penalty provisions are set out in its *Guidance Note 2*.[3] This notes that in a corporate context where the penalties are small it is generally not necessary

2 Explanatory memorandum (EM) 5.

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

to provide an assessment of whether civil penalty provisions are considered 'criminal' for the purposes of international human rights law.

2.176 However, in this case, some of the penalties under the Franchising Code apply to franchisees, who may be individuals or small businesses, and the maximum civil penalty of 300 penalty units ($51000) therefore appears significant. The committee therefore considered that, due to these factors, an assessment was required as to whether the civil penalty provisions should be considered 'criminal' for the purposes of international human rights law and, if so, whether the provisions were compatible with criminal process rights under article 14 and 15 of the ICCPR.

2.177 Accordingly, the committee sought the advice of the Minister for Small Business as to whether the civil penalty provisions in the new Franchising Code were compatible with the right to a fair trial and fair hearing.

Minister's response

Having regard to the matters outlined below, I believe it is reasonable for the Committee to conclude that the civil penalties regime set out in the Franchising Code is not a 'criminal' penalty regime for the purposes of international human rights law.

- Penalties under the Franchising Code do not apply to the public in general. Rather, they apply only in relation to persons in a particular business relationship, in a specific regulatory context, and are directed towards promoting openness and transparency between the parties to that relationship. This is inconsistent with characterising the penalties as criminal.
- I note that the penalties are moderate having regard to other civil penalties that are imposed under the *Competition and Consumer Act 2010* (CCA). The amount of the penalty is also mitigated by the fact that the penalties are only imposed on persons in a particular business relationship.
- It is also important to appreciate that 300 penalty units is the maximum penalty; the Court has full discretion to determine the appropriate level of penalty having regard to all relevant matters, including the nature and extent of the relevant conduct, any loss or damaged suffered as a result of that conduct, the circumstances in which the conduct took place, and whether the person has previously engaged in similar conduct (see section 76(1) of the CCA).

I would also like to draw the Committee's attention to the following matters, which may be relevant to its deliberations.

- The civil penalties imposed under the Franchising Code slot into the existing pecuniary penalty regime established by the CCA. This regime is long-standing and well litigated. It has not previously been thought that the failure to apply the criminal standard of proof in these type of proceedings has resulted in injustice. Indeed, the courts

have indicated on numerous occasions that the gravity of the allegations being tested in the court will be taken into account, and that the graver the allegation, the greater the strictness of proof that will be required (see, for example, *Australian Competition and Consumer Commission v IF Woo lam & Sons Pry Ltd* (2011) 196 FCR 212 at [8]).

- The penalties imposed in respect of clauses 6, 39 and 41 of the Code are imposed in respect of conduct engaged in by persons in a particular relationship. The relevant provisions are intended to encourage both parties to that relationship to act openly towards each other. Given this, if it is accepted that it is unnecessary to apply the criminal standard of proof to one party to that relationship (the franchisor), it would be inappropriate to apply a different standard of proof to the other.
- The civil penalties imposed under the Code are but one of a number of enforcement provisions provided for in the CCA, which include infringement notices (Part IVB, Division 2A) and public warning notices (Part 1VB, Division 3). Given this, even if it is possible that a civil penalty could be imposed on an individual, it is unlikely that this would occur, save in exceptional circumstances.

Industry codes prescribed under the provisions of the CCA are co-regulatory measures designed to encourage best practice among an industry and improve transparency and conduct in business to business relationships.

The introduction of civil penalties for serious breaches of the Franchising Code is an important development in ensuring that the franchising sector is effectively regulated. The introduction of penalties followed extensive public consultation and engagement with the franchising sector. There was significant industry consensus that penalties were an appropriate mechanism for responding to instances of inappropriate conduct in the sector.[4]

Committee response

2.178 **The committee thanks the Minister for Small Business for his response.**

2.179 The committee notes the minister's belief that the civil penalties set out in the Franchising Code should not be considered 'criminal' for the purposes of international human rights law.

2.180 In particular, the committee notes the minister's advice that the penalties under the Franchising Code do not apply to the public in general, but apply in a specific regulatory context and are only imposed on persons in a particular business

4 Appendix 1, Letter from the Hon Bruce Billson MP, Minister for Small Business, to the Hon Philip Ruddock MP (received 05/05/2015) 1-2.

relationship. A penalty is likely to be considered 'criminal' for the purposes of international human rights law if its purpose is to punish or deter; and it applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.) The penalties are therefore less likely to be considered 'criminal' for the purposes of international human rights law.[5]

2.181 However, even if a penalty occurs in a regulatory context, it may still be considered 'criminal' for the purposes of international human rights law if the penalty carries a substantial pecuniary sanction. In relation to the severity of the penalty, the committee notes the minister's advice that 300 penalty units is relatively moderate in its specific regulatory context when compared to other civil penalties under the *Competition and Consumer Act 2010.* On this basis, the committee considers that the civil penalty provisions under the Franchising Code are not 'criminal' for the purposes of international human rights law. The criminal process rights contained in articles 14 and 15 of the ICCPR are therefore not engaged or limited.

2.182 **Based on the information provided, the committee considers that the civil penalty provisions set out in the Franchising Code are not 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights contained in articles 14 and 15 of the ICCPR are not engaged or limited. The committee notes that other aspects of article 14, which relate to the right to a fair hearing in civil matters, are still engaged by the civil penalty provisions.**

2.183 **The committee considers that the civil penalty provisions in the Franchising Code are compatible with the right to a fair hearing.**

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

Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]

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

Purpose

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

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

Background

2.186 The committee reported on the regulation in its *Eighteenth Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether the bill was compatible with Australia's international human rights obligations.[1]

Increase to visa application charges

2.187 The committee noted in its previous analysis that the regulation engages the right to protection of the family.

2.188 The committee considered that the increases to visa application charges (VACs) limit the right to protection of the family of Australian citizens and residents who wish to live permanently in Australia with their partner.

Right to protection of the family

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

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

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 86-87.

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

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

2.192 The committee noted in its previous analysis that the fees for the affected visa classes were, prior to the making of the regulation, already considerable. Given this, the 50 per cent increase to the VACs could make it less affordable and therefore more difficult for an Australian citizen or resident to bring their partner to Australia. Accordingly, the committee considered that the regulation may limit the right to the protection of the family.

2.193 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the increases to certain VACs are compatible with the right to protection of the family, and in particular whether the limit imposed on human rights by the amendment is in pursuit of a legitimate objective, has a rational connection between the limitation and that objective, and is proportionate to achieving that objective.

Minister's response

> This regulation does not impact the ability of individuals to form a family. The right to protection of the family in Articles 17 and 23 does not amount to a right to enter or remain in Australia where there is no other right to do so. Requiring a visa applicant to pay a higher application charge has no impact upon the ability of the Australian citizen, permanent resident or eligible New Zealand citizen sponsor from travelling, visiting or residing with their partner or prospective partner in other countries. In order to demonstrate eligibility for the visa, the applicant must show that the couple has been living together or has not been living separately and apart on a permanent basis. This requirement has been provides for in migration legislation since 1994. For offshore applicants, this means that the relationship will have been established in a country other than Australia and any separation of the couple in order to save for the VAC would be voluntary.
>
> The government offers a wide range of visa options to potential applicants and it is open to affected individuals to seek other visa options where they meet the specific application requirements for the visa. Applicants who are affected by the VAC increase have been encouraged to consider applying for a skilled visa, and visitor visas are available for short term stays. As the committee points out, it is legitimate for the Australian government to charge visa processing fees. Given the availability of alternative visas pathways with lower associated costs and that there is nothing preventing the couple from residing together in the applicant's country of residence, I

> am of the view that this regulation does not limit the right to protection of the family or any other applicable rights or freedoms.[2]

Committee response

2.194 **The committee thanks the Minister for Immigration and Border Protection for his response.** The committee notes the minister's view that increasing the visa charges for partner visas does not limit the right to protection of the family, on the basis that affected persons would have the opportunity to travel to, visit and reside with their partner in other countries, or to seek other visa options.

2.195 Assessments of the compatibility of legislation by the committee involve the application of its analytical framework to, first, identify if a measure engages a human right (that is, whether in the broadest sense the measure may interact with a right); second, identify if a measure limits any right that is engaged; and third, assess whether any limitation is legally justified (that is, pursues a legitimate objective, is rationally connected to that objective and is proportionate).

2.196 Since its inception, the committee's approach is to apply the above analytical framework in undertaking a routine and technical examination of legislation, which therefore necessarily does not encompass consideration of its policy merits, or broader arguments which may be advanced in support of or against a proposed measure.

2.197 With reference to this context, while the minister's response identifies a number of alternatives for persons potentially affected by the increased visa charge, the existence of such alternatives falls outside the scope of the committee's examination of the regulation as guided by the routine application of its analytical framework to the bill.

2.198 Turning to the committee's analysis of the increases to the VACs, the committee considers that it is uncontentious as a matter of law that significant increases to VACs for partners may limit the right to protection of the family for Australian citizens and residents who wish to live permanently in Australia with their partner. This is because such increases could represent a 'financial barrier' to persons who wish to live with their partner in Australia.

2.199 The committee's conclusion in this respect appears to be consistent with guidance from the Attorney-General's Department on the preparation of statements of compatibility, which states that the right to the protection of the family may be engaged by policy or legislation that:

> …provides for the entry into or removal from Australia of persons under migration laws in circumstances that may affect the unity of a family.[3]

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2 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 8 April 2015) 20.

2.200 As noted above, the statement of compatibility for the bill provided no assessment of this limitation of the right to the protection of the family, and the minister's response has maintained the view that the measure does not limit the right.

2.201 The existence of alternative courses of action for persons affected by the measure does not provide a justification for the limitation. The very significant quantum of increase to the VACs for a partner visa from $4,575 to $6,865 could represent a substantial financial barrier to persons otherwise eligible for the grant of a visa that would allow them to reside in Australia with their partner. The committee also notes that the charges appear to be set at a level that will enable the government to collect revenue and may not reflect only the costs involved in reviewing and verifying the veracity of the visa application.

2.202 **Some committee members noted the minister's advice that applicants have the ability to reside together in another country and, accordingly, consider the measure is compatible with the right to protection of the family.**

2.203 **Other committee members considered that the regulation increasing the visa application charges for partner visas limits the right to protection of the family. As set out above, the Minister for Immigration and Border Protection does not accept that the right is limited, and has provided no justification for the limitation. Noting that the significant increase to VACs has reduced the affordability of applying for a visa that would allow a person to live with their partner in Australia, those committee members consider the regulation is likely to be incompatible with the right to protection of the family.**

3 Attorney-General's Department, List Of Guidance Sheets And Policy Triggers available at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/PolicyTriggers.pdf.

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

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

Purpose

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

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

Background

2.206 The committee previously considered the bill in its *Twenty-first Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether the discretion to apply the 'no work' condition on the grant of a BVE was compatible with the right to work, the right to an adequate standard of living, and the obligation to consider the best interests of the child.[1]

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

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

Right to work

2.208 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).[2]

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1 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 20-24.

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

2.209 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.

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

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

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

Compatibility of the measure with the right to work

2.212 In its previous analysis the committee noted that the regulation in part advances the right to work as compared with the situation prior to the making of the regulation because some BVE visa holders will have the right to work in Australia where previously they did not have that right.

2.213 Nevertheless, the committee noted that the right to work will not be afforded to all BVE holders and that a BVE holder's right to work will be at the discretion of the minister. Accordingly, the committee considered that the regulation limits the right to work.

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

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

2.216 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to work.

Right to an adequate standard of living

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

2.218 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

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

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

2.221 As noted at [2.214], the committee considered that it is unclear as to whether the measure may be regarded as proportionate to its stated objective (that is, as the least rights restrictive alternative to achieve this result).

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

2.223 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to an adequate standard of living.

Minister's response

I respectfully advise the committee that the regulation applies only to Subclass 050 BVEs granted by me personally under section 195A of the Migration Act. The regulation does not apply to BVEs granted by me under other provisions of the Migration Act, including where an individual makes a valid application for a BVE.

Section 195A provides me with a non-compellable, non-delegable power to grant visas to persons who are in immigration detention under section 189 of the Migration Act, if I think that it is in the public interest to do so. Section 189 relates to the immigration detention of unlawful non-citizens.

As a result, the regulation only applies to individuals who are:

- unlawful non-citizens; and
- detained under section 189 of the Migration Act; and
- granted a BVE by me using my personal, non-compellable power under section 195A of the Migration Act.

Section 196(1) of the Migration Act provides that:

'An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.'

Granting a BVE under section 195A is, therefore, a mechanism by which I can decide that an individual will be released from immigration detention.

Section 195A of the Migration Act provides that I may grant a person who is in immigration detention a visa of a particular class, whether or not the person has applied for the visa. When exercising my personal power under section 195A, I am not bound by Subdivision AA (Applications for visas), Subdivision AC (Grant of visas) or Subdivision AF (Bridging visas) of Division 3 of Part 2 of the Migration Act, or by the Migration Regulations. As a result, I am not required to consider whether or not an individual is able to meet the eligibility requirements of the visa I grant. I do not have a duty to consider whether to exercise this power, but must think that it is in the public interest to grant the detainee a visa.

In practice, where I grant a BVE under section 195A, it is to people who are otherwise ineligible for the grant of a visa (for example, because the Migration Act prevents them from making a valid visa application). Individuals who make a valid application for a visa will have that application assessed under the Migration Act and Migration Regulations, and visa conditions will be imposed accordingly.

> I consider that the discretion to impose a 'no work' condition on certain BVE holders is appropriately limited, and is a least rights restrictive approach. As outlined above, the discretion to grant or withhold permission to work under this regulation will only exist in the context of the exercise of my personal power under section 195A of the Migration Act to grant a BVE to a non-citizen who has become unlawful and been taken into immigration detention. Further, the fact that the regulation only permits (rather than requires) me to impose the condition does not mean that the 'no work' condition will be imposed on all individuals to whom I grant a BVE under section 195A.
>
> It is not feasible or appropriate to codify the range of circumstances in which I may exercise my power under section 195A of the Migration Act to grant a BVE to an immigration detainee. It is, however, appropriate for permission to work to be granted on a discretionary basis to individuals who are granted BVEs by me using this power. This allows me to consider an individual's personal circumstances against the integrity of the migration programme, which is a proportionate limitation on the right to work and on the right to an adequate standard of living. As outlined in the Statement of Compatibility for this Regulation, this discretion also allows me to give permission to work in circumstances where this was previously prevented by the Migration Regulations.[3]

Committee response

2.224 **The committee thanks the Minister for Immigration and Border Protection for his response. On the basis of the information provided, the committee considers that the measure is compatible with the right to work and the right to an adequate standard of living, and has concluded its examination of this aspect of the instrument.**

Obligation to consider the best interests of the child

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

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

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3 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 1 May 2015) 6-7.

4 Article 3(1).

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

2.227 The imposition of a 'no work' condition on the grant of a BVE holder may inhibit a parent's ability to provide for their child. Accordingly, the imposition of a 'no work' condition may not be in the best interests of the child.

2.228 As noted at [2.214], the committee considered that it is unclear as to whether the measure may be regarded as proportionate to its stated objective (that is, as the least rights restrictive alternative to achieve this result).

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

2.230 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.

Minister's response

> As the committee has pointed out, the Statement of Compatibility explained that I may consider the best interests of the child (for example, the child of a non-citizen to whom I grant a BVE under section 195A of the Migration Act) when deciding whether or not to impose condition 8101 on a BVE granted by me under section 195A. Clearly, however, there will be circumstances in which it will not be necessary to consider the best interests of the child, for example, where there are no children involved.
>
> It is my view that the regulation does not in fact limit consideration of the best interests of the child.[5]

Committee response

2.231 **The committee thanks the Minister for Immigration and Border Protection for his response, and has concluded its examination of this aspect of the instrument.**

5 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 1 May 2015) 8.

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-000826

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

Dear Chair

Thank you for your letter of 18 March 2015 drawing to my attention the *Twentieth Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights, concerning the Defence Trade Controls Amendment Bill 2015.

Noting that the Bill requires the defendant to carry an evidential burden of proof with regard to the new exceptions, the Report queries whether the Bill is consistent with Article 14(2) of the International Covenant on Civil and Political Rights which protects the right of the defendant to be presumed innocent. The Bill's explanatory memorandum justifies these reversals on the grounds that the evidence that would need to be raised would either be solely within the defendant's knowledge or it would be more reasonable, more practical and less burdensome for the defendant to establish the facts. Although the Committee agrees that this explanation holds true in some circumstances, it has asked for my further advice as to whether the limitation is reasonable and proportionate to achieve the Bill's stated objective.

While I acknowledge that the Bill does reverse the onus of proof for the introduced exceptions, these reversals are within reasonable limits, considering the importance of the Bill's objective, the lower standard of proof that the defendant bears, and that the defendant's right to a defence is maintained. The objective of the legislation, to stop proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs, will be strengthened by exceptions that shift the onus to the defendant. To discharge the onus, a defendant need only produce evidence that suggests a reasonable possibility that the exception applies. Noting that a defendant who wishes to rely on an exception should have conducted compliance checks to satisfy themselves that their activity falls within the exception, it is reasonable to expect the defendant to produce evidence of these checks to discharge the onus.

Reversing the onus for the defences within the Bill does not erode the defendant's right to a defence, is within reasonable limits and, given the important counter-proliferation objective of the Bill, is a proportionate measure to achieve the Bill's stated objective.

Yours sincerely

KEVIN ANDREWS MP 21 APR 2015

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MC15-000678

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 18 March 2015 drawing my attention to comments relating to *Appropriation Bill (No. 3) 2014-2015* and *Appropriation Bill (No. 4) 2014-2015* in the *Twentieth Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights (the Committee). In particular I note the Committee considers that appropriation bills may engage rights according to Australia's obligations under international human rights law.

My view remains however, that given the extremely limited legal effect of the appropriation bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011.* This is consistent with the position I have previously expressed to the Committee on the adequacy of the statements of compatibility with human rights within the explanatory memoranda of appropriation bills.

I have noted and carefully considered the suggestions the Committee has made to assess whether the appropriation bills are compatible with human rights obligations. It is the government's view, however, that there are already extensive opportunities within the existing legislative process for the adequate scrutiny of these bills, and changes are not required.

As my predecessor, Senator the Hon Penny Wong, replied on 10 May 2013 the detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the relevant Minister. This detail allows the examination of proposed expenditure and budgetary processes through the Senate Estimates process.

The policy development process does however by its nature require an assessment of all factors that might relate to the relevant policies, including environmental, legal, economic, social and moral factors. The Attorney General's Department has developed an assessment tool and educational materials for use by policy officers to strengthen the capacity to develop policies, programs and legislation consistent with human rights.

Thank you for bringing the committee's comments to my attention.

Kind regards

Mathias Cormann
Minister for Finance

3 April 2015

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-000613

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

I refer to the letter of 3 March 2015 from your predecessor, Senator Dean Smith, regarding the Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Bill 2014 (the Bill).

The Department of Defence has long regarded ascertaining the true causes of significant events involving its personnel as being more important than possible prosecution of, or civil suit against, individuals. Such information enables actions to be undertaken to prevent the reoccurrence of adverse events – for example, you may recall that the Sea King Board of Inquiry led to major changes in the Navy's helicopter maintenance practices.

Experience suggests that individuals may be reluctant to provide evidence that could be used against them. This can make it difficult to investigate and ascertain the true causes of significant events, which are often systemic or cultural rather than solely the fault of individuals. Compelling individuals to provide information, even though it may implicate them in wrongdoing, and protecting the information from use in subsequent criminal or civil proceedings, will sometimes be the only way to determine the true causes of significant events. This is demonstrated in cases where witnesses have refused to cooperate with disciplinary investigations, but have provided information when compelled in an administrative inquiry.

Under the new arrangements made possible by the Bill, the Inspector-General of the Australian Defence Force be responsible for inquiring into service-related deaths and other matters directed by the Minister or the Chief of the Defence Force, in addition to a military justice oversight role. These functions will frequently involve ascertaining the true causes of significant events in order to prevent reoccurrence, often in situations where individuals could be implicated and, accordingly, where they could be reluctant to provide all relevant information. In these circumstances, limiting the abrogation against self-incrimination to compel witnesses to provide information to the Inspector-General ADF that may incriminate them, while also protecting witnesses from having information they have provided used against them, supports the legitimate objective of ascertaining the true causes of significant events.

Under current arrangements, the privilege against self-incrimination is abrogated by the Defence (Inquiry) Regulations 1985 (the Regulations) which have been made under paragraph 124(1)(gc) of the *Defence Act 1903* (the Act). The abrogation is also governed by sub-sections 124(2A), (2B) and (2C) of the Act. The privilege is abrogated for all types of inquiry under the Regulations, including Chief of the Defence Force Commissions of Inquiry (Part 8 of the Regulations), Boards of Inquiry (Part 3), and to a lesser extent in Inquiry Officer inquiries (Part 6) and inquiries by the Inspector-General ADF (Part 7).

Currently, unless I direct otherwise, a Chief of the Defence Force Commission of Inquiry must be held into all service-related deaths. These Commissions have the ability to require witnesses to answer questions in abrogation of their right against self-incrimination. For consistency of approach and to ensure quality outcomes, it is proposed that similar powers should apply to the Inspector-General ADF, who will take over responsibility for inquiring into service-related deaths under the new arrangements.

In these circumstances, it is considered that allowing for the privilege against self-incrimination to be abrogated, while protecting information collected from subsequent use in criminal and civil proceedings, is a reasonable and proportionate measure to achieve the objective of ascertaining the true causes of significant events in Defence.

It should also be noted that the abrogation of the privilege against self-incrimination can only have an extremely limited scope due to the limitations imposed by the new sub-section 110C(4) of the Act on the functions of the Inspector-General ADF.

Finally, Defence regrets not including this information in the explanatory material, which may have alleviated the Committee's concerns on these matters. A replacement explanatory memorandum addressing these concerns was tabled in the Senate on 5 March 2015.

I trust this information is of assistance to the Committee.

Yours sincerely

KEVIN ANDREWS MP

26 MAR 2015

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

14 APR 2015

Dear Mr Ruddock Philip,

I refer to the letter of 3 March 2015 from Senator Dean Smith, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Fair Work Amendment (Bargaining Processes) Bill 2014.

The Bill seeks to deliver the Australian Government's election commitment to promote harmonious, sensible and productive enterprise bargaining. The Bill achieves this by providing that the independent Fair Work Commission must be satisfied that claims are not manifestly excessive or would have a significant adverse impact on productivity, before it approves an application to take protected industrial action and that there has been a discussion about productivity at some point in bargaining.

These changes were outlined in detail in *The Coalition's Policy to Improve the Fair Work Laws* that was released in May 2013. The Explanatory Memorandum to the Bill included a thorough Statement of Compatibility with Human Rights. The Statement confirms that the amendments contained in the Bill are 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*.

To the extent that it is suggested the measures in the Bill limit human rights and freedoms, those limitations are reasonable, necessary and proportionate because they pursue the legitimate objectives of ensuring meaningful and genuine negotiations during enterprise bargaining and that the bargaining claims of applicants for protected action ballot orders are not unrealistic.

The Committee has requested further information on certain matters and those have been addressed and in the **enclosed** document.

Yours sincerely

ERIC ABETZ

Encl.

CANBERRA: MG 68, Parliament House, Canberra ACT 2600. Phone: 02 6277 7320 Fax: 02 6273 4115
HOBART: 136 Davey Street, Hobart TAS 7001 Phone: 03 6224 3707 Fax: 03 6224 3709
minister@employment.gov.au http://abetz.com.au

Fair Work Amendment (Bargaining Processes) Bill 2014

Please find below responses to each of the Committee's requests for further information.

The Committee has requested advice on whether the proposed amendment to subsection 443(2) of the Fair Work Act 2009 (Fair Work Act) is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for achievement of that objective.

The Government's clear position set out in *The Coalition's Policy to Improve the Fair Work Laws* (the Policy), released in May 2013, was that it would legislate to 'encourage meaningful, genuine negotiations during enterprise bargaining' and 'change the laws to ensure that protected industrial action can only happen after there have been genuine and meaningful talks'.[1]

As the Committee is no doubt aware, protected industrial action does not occur in a vacuum. Rather, protected industrial action is taken in support of *bargaining claims*. It is therefore wholly unexceptional to expect that parties have had, or at least attempted to have had, genuine and meaningful talks *in bargaining* before they resort to industrial action.

It is approaching the absurd to suggest that employees' right to take industrial action in support of a bargaining position is limited by an expectation that there has at least been an attempt to engage meaningfully on the bargaining position or that this requirement has human rights implications that warrant the attention of a Parliamentary Committee.

The Policy also stated that 'it is important to ensure that claims made by parties when negotiating for an enterprise agreement are sensible and realistic'[2] and that the Government 'will change the laws so that the Fair Work Commission must be satisfied that claims are realistic and sensible before they approve an application to take industrial action'.[3] In support of the above statements, the Policy sets out examples where 'fanciful, exorbitant or excessive' enterprise bargaining claims were, in effect, undermining the operation of Australia's enterprise bargaining and industrial action framework.[4]

The Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) seeks to implement these commitments and respond to these concerns by providing that the independent Fair Work Commission must not make a protected action ballot order if it is satisfied that the bargaining claims of an applicant are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates, or, if acceded to, would have a significant adverse impact on productivity at the workplace.

The Committee, at 1.33 of its report, refers to the permissible limitations on rights where a limitation is 'necessary…for the protection of the rights and freedoms of others'. It appears the Committee has inexplicably overlooked the potentially significant and disproportionate damage that protected industrial action can cause not only to an employer, but to other employees and workers not engaging in industrial action as well as on innocent third parties. Remembering also that those engaged in protected industrial action are provided with a statutory immunity over the loss or damage they cause to others by their industrial action, it is appropriate and entirely unexceptional that, for the protection of the rights of others, the powerful tool of protected industrial action is not used capriciously and in support of claims that are *manifestly* excessive or would have a *significant adverse impact* on productivity.

The Committee also comments that this same standard is not applied to claims by an employer. Whilst this is correct, the Committee's analysis embarrassingly ignores the reality that employers have no right to unilaterally commence protected industrial action in support of its bargaining claims. An employer's recourse to protected industrial action depends entirely on whether employees engage in industrial action first.

The critical points are that these amendments do not limit the right to form trade unions by limiting the right to strike and the Committee's assertion to the contrary would be quite laughable if it didn't

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[1] *The Coalition's Policy to Improve the Fair Work Laws*, page 32.
[2] Ibid, page 33.
[3] Ibid, page 34.
[4] Ibid, page 34.

trivialise genuine human rights issues. The Committee's bland assertion without supportive evidence undermines the credibility of the Committee.

The Committee has requested advice on whether the amendment to subsection 187(1) of the Fair Work Act 2009 is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for achievement of that objective.

The Government was very clear in the Policy that it intended to 'put productivity back on the agenda' by requiring that 'before an enterprise agreement is approved, the Fair Work Commission will have to be satisfied that the parties have at least discussed productivity as part of their negotiation process'.[5]

The Bill seeks to implement this commitment by requiring that before the Fair Work Commission approves an agreement, it must be satisfied that improvements to productivity at the workplace were discussed during bargaining for the agreement. That is all. All this amendment requires is that there has been a discussion about productivity at some point in bargaining.

The Government reiterates (as noted in the Explanatory Memorandum to the Bill) that this amendment is not intended to require the Fair Work Commission to consider the merit of the improvements to productivity that were discussed, the detail of the matters that were discussed, the outcome of those discussions or whether it would be reasonable for certain provisions to be included in an enterprise agreement. All that is required is that there is a discussion. This is hardly onerous on either the employer, employees or bargaining representatives.

It was ludicrous and unsustainable for the Committee to have concluded in its report, at 1.45, that a requirement to have a discussion about productivity at some point during bargaining "limits the right to organise and bargaining collectively". Many objective observers would disagree that the need to have a discussion 'limits' in any substantive way the right to freedom of association and the right to organise and bargaining collectively.

The Committee's approach to whether the requirement to have a discussion constitutes a substantive limitation is, with respect, narrow, impractical and ignores the realities of bargaining and again, regrettably, only trivialises the work of the Committee and genuine human rights issues.

The Government does not consider that the proposed amendment limits the right to freedom of association.

[5] Ibid, page 33.

Senator the Hon Simon Birmingham

Assistant Minister for Education and Training
Senator for South Australia

Our Ref MC15-001260

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

20 MAY 2015

Dear ~~Chair~~ Philip,

Thank you for your letter of 18 March 2015 concerning the National Vocational Education and Training Regulator Amendment Bill 2015 (the Bill), which was passed by Parliament on 16 March 2015 and received the Royal Assent on 2 April 2015.

I note the Committee is concerned with the amendments to the definition of 'VET information' and the disclosure provisions, in particular in relation to the potential for disclosure of students' personal information held by the national training regulator, the Australian Skills Quality Authority (ASQA).

Under the provisions of the *National Vocational Education and Training Regulator Act 2011* (the Act), ASQA may, in the course of regulating registered training organisations (RTOs), collect vocational education and training (VET) information. After the amendments in the Bill commence, VET information will be defined to mean information that is held by ASQA and relates to the performance of ASQA's functions, including information and documents collected by ASQA in the course of administering the Act, or in the exercise or performance of a function under the Act.

I have been advised that ASQA does collect some personal information relating to individual students and I agree, this information will be VET information under the Act.

As the Committee notes, one of the purposes of amending the definition of VET information is to assist ASQA in removing dishonest providers from the VET sector. It is envisaged that this objective will be predominantly achieved by means of ASQA providing other (not personal) types of VET Information, such as marketing materials to the Australian Competition and Consumer Commission.

The amended provision allows for the possibility that there may be circumstances where it is necessary for ASQA to disclose personal information to another agency for the purposes of, among other things, identifying and removing unscrupulous providers from the VET sector.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644 **Fax** 08 8354 1655

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7630 **Fax** 02 6273 5188

While such a circumstance may not be a common occurrence, it is important that ASQA is able to respond in a timely and efficient manner, and to ensure that the relevant receiving agency has the information necessary to perform its functions or exercise its powers. I note the Committee's concerns that this measure may limit an individual's right to privacy. There are a number of safeguards in place to ameliorate that risk.

ASQA will only be permitted to disclose an individual's personal information to a Commonwealth authority or state or territory authority if it is reasonably satisfied that disclosure is necessary to enable or assist the authority to perform or exercise any of its functions or powers. Under Part 9 Division 2 of the Act, which governs the disclosure and sharing of information (including any personal student information), it is an offence for a person to make an unauthorised disclosure of VET information, with a penalty of two years imprisonment. In addition, ASQA is bound by the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs include rules around the collection, use and disclosure of personal information. The Office of the Australian Information Commissioner can investigate potential breaches of the APPs.

The amended provision, when combined with the existing privacy safeguards, is an effective way of ensuring that the right to privacy is balanced with the need to protect the interests of VET students, as well as to protect and enhance Australia's reputation for VET nationally and internationally.

Thank you for bringing this matter to my attention. I trust the above clarification addresses the concerns raised by the Committee.

Yours sincerely

Simon Birmingham

PARLIAMENTARY SECRETARY
TO THE PRIME MINISTER

Reference: C15/27983

13 APR 2015

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter dated 24 March 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Omnibus Repeal Day (Autumn 2015) Bill 2015 (the Bill). I welcome this opportunity to address the Committee's questions on the Bill as presented in the *Twenty-First Report of the 44th Parliament.*

The Committee seeks advice as to whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (the Queensland Discriminatory Laws Act) .

The *Racial Discrimination Act 1975* (the Racial Discrimination Act) will continue to provide protection of the rights of Aboriginal persons and Torres Strait Islanders to equality and non-discrimination.

Specifically, section 9 of the Racial Discrimination Act prohibits 'direct' race discrimination, while section 10 provides for a general right to equality before the law. Subsection 10(3) supersedes State or Territory laws that authorise the management of Aboriginal or Torres Strait Islander property without their consent. This subsection is essentially in the same terms as section 5 of the Queensland Discriminatory Laws Act.

The Committee also seeks advice as to whether there are any Queensland laws which continue to apply such that the Queensland Discriminatory Laws Act may not be redundant.

The Queensland Discriminatory Laws Act deals with the *Aborigines Act 1971* (Qld) and the *Torres Strait Islanders Act 1971* (Qld) and, where relevant, their successor Acts.

These Acts imposed a different legal regime on Aboriginal and Torres Strait Islander reserves in Queensland than that which applied to persons in other parts of Queensland.

The laws targeted by the Queensland Discriminatory Laws Act have since been repealed. While the Discriminatory Laws Act continues to have legal effect, it serves no practical purpose. Please refer to Attachment A which traces changes to targeted Queensland laws, including the removal of discriminatory aspects.

Yours sincerely

CHRISTIAN PORTER

Attachment A – Changes to Queensland laws to remove discriminatory aspects targeted by *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (the Discriminatory Laws Act).

Queensland Discriminatory Laws Act	Queensland law targeted	Queensland successor provisions (if any)	Removal of discriminatory aspects
Section 5 – Management of Property Section 5 superseded Queensland laws allowing for the management of Aboriginal and Torres Strait Islander property without consent. [NB. Section 5 is replicated in similar terms s 10(3) of the *Racial Discrimination Act 1975* (Cth)].	*Aborigines Act 1971,* ss 4(6), 37, 38 and 45. *Torres Strait Islanders Act 1971*, ss 4(8), 61, 62 and 69. Under these laws: • property managed without consent under previous laws would continue to be managed (ss 4(6) and 4(8)); and • although an application could be made to terminate management, termination was subject to the discretion of the Director (ss 45 and 69).		*Aborigines Act and Torres Strait Islanders Acts Amendment Act 1974*, ss 5 and 6, amended the *Aborigines Act 1971* and ss 11 and 12 amended the *Torres Strait Islanders Act 1971* to make provision for Aboriginal and Torres Strait Islander people: • to give consent to another person to manage their property; and • to terminate management of their property.
Section 6 – Residence etc on Reserves Section 6 superseded Queensland laws preventing Aboriginal or Torres Strait Islander persons from being on a reserve without a permit.	*Aborigines Act 1971*, Part III (particularly s 19) and *Torres Strait Islanders Act 1971,* Part III (particularly s 19). • Entitlement to be on a Reserve required a permit.	*Community Services (Aborigines) Act 1984*, Part IV. *Community Services (Torres Strait Islanders) Act 1984,* Part IV.	The *Community Services (Aborigines) Act 1984* repealed the *Aborigines Act 1971*. Part 4 of the new Act: • allowed any person to enter public parts of an area; and • allowed any person to be on an area that was not public as a guest or at the request of a resident. The *Community Services (Torres Strait Islanders) Act 1984* had the same effect.
Section 7 – Conduct on reserves Section 7 superseded Queensland laws allowing ejection from a Reserve, or penalisation, if the only reason was that conduct was unsatisfactory to the authorities.	*Aborigines Act 1971*, s 56 (Power to make regulations), *Aborigines Regulation 1972*, reg 14. Also: Regulations and by-laws creating a 'code of community conduct', eg: • *Aborigines Regulation 1972*, regs 11-15. • *Aboriginal Council By-Laws*, by-laws 4.1(h), 6.10, 8.3, 9.3, 10.1, 14.5, 24.3A.		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.

Queensland Discriminatory Laws Act	Queensland law targeted	Queensland successor provisions (if any)	Removal of discriminatory aspects
Section 7 – Continued	*Aborigines Regulation 1972*, reg 46(a) and (b) (vesting jurisdiction in Aboriginal courts to adjudicate complaints of offences against both Regulations and By-Laws).		
Section 8 – Entry on premises situated on reserves Section 8 superseded Queensland laws allowing authorities to enter occupied premises on a Reserve without consent, unless to do so would be lawful if the premises were not on a Reserve.	*Aborigines Act 1971*, s 56 (Power to make regulations), *Aborigines Regulation 1972*, reg 19-21 and Aboriginal Council By-Laws, Ch 8. By-law 8.6 provided: 'A householder shall allow an authorised person to enter his house for the purpose of inspection.'		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.
Section 9 – Legal proceedings Section 9 provided: • Entitlement to representation by a legal practitioner. • Equivalent rights of appeal against, or review of, a conviction.	*Aborigines Act 1971*, s 32 (Aboriginal courts) and *Aborigines Regulation 1972*, regs 45 and 46. • No right of appeal. • No right to representation. *Torres Strait Islander Act 1971*, Div 3 of Part III. • No right to representation.	*Community Services (Aborigines) Act 1984*, Div 3 of Part III. *Community Services (Aborigines) Act 1984*, Div 4 of Part III (renumbered under the *Reprints Act 1992*, s 43 as required by the *Community Services (Aborigines) Act 1984*, s 87). *Community Services (Torres Strait Islanders) Act 1984*, Div 3 of Part III.	*Aborigines and Islanders Acts Amendment Act 1979* amended the *Aborigines Act 1971* to introduce a formal right of appeal from decisions of Aboriginal courts. Item 13 of Sch 1 to the *Local Government (Community Government Areas) Act 2004* repealed Div 4 of Part III of the *Community Services (Aborigines) Act 1984* to abolish Aboriginal courts. *Local Government and Other Legislation (Indigenous Regional Councils) Amendment Act 2007* repealed the *Community Services (Torres Strait Islanders) Act 1984*, abolishing Island courts.
Section 10 – Directions to work Section 10 superseded any requirement in Queensland law to comply with any direction to perform work on a Reserve, subject to limited exceptions.	*Aborigines Act 1971*, s 56 (Power to make regulations), *Aborigines Regulation 1972*, reg 19-21 and the Aboriginal Council By-Laws, Ch 3. Chapter 3 reportedly contained a by-law that required all able-bodied persons over 15 years residing in a Reserve to perform work as directed.		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.

Queensland Discriminatory Laws Act	Queensland law targeted	Queensland successor provisions (if any)	Removal of discriminatory aspects
Section 11 – Terms and conditions of employment Section 11 provided that Aboriginals or Torres Strait Islanders in Queensland were to be employed on the same terms and conditions as anyone else.	*Aborigines Act 1971*, s 56 (power to make regulations) and *Aborigines Regulation 1972*, reg 68.* Reg 68 specified that Aboriginal workers, other than those on a Reserve, be employed in accordance with the provisions of the applicable award or industrial agreement, or where none existed, they were entitled to the basic wage.		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.

* Until 1979, the Queensland Government considered that reg 68 implicitly authorized employment of indigenous persons on reserves at wages less than those payable pursuant to relevant awards. However, on 29 May 1979, Matthews J, then the Supreme Court Judge serving as President of the Industrial Court, found that reg 68 did not displace the entitlement of an indigenous person employed on a reserve to receive wages payable pursuant to an applicable award. See discussion in *Baird v State of Queensland* [2005] FCA 495 at para [9].

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

13 MAY 2015

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

Communications portfolio response – Parliamentary Joint Committee on Human Rights' Eighteenth Report of the 44th Parliament

Dear Chair Dean

Thank you for your letter dated 13 February 2015 following the tabling of the Parliamentary Joint Committee on Human Rights' Eighteenth Report of the 44th Parliament.

Following the Committee's examination of the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014, the Telecommunications (Industry Levy) Amendment Bill 2014, and the Telecommunications Legislation Amendment (Deregulation) Bill 2014, the Committee raised a number of specific questions for my response in November 2014.

Following consideration of my initial response, the Committee sought further clarification on the Telecommunications Legislation Amendment (Deregulation) Bill 2014, specifically the proposed repeal of Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act* (TCPSS Act). Part 9A has now been repealed following passage of the Telecommunications Legislation Amendment (Deregulation) Bill 2014 through the Parliament on Wednesday 25 March 2015. However, I still welcome the opportunity to respond to the Committee's request for further clarification.

In my previous response, I outlined the protections within Schedule 7 of the *Broadcasting Services Act 1992* (BSA) that protect children from accessing R18+ content via a range of platforms, including telephone sex services. I note the Committee's request for further clarification on whether Schedule 7 of the BSA offers a comparable level in terms of protecting children from harm to that which was provided under Part 9A of the TCPSS Act.

It may be useful to outline the background to Part 9A, which was originally made as part of amendments to the Telecommunications Consumer Protection and Service Standards Bill 1998, before it was passed by the Parliament as the TCPSS Act in 1999. Part 9A originally provided a regulatory solution to address community concern that telephone sex services were too easily accessed by children of standard telephone service customers. At that time

Parliament House, Canberra ACT 2600 | Telephone 02 6277 7480
287-289 New South Head Road, Edgecliff NSW 2027 | Telephone 02 9327 3988

there had been a steady increase in complaints about telephone sex services since the introduction of premium rate services in 1990-91.

However, since the passage of the *Communications Legislation Amendment (Content Services) Act 2007*, provisions that ensure the protection of children from adult content, including that delivered via telephone sex services, have resided within Schedule 7 of the BSA. The *Communications Legislation Amendment (Content Services) Act 2007* also repealed most of the key provisions previously contained in Part 9A of the TCPSS Act.

The Committee has sought my advice that Schedule 7 of the BSA offers a comparable or equivalent level of protection for children from the harm of telephone sex services to that which was provided by Part 9A. This seems to be based on an assumption that both Part 9A of the TCPSS Act and Schedule 7 of the BSA worked in parallel to protect children from harm.

However, as I have previously advised the Committee, Schedule 7 of the BSA continues to be the primary regulatory instrument protecting children from accessing telephone sex services or other age restricted materials. I also note that at the time Schedule 7 of the BSA was introduced, Part 9A of the TCPSS Act was substantially amended. Since that time, Part 9A had not contained provisions specifically designed to protect children from harm, instead it only provided certain limited consumer protections by:

- regulating billing arrangements for telephone sex services; and
- prohibiting telephone sex services from being bundled with other goods and services.

Until its recent repeal, section 158B of Part 9A prohibited a carriage service provider from billing a customer in relation to the supply of a telephone sex service unless the telephone sex service was supplied using a specific number range (that is, the 1901 prefix, or another prefix determined by the Minister for Communications or the Australian Communications and Media Authority (ACMA)).

However, the former requirements in Part 9A around billing arrangements were clearly only relevant to the extent that a consumer had access to, and had used a telephone sex service. Fundamentally, Schedule 7 of the BSA has proven to be effective in requiring industry to have a range of mechanisms to prevent children from accessing telephone sex services in the first place. Therefore, I considered the repeal of the billing arrangements for telephone sex services in Part 9A of the TCPSS Act would clearly not in any way reduce the protection from harm already afforded to children.

Secondly, until its recent repeal, Section 158C of Part 9A limited how telephone sex services were marketed and supplied, by preventing telephone sex services from being tied to the supply of any other goods or services. The original Explanatory Memorandum[1] explained this was to:

> "*...prevent suppliers getting customers to 'opt-in' to telephone sex services by requiring them to 'opt-in' as a condition of purchasing certain services, or by giving discounts or special offers if they do `opt-in'.*"

[1] http://www.comlaw.gov.au/Details/C2004B00256/Supplementary Explanatory Memorandum/Text

There is no equivalent or directly comparable provision contained in Schedule 7 of the BSA. However, regardless of how telephone sex services are marketed now or into the future, Schedule 7 provides assurances that appropriate age verification requirements are in place to protect children from accessing these types of services in the first instance.

In conclusion, the recent repeal of Part 9A reflects rapid technological developments and consumer usage trends whereby online services and mobile apps have become the preferred means by which consumers access adult content. Further, during consultation on the proposed repeal of Part 9A, the ACMA confirmed it had not received any complaints in recent years about telephone sex services. Accordingly, the Government considered Part 9A of the TCPSS Act was obsolete and notes the repeal was supported by all stakeholders consulted, including the peak consumer and industry representative bodies, namely the Australian Communications Consumer Action Network and the Communications Alliance.

Thank you for the further opportunity to address the Committee's concerns. I trust this information is of assistance.

Yours sincerely

Malcolm Turnbull

Minister for Small Business

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
Canberra ACT 2600

Copy to: human.rights@aph.gov.au

Dear ~~Chair~~ Philip,

Thank you for Senator Smith's letter of 13 February 2015, addressed to the Treasurer, concerning the compatibility with human rights of the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* ("Franchising Code").

As the Minister for Small Business I have portfolio responsibility for the Franchising Code and as such your letter has been provided to me for response.

The Franchising Code has recently been amended such that certain breaches of the Franchising Code may result in a court imposing a civil penalty. The Committee has expressed concern about the potential for penalties to apply to franchisees, who may be individuals or small businesses. The relevant provisions which apply to franchisees and may attract a penalty are clause 6 (obligation to act in good faith), and clauses 39 and 41 (obligation to participate in mediation). The Committee is concerned that, in this context, penalties may be considered to be criminal, attracting rights under the International Covenant on Civil and Political Rights. The Committee has sought my advice on these matters.

As noted by the Committee in its Guidance Note 2, the term 'criminal' has an autonomous meaning in international human rights law: a penalty may be considered 'criminal' for the purposes of human rights law even if it is considered to be 'civil' under Australian domestic law.

Having regard to the matters outlined below, I believe it is reasonable for the Committee to conclude that the civil penalties regime set out in the Franchising Code is not a 'criminal' penalty regime for the purposes of international human rights law.

- Penalties under the Franchising Code do not apply to the public in general. Rather, they apply only in relation to persons in a particular business relationship, in a specific regulatory context, and are directed towards promoting openness and transparency between the parties to that relationship. This is inconsistent with characterising the penalties as criminal.

Parliament House CANBERRA ACT 2600
Telephone: 02 6277 7930 Facsimile: 02 6273 0434
Email: sbminister@treasury.gov.au

- I note that the penalties are moderate having regard to other civil penalties that are imposed under the *Competition and Consumer Act 2010* (CCA). The amount of the penalty is also mitigated by the fact that the penalties are only imposed on persons in a particular business relationship.

- It is also important to appreciate that 300 penalty units is the maximum penalty; the Court has full discretion to determine the appropriate level of penalty having regard to all relevant matters, including the nature and extent of the relevant conduct, any loss or damaged suffered as a result of that conduct, the circumstances in which the conduct took place, and whether the person has previously engaged in similar conduct (see section 76(1) of the CCA).

I would also like to draw the Committee's attention to the following matters, which may be relevant to its deliberations.

- The civil penalties imposed under the Franchising Code slot into the existing pecuniary penalty regime established by the CCA. This regime is long-standing and well litigated. It has not previously been thought that the failure to apply the criminal standard of proof in these type of proceedings has resulted in injustice. Indeed, the courts have indicated on numerous occasions that the gravity of the allegations being tested in the court will be taken into account, and that the graver the allegation, the greater the strictness of proof that will be required (see, for example, *Australian Competition and Consumer Commission v TF Woolam & Sons Pty Ltd* (2011) 196 FCR 212 at [8]).

- The penalties imposed in respect of clauses 6, 39 and 41 of the Code are imposed in respect of conduct engaged in by persons in a particular relationship. The relevant provisions are intended to encourage both parties to that relationship to act openly towards each other. Given this, if it is accepted that it is unnecessary to apply the criminal standard of proof to one party to that relationship (the franchisor), it would be inappropriate to apply a different standard of proof to the other.

- The civil penalties imposed under the Code are but one of a number of enforcement provisions provided for in the CCA, which include infringement notices (Part IVB, Division 2A) and public warning notices (Part 1VB, Division 3). Given this, even if it is possible that a civil penalty could be imposed on an individual, it is unlikely that this would occur, save in exceptional circumstances.

Industry codes prescribed under the provisions of the CCA are co-regulatory measures designed to encourage best practice among an industry and improve transparency and conduct in business to business relationships.

The introduction of civil penalties for serious breaches of the Franchising Code is an important development in ensuring that the franchising sector is effectively regulated. The introduction of penalties followed extensive public consultation and engagement with the franchising sector. There was significant industry consensus that penalties were an appropriate mechanism for responding to instances of inappropriate conduct in the sector.

I trust the Committee will take some comfort from this response that there are no adverse human rights implications arising from recent amendments to the Franchising Code.

Yours sincerely

BRUCE BILLSON

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001027

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Mr~~ Philip, Ruddock

Response to questions received from the Parliamentary Joint Committee on Human Rights in its Eighteenth Report of the 44th Parliament

Thank you for your letters of 13 February 2015 in which information was requested on the *Australian Citizenship and Other Legislation Amendment Bill 2014* and the *Migration Amendment (Partner Visas) Regulation 2014*.

My response to your request is attached. I have also included a response to the committee's further questions regarding the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* which were raised in the Committee's 14th report.

I trust the information provided is helpful.

Yours sincerely

8/4/15

PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

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

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

This regulation does not impact the ability of individuals to form a family. The right to protection of the family in Articles 17 and 23 does not amount to a right to enter or remain in Australia where there is no other right to do so. Requiring a visa applicant to pay a higher application charge has no impact upon the ability of the Australian citizen, permanent resident or eligible New Zealand citizen sponsor from travelling, visiting or residing with their partner or prospective partner in other countries. In order to demonstrate eligibility for the visa, the applicant must show that the couple has been living together or has not been living separately and apart on a permanent basis. This requirement has been provides for in migration legislation since 1994. For offshore applicants, this means that the relationship will have been established in a country other than Australia and any separation of the couple in order to save for the VAC would be voluntary.

The government offers a wide range of visa options to potential applicants and it is open to affected individuals to seek other visa options where they meet the specific application requirements for the visa. Applicants who are affected by the VAC increase have been encouraged to consider applying for a skilled visa, and visitor visas are available for short term stays. As the committee points out, it is legitimate for the Australian government to charge visa processing fees. Given the availability of alternative visas pathways with lower associated costs and that there is nothing preventing the couple from residing together in the applicant's country of residence, I am of the view that this regulation does not limit the right to protection of the family or any other applicable rights or freedoms.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001898

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Philip, Mr Ruddock

I refer to your letter of 24 March 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the *Migration Amendment (2014 Measures No.2) Regulation 2014*, and the *Migration Amendment (Subclass 050 Visas) Regulation 2014*.

The committee's remarks are contained in its *Twenty-first Report of the 44th Parliament*. My response addressing the remarks is attached.

Thank you for bringing the committee's views to my attention. I trust the attached information is of assistance.

Yours sincerely

PETER DUTTON 01/05/15

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

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

Right to work and right to an adequate standard of living

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

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

I respectfully advise the committee that the regulation applies only to Subclass 050 BVEs granted by me personally under section 195A of the Migration Act. The regulation does not apply to BVEs granted by me under other provisions of the Migration Act, including where an individual makes a valid application for a BVE.

Section 195A provides me with a non-compellable, non-delegable power to grant visas to persons who are in immigration detention under section 189 of the Migration Act, if I think that it is in the public interest to do so. Section 189 relates to the immigration detention of unlawful non-citizens.

As a result, the regulation only applies to individuals who are:

- unlawful non-citizens; and
- detained under section 189 of the Migration Act; and

- granted a BVE by me using my personal, non-compellable power under section 195A of the Migration Act.

Section 196(1) of the Migration Act provides that:

'An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
(a) he or she is removed from Australia under section 198 or 199; or
(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
(b) he or she is deported under section 200; or
(c) he or she is granted a visa.'

Granting a BVE under section 195A is, therefore, a mechanism by which I can decide that an individual will be released from immigration detention.

Section 195A of the Migration Act provides that I may grant a person who is in immigration detention a visa of a particular class, whether or not the person has applied for the visa. When exercising my personal power under section 195A, I am not bound by Subdivision AA (Applications for visas), Subdivision AC (Grant of visas) or Subdivision AF (Bridging visas) of Division 3 of Part 2 of the Migration Act, or by the Migration Regulations. As a result, I am not required to consider whether or not an individual is able to meet the eligibility requirements of the visa I grant. I do not have a duty to consider whether to exercise this power, but must think that it is in the public interest to grant the detainee a visa.

In practice, where I grant a BVE under section 195A, it is to people who are otherwise ineligible for the grant of a visa (for example, because the Migration Act prevents them from making a valid visa application). Individuals who make a valid application for a visa will have that application assessed under the Migration Act and Migration Regulations, and visa conditions will be imposed accordingly.

I consider that the discretion to impose a 'no work' condition on certain BVE holders is appropriately limited, and is a least rights restrictive approach. As outlined above, the discretion to grant or withhold permission to work under this regulation will only exist in the context of the exercise of my personal power under section 195A of the Migration Act to grant a BVE to a non-citizen who has become unlawful and been taken into immigration detention. Further, the fact that the regulation only permits (rather than requires) me to impose the condition does not mean that the 'no work' condition will be imposed on all individuals to whom I grant a BVE under section 195A.

It is not feasible or appropriate to codify the range of circumstances in which I may exercise my power under section 195A of the Migration Act to grant a BVE to an immigration detainee. It is, however, appropriate for permission to work to be granted on a discretionary basis to individuals who are granted BVEs by me using this power. This allows me to consider an individual's personal circumstances against the integrity of the migration programme, which is a proportionate limitation on the right to work and on the right to an adequate standard of living. As outlined in the Statement of Compatibility for this Regulation, this discretion also allows me to give permission to work in circumstances where this was previously prevented by the Migration Regulations.

Obligation to consider the best interests of the child

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

As the committee has pointed out, the Statement of Compatibility explained that I may consider the best interests of the child (for example, the child of a non-citizen to whom I grant a BVE under section 195A of the Migration Act) when deciding whether or not to impose condition 8101 on a BVE granted by me under section 195A. Clearly, however, there will be circumstances in which it will not be necessary to consider the best interests of the child, for example, where there are no children involved.

It is my view that the regulation does not in fact limit consideration of the best interests of the child.

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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

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

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

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