Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-fourth 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
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Ms Jessica Strout, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

External legal adviser

Professor Simon Rice OAM

Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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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 15 to 18 June 2015, legislative instruments received from 15 to 28 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 bill does not require additional comment as it either does not engage human rights or engages rights (but does not promote or limit rights):

- Gene Technology Amendment Bill 2015.

1.8 The committee considers that the following bill does not require additional comment as it promotes human rights or contains justifiable limitations on human rights (and may contain both justifiable limitations on rights and promotion of human rights):

- Australian Radiation Protection and Nuclear Safety 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.

Deferred bills and instruments

1.11 The committee has deferred its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542].

1.12 As previously noted, the committee continues to defer one bill and 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]

1.13 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]

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

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

3 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015).

Criminal Code Amendment (Animal Protection) Bill 2015

Sponsor: Senator Chris Back
Introduced: Senate, 29 October 2014; passed both Houses 2 December 2014

Purpose

1.14 The Criminal Code Amendment (Animal Protection) Bill 2015 (the bill) proposes to amend the *Criminal Code Act 1995* to insert new offences in relation to failure to report a visual recording of malicious cruelty to domestic animals, and interference with the conduct of lawful animal enterprises.

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

Requirement to report malicious cruelty to animals

1.16 The bill would introduce an offence provision to provide that a person recording what they believe to be malicious cruelty to an animal or animals commits an offence if they fail to report the event to the relevant authorities within one business day of the event occurring, and to provide all recorded material within five business days.

1.17 The committee considers that the bill engages and limits the right not to incriminate oneself.

Right to a fair trial and fair hearing rights

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

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

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

1.20 The committee considers that the bill engages and limits the right not to incriminate oneself as providing a recording of cruelty to animals to the relevant authorities may provide evidence of the individual undertaking the recording committing an offence, such as criminal trespass.

1.21 However, the statement of compatibility does not identify the measure as limiting the right to protection from self-incrimination in this way, and therefore provides no justification for the limitation.

1.22 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[1] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[2] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.23 **The committee's assessment of the requirement to report malicious cruelty to animals against article 14 of the International Covenant on Civil and Political Rights (right not to incriminate oneself) raises questions as to whether the requirement to potentially incriminate oneself is justifiable.**

1.24 **As set out above, the requirement to report malicious cruelty to animals engages and limits the right not to incriminate oneself. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the legislation proponent as to whether the limitation on the right to freedom from self-incrimination is compatible with the right to a fair trial, and particularly:**

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

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

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

Offence provision for conduct that destroys or damages property

1.25 The bill provides that a person commits an offence if they engage in conduct that destroys or damages property used in carrying on an animal enterprise, or belonging to a person who carries on, or is associated with, a person who carries on an animal enterprise. A person who causes economic damage exceeding $10 000 is liable to a maximum five year prison term.

1.26 The committee considers that this offence provision engages the prohibition against arbitrary detention.

Right to liberty (prohibition against arbitrary detention)

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

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

Compatibility of the measures with the right to liberty

1.29 The committee considers that the proposed offence provision engages and may limit the prohibition against arbitrary detention.

1.30 In particular, the committee notes that the *Guide to Framing Commonwealth Offences* states that 'a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness'.[3] As it not clear that a prison term of five years for economic damage in excess of $10 000 is comparable to similar types of offences, the committee considers that the penalty may be so excessive as to be unjust (and therefore could amount to arbitrary detention under article 9 of the ICCPR).

1.31 However, the statement of compatibility does not identify the measure as limiting the right to liberty, and therefore provides no justification for the limitation.

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

Guidance Note 1,[4] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[5] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.33 The committee notes that, as other legislation already includes provisions that make property damage a criminal offence, it is important that the human rights assessment of the bill address the question of whether the proposed offence provisions may be regarded as necessary in pursuit of a legitimate objective for the purposes of international human rights law.

1.34 **The committee's assessment of the offence provision against article 9 of the International Covenant on Civil and Political Rights (right not to be arbitrarily detained) raises questions as to whether the offence may be excessive or disproportionate having regard to the breadth of the provision.**

1.35 **As set out above, the offence provision for conduct that destroys or damages property engages and limits the right not to be arbitrarily detained. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the legislation proponent as to whether the limitations on the right to liberty, and particularly:**

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

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

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

Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015

Sponsor: Mr Clive Palmer MP
Introduced: House of Representatives, 1 June 2015

Purpose

1.36 The Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015 (the bill) seeks to create an offence for public officials and former public officials who recklessly disclose information resulting in a person being tried, investigated, prosecuted or punished for an offence that carries the death penalty in a foreign country.

1.37 The bill provides for an exception from the offence if the foreign death penalty offence is constituted by conduct that involves a terrorist act or 'act of violence that causes death or endangers life'.

1.38 The bill proposes to introduce a mandatory minimum one-year term of imprisonment for the offence, and a maximum term of 15 years imprisonment.

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

Exception if death penalty to be imposed in relation to certain serious crimes

1.40 Proposed section 7 makes it an offence for a public official to indirectly or directly disclose information to another person, and the official is reckless as to whether the disclosure will assist in the investigation, prosecution or punishment of a person for an offence for which the death penalty may be applied in a foreign country.

1.41 Under proposed subsection 7(2) of the bill, this offence will not apply if the Attorney-General certifies that the disclosure is necessary to prevent or assist in the investigation or prosecution of a person suspected of having engaged in a terrorist act or an act of violence causing a person's death or endangering life.

Right to life

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

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

1.43 The Second Optional Protocol, to which Australia is a signatory, prohibits in absolute terms the imposition of the death penalty.

Compatibility of the measure with the right to life

1.44 The committee notes that under international human rights law every human being has the inherent right to life, which should be protected by law and welcomes measures that seek to protect people from exposure to the death penalty. The committee notes that the right to life imposes an obligation on the state to protect people from being killed by others or identified risks.

1.45 The committee notes that, while the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits States which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another State.

1.46 As the United Nations Human Rights Committee has made clear, this not only prohibits deporting or extraditing a person to a country where they may face the death penalty, but also prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. However, that committee has expressed concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[1]

1.47 The committee therefore considers that the bill, in seeking to prevent the disclosure of information by public officials in circumstances that might lead to the imposition of the death penalty, promotes the right to life.

1.48 However, Australia's obligation to prohibit the death penalty applies in all circumstances, regardless of the severity of the alleged crime. Enabling the Attorney-General to allow information to be disclosed where it might lead to the death penalty being imposed, on the basis of the type of crime alleged to have been committed, therefore limits the right to life.

1.49 In this regard, the statement of compatibility provides no assessment of the compatibility of the proposed exception with the right to life.

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

1.51 However, it is unclear to the committee on the basis of the information provided in the statement of compatibility what the objective of proposed subsection 7(2) of the bill is, and how this limitation on the right to life may be considered to be a necessary and proportionate limitation on the right to life.

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1 Human Rights Committee, Concluding observations on the fifth periodic report of Australia, CCPR/C/AUS/CO/5, 7 May 2009, [20].

1.52 **The committee's assessment against article 6 of the International Covenant on Civil and Political Rights (right to life) of allowing information to be shared, even if it may result in the death penalty being imposed in relation to certain serious crimes, raises questions as to whether the exception is justifiable.**

1.53 **As set out above, the exception engages and limits the right to life. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponent as to:**

- **whether the exception 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 the achievement of that objective.**

Mandatory minimum sentence for disclosure of information

1.54 Proposed section 9 of the bill provides that if a person is convicted of an offence against section 7, the court must impose a mandatory sentence of imprisonment of at least one year.

1.55 As set out in the Committee's Guidance Note 2,[2] mandatory minimum sentences engage both the right to freedom from arbitrary detention and the right to a fair trial.

Right to freedom from arbitrary detention and right to a fair trial

1.56 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and 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. Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

1.57 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,

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2 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014), available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

given the substantial limitations it places on the right to freedom from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.

Compatibility of the measure with the right to freedom from arbitrary detention and the right to a fair trial

1.58 The statement of compatibility does not identify the right to freedom from arbitrary detention as being engaged by the introduction of mandatory minimum one year sentences.

1.59 However, detention may be considered arbitrary where it is disproportionate to the crime. This is why it is generally important for human rights purposes to allow courts the discretion to ensure that punishment is proportionate to the seriousness of the offence and individual circumstances.

1.60 The statement of compatibility identifies the legitimate objective being pursued as 'ensuring offenders receive sentences that reflect the seriousness of their offending'.[3] It further states that, as the death penalty clearly infringes human rights, the act of disclosing information 'that may result in citizens being tried or convicted of the death penalty is unacceptable'.[4]

1.61 The committee acknowledges that overall the bill pursues a legitimate objective and addresses a pressing and substantial need.

1.62 However, it is not clear to the committee that the imposition of a mandatory sentence may be regarded as proportionate to achieving the bill's stated objective.

1.63 The committee further notes that the proposed offence applies to those who have acted 'recklessly' in disclosing information, which is a lesser standard than one of committing the act with 'intention'. Enabling the courts to retain judicial discretion to determine the most appropriate sentence on the facts of each case would appear to be the least rights restrictive approach, particularly in this case as the offence applies to recklessness.

1.64 The committee notes that the statement of compatibility states that the penalties do not impose a minimum non-parole period on offenders and thereby preserve some of the court's discretion as to sentencing.

1.65 However, the committee considers that the statement of compatibility does not provide a sufficient analysis as to why mandatory minimum sentences are

3 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 1.

4 EM, SoC 1.

required to achieve the legitimate objective being pursued. In particular there is no analysis as to why the exercise of judicial discretion, by judges who have experience in sentencing, would be inappropriate or ineffective in achieving the objective of appropriately serious sentences.

1.66 The committee considers that mandatory sentencing may also engage article 14(5) of the ICCPR, which provides the right to have a sentence reviewed by a higher tribunal. This is because mandatory minimum sentencing impacts on judicial review of the minimum sentence.

1.67 However, the statement of compatibility does not address the potential engagement of the right to have a sentence reviewed by a higher tribunal.

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

1.69 **The committee's assessment of the mandatory minimum sentence for disclosure of information, against articles 9 and 14 of the International Covenant on Civil and Political Rights (right to freedom from arbitrary detention and right to a fair trial), raises questions as to whether the mandatory minimum is justifiable.**

1.70 **As set out above, the mandatory minimum sentence engages and limits the right to freedom from arbitrary detention and the right to a fair trial. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponent as to whether the mandatory sentence is a reasonable and proportionate measure to achieve the stated objective, in particular, that it is the least rights restrictive approach.**

Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015

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

Purpose

1.71 The Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- extend the ordinary waiting period for all working age payments from 1 July 2015;
- remove access to Newstart allowance and sickness allowance to 22 to 24 year olds and replace these benefits with access to youth allowance (other) from 1 July 2016;
- provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (other) or special benefit from 1 July 2016;
- pause indexation on certain income free and income test free areas and thresholds for three years; and
- cease the low income supplement from 1 July 2017.

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

Background

1.73 The bill reintroduces a number of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 bill). The No. 4 bill reintroduced some measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the No. 1 bill) and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 bill).

1.74 The committee reported on the No. 1 bill and No. 2 bill in its *Ninth Report of the 44th Parliament*,[5] and concluded its examination of the No. 2 bill in its *Twelfth Report of the 44th Parliament*.[6] In that report, the committee requested further

5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83.

6 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67.

information from the Minister for Social Services regarding measures contained within the No. 1 bill.[7]

1.75 The committee then considered the No. 4 bill in its *Fourteenth Report of the 44th Parliament*, and requested further information from the Minister for Social Services as to whether the bill was compatible with Australia's international human rights obligations.[8]

1.76 The committee considered the Minister for Social Services' response in its *Seventeenth Report of the 44th Parliament*, and concluded its consideration of the No. 1 bill and No. 4 bill.[9]

Schedule 2 – Age requirements for various Commonwealth payments

1.77 Schedule 2 of the bill would provide that 22-24 year olds are no longer eligible for Newstart allowance (or sickness allowance), and are instead eligible for youth allowance. Existing recipients of Newstart allowance (or sickness allowance) would continue to receive those payments until such time as they are no longer eligible.

1.78 The committee considers that increasing the age of eligibility for various Commonwealth payments engages and limits the right to equality and non-discrimination.

Right to equality and non-discrimination

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

1.80 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

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

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7 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 55.

8 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 94-95.

9 Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014) 11-13.

10 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.

affecting human rights.[11] 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.[12]

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

1.82 The changes to the threshold for Newstart eligibility in Schedule 2 of the bill reintroduces measures previously contained within Schedule 8 of the No. 2 bill and Schedule 6 of the No. 4 bill, which the committee has previously considered.

1.83 The statement of compatibility for the bill does not identify the measures as engaging and potentially limiting the right to equality and non-discrimination.

1.84 However, as the committee noted in its *Ninth Report of the 44th Parliament*, a measure that establishes criteria for access to social security based on age is likely, on its face, to limit the right to equality and non-discrimination. That is, by reducing access to the amount of social security entitlements for persons of a particular age, the measure appears to directly discriminate against persons of this age group.

1.85 A measure which appears directly discriminatory in this way may nevertheless be justifiable under international human right law. The human rights assessment of the measure therefore must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

1.86 In response to its inquiries on the previous bills as to the compatibility of the measures with the right to equality and non-discrimination, the Minister for Social Services stated that 'young people will continue to have…access [to social security] without illegitimate differential treatment and without affecting their other rights.'[13]

1.87 However, the committee considered that the minister's response did not establish that the proposed age cut-offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

1.88 In particular, the committee noted that, for the purposes of international human rights law, 'discrimination' is impermissible differential treatment among persons or groups that results in a person or group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[14] In this

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

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

13 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) Appendix 1, Letter from the Hon. Kevin Andrews MP, previous Minister for Social Services, to Senator Dean Smith (dated 28/08/2014) Attachment B 9.

14 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.

respect, a measure that impacts differentially on individuals based on their age to exclude them from particular benefits is likely to be incompatible with the right to equality and non-discrimination.

1.89 As noted above, the statement of compatibility for the bill does not identify the measure as engaging and potentially limiting the right to equality and non-discrimination, and therefore provides no assessment as to the compatibility of the measure with reference to the committee's previous examination of the measures.

1.90 The committee notes its usual expectation that where a measure that it has previously considered is reintroduced, previous responses to the committee's requests for further information be used to inform the statement of compatibility for the reintroduced measure.

1.91 **The committee's assessment of the age requirements for various Commonwealth payments, against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights (right to equality and non-discrimination), raises questions as to whether the age requirements are justifiable.**

1.92 **As set out above, the age requirements for various Commonwealth payments engage and limit the right to equality and non-discrimination. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services 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.**

Schedule 3 – Income support waiting periods

1.93 Schedule 3 of the bill would introduce a requirement from 1 July 2016 that individuals under the age of 25 be subject to a four-week waiting period, as well as any other waiting periods that may apply, before social security benefits become payable.

1.94 The measure would apply to applicants seeking youth allowance (other) and special benefit. The four-week waiting period may be reduced if a person has previously been employed, and there are a range of exemptions for parents and individuals with a disability.

1.95 The committee considers that the income support waiting periods engage and limit the rights to social security and an adequate standard of living.

Right to social security

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

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

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

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

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

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

Right to an adequate standard of living

1.100 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.101 In respect of the right to an adequate standard of living, article 2(1) of ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

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

1.102 The introduction of the four-week waiting period in Schedule 3 of the bill re-introduces, with some amendments, the proposal for a 26-week waiting period previously contained in Schedule 9 of the No. 2 bill and Schedule 7 of the No. 4 bill.

1.103 The committee previously concluded, in its *Twelfth Report of the 44th Parliament*, that the measure was incompatible with the right to social security and an adequate standard of living.[15]

1.104 In comparison to the previous measure, the bill would reduce the waiting period four weeks rather than 26 weeks; and introduce an additional $8.1 million in funding that will be allocated to Emergency Relief providers to provide assistance for those that have been disproportionately impacted by the measure.

1.105 The statement of compatibility for the bill acknowledges that the measure engages the rights to social security and an adequate standard of living, and states that the objective of the measure is to 'encourage greater participation in work through establishing firm expectations for young job seekers.'

1.106 The committee considers that this may be regarded as a legitimate objective, and that the measure is rationally connected to that objective, for the purposes of international human rights law.

1.107 However, the committee considers that the statement of compatibility has not demonstrated that the measure is proportionate to its stated objective, that is, that it is the least rights restrictive means of achieving that objective.

1.108 In particular, the statement of compatibility has not addressed how young people are to sustain themselves and provide for an adequate standard of living during the four-week period without social security.

1.109 Further, while the committee welcomes additional funding for Emergency Relief providers, the bill provides no explicit guarantee that individuals subject to the measure will be able to access support from the charitable organisations allocating the funding . In addition, the statement of compatibility provides no justification as to how this additional funding supports the compatibility of the measure with the right to social security (which is broader than the receipt of charity) and the right to an adequate standard of living.

1.110 **The committee's assessment of income support waiting periods, against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and an adequate standard of living), raises questions as to whether the waiting periods are justifiable.**

15 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 73, para 2.12.

1.111 **As set out above, the income support waiting periods engage and limit the rights to social security and an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.**

Right to equality and non-discrimination

1.112 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR. More information is provided above at [1.79] to [1.81].

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

1.113 As noted above, the introduction of the four-week waiting period in Schedule 3 of the bill re-introduces, with some amendments, the proposal for a 26-week waiting period previously contained in Schedule 9 of the No. 2 bill and Schedule 7 of the No. 4 bill.

1.114 The committee previously concluded that the measure was incompatible with the right to equality and non-discrimination on the basis of age (direct discrimination).[16]

1.115 In comparison to the previous measure, the bill provides that the waiting period will apply to persons under the age of 25, rather than those under the age of 30.

1.116 The statement of compatibility for the bill acknowledges that the measure engages the right to equality and non-discrimination on the basis of age, but concludes that:

> Although this measure differentiates between those aged under 25 and those aged 25 and over, this differential treatment is designed so that those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period. Additional funding for Emergency Relief providers acts as a further contingency plan for those young people who need it.[17]

1.117 However, as stated above at [1.87], a measure that impacts differentially on or excludes individuals based on their age is likely, on its face, to be incompatible with the right to equality and non-discrimination. In this respect, by imposing a four-week waiting period based on a person's age, the measure appears to directly discriminate against persons under 25 years of age.

16 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 79, para 2.25.

17 Explanatory memorandum (EM) 12.

1.118 As noted above, a measure which appears directly discriminatory in this way may nevertheless be justifiable under international human right law. The human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective.

1.119 However, the committee considers that the statement of compatibility has not established how persons under the age of 25, who will be impacted by the measure, will be able to 'reasonably draw on family support' any more than those over the age of 25.

1.120 In addition, no information is given as to how persons affected by the measure, who do not have the ability to draw on family support, could maintain housing and an adequate standard of living during the waiting period.

1.121 As noted above at [1.106], the committee considers that the measure may have a legitimate objective for the purposes of international human rights law, and that the measure is likely to be rationally connected to that objective. However, the committee is concerned that the measure may not be proportionate to its stated objective.

1.122 **The committee's assessment of income support waiting periods, against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights (right to equality and non-discrimination), raises questions as to whether the waiting periods are justifiable.**

1.123 **As set out above, the income support waiting periods engage and limit the right to equality and non-discrimination on the basis of age. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to whether the measure is a proportionate means of achieving the stated objective.**

Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 13 August 2015 (Senate)

Purpose

1.124 The Migration (Resolving the Asylum Legacy Caseload) Regulation 2015 (the regulation) amends the Migration Regulations 1994 to:

- provide the manner in which the Immigration Assessment Authority will exercise its functions in the fast track assessment process;
- remove most references to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) and replace them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations; and
- establish criteria for the grant of the temporary protection visa (TPV) and safe haven enterprise visa (SHEV).

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

Background

1.126 The regulation is consequential to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the RALC Act). The committee reported on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the* 44th *Parliament*.[1]

1.127 In this report the committee raised concerns about the compatibility, among other things, of:

- the fast track assessment process with the rights of the child, the right to a fair hearing and the obligation of non-refoulement;
- removing most references to the Refugee Convention from the *Migration Act 1958*, and replacing them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations, with multiple human rights; and
- TPVs with the obligation not to place any person at risk of refoulement, the obligation to consider the best interests of the child as a primary

1 Parliamentary Join Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

consideration, the right to the protection of the family and the right to health.

1.128 It also concluded that the fast-track assessment process, in excluding merits review for certain applicants, was incompatible with Australia's obligations of non-refoulement.

1.129 The committee notes that the statement of compatibility to the regulation relies on the statement of compatibility for the RALC Act to assess the human rights implications of the measures contained in the regulation.[2]

1.130 Accordingly, to the extent that the regulation is consequential to the amendments introduced by the RALC Act, the concerns set out in the committee's previous report in relation to the RALC bill apply to the regulation.[3]

Safe haven enterprise visas

1.131 Safe Haven Enterprise Visas (SHEVs) were created by the RALC Act. These visas may be granted to persons who are found to be owed protection obligations and who indicate an intention to work or study in regional areas in Australia. The regulation sets out certain criteria for the grant of a SHEV.

1.132 The committee notes that the main criteria for the grant of a SHEV were included by an amendment to the RALC bill, and the committee therefore did not examine the human rights compatibility of the SHEV regime during its consideration of the bill. However, many of the previous report's concerns in relation to TPVs implemented by the RALC bill apply equally to the SHEV regime, particularly in relation to Australia's non-refoulement obligations.[4]

1.133 Many of the measures in the regulation are technical in nature or alleviate minor aspects of the human rights concerns with SHEVs – one example is that it ensures that only one member of a family unit needs to have indicated an intention to work or study to be eligible for a SHEV, so that the family unit can receive the same category of visa.

1.134 However, the regulation raises a human rights compatibility concern in respect of providing that people who hold a SHEV, and people whose last substantive visa was a SHEV, are unable to make a valid application for a Bridging Visa B. A Bridging Visa B has a travel facility attached to it.

2 See Explanatory Statement (ES), Attachment B, p. 5-9.

3 See above footnote 1.

4 See Parliamentary Join Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

1.135 The statement of compatibility for the regulation explains the reason for this amendment as follows:

> The RALC Act made it a condition imposed on all SHEV holders that they must seek permission before travelling overseas and are not to travel to the country in respect of which protection was sought. If the visa holder breaches this condition a discretion to cancel the visa under s116(1)(b) of the Migration Act will be enlivened.
>
> However, due to an oversight in the Government-sponsored amendments, the RALC Act did not make a consequential amendment to remove the access of SHEV holders to BVBs. If SHEV holders were to be granted BVBs whilst waiting for a further substantive visa to be granted, the intended restriction on travel could not be enforced.[5]

1.136 The committee considers that the restriction on travel for SHEV holders engages and limits the right to freedom of movement.

Right to freedom of movement

1.137 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

1.138 The right to freedom of movement is linked to the right to liberty – a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.139 The right to freedom of movement also includes a right to leave Australia, either temporarily or permanently. This applies to both Australian citizens and non-citizens. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents without unreasonable delay or cost.

1.140 Limitations can be placed on the right as long as they are lawful and proportionate. Particular examples of the reasons for such limitations include the need to protect public order, public health, national security or the rights of others.

Compatibility of the measure with the right to freedom of movement

1.141 The statement of compatibility for the regulation acknowledges that preventing SHEV holders from applying for a visa that allows the visa holder to travel limits the right to freedom of movement. However, it justifies this limitation as follows:

5 ES, Attachment B, 8.

> The amendments are reasonable and proportionate in pursuit of the Government's legitimate aim of offering protection to genuine refugees and those fearing significant harm, while also protecting the integrity of the protection visa regime by enabling cancellation of a protection visa (which includes a SHEV) where circumstances indicate the person does not, or no longer, requires Australia's protection. The amendments are therefore consistent with Australia's international human rights obligations.[6]

1.142 The committee acknowledges that protecting the integrity of the protection visa regime may be regarded as a legitimate objective for the purposes of international human rights law.

1.143 However, it is unclear how denying a person the right to travel is rationally connected to that objective.

1.144 In particular, the statement of compatibility states that the protection visa regime's integrity will be upheld if it allows protection visas, including SHEVs, to be cancelled where circumstances indicate the person no longer requires Australia's protection. However, it is unclear how preventing a person from travelling to any country, and not just to the country from which they have a well-founded fear of persecution, ensures that protection visas are only held by those to whom Australia owes protection obligations.

1.145 The regulation provides that SHEV holders are no longer eligible for the Bridging Visa B, which is a temporary visa that lets the holder leave and return to Australia while their application for a substantive visa is being processed. It allows a person who returns to Australia within the specified travel period to remain lawfully in Australia while their substantive visa application is being processed.

1.146 The SHEV regime allows a visa holder to travel in compassionate and compelling circumstances, as approved by the minister in writing, and to places other than the country in respect of which protection was sought.[7] However, it is unclear why it is necessary to require the minister's written approval before the SHEV holder is able to travel to any country, as merely seeking to travel would not appear to indicate in and of itself that a person is not in need of protection.

1.147 Further, it is noted that the regulation does not allow a SHEV holder, or former SHEV holder to ever apply for a Bridging Visa B. It is not clear how this blanket denial of the right to apply for this type of visa could, even if rationally connected to a legitimate objective, be regarded as proportionate to that objective.

1.148 **The committee's assessment of denying SHEV holders access to a Bridging Visa B, against article 12 of the International Covenant on Civil and Political Rights**

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6 ES, Attachment B, 9.

7 See clause 8570 of Schedule 8 to the Migration Regulations 1994.

(right to freedom of movement), raises questions as to whether the restrictions are justifiable.

1.149 **As set out above, denying SHEV holders access to a Bridging Visa B engages and may limit the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is a rational connection between the limitation and the stated objective, in particular, how does denying access to travel to SHEV holders to *any* country further the objective of maintaining the integrity of the protection visa regime; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and in particular, why it is necessary to prohibit access entirely to Bridging Visa Bs for all SHEV, or former SHEV, holders.**

Chapter 2

Concluded matters

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

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

Australian Citizenship and Other Legislation Amendment Bill 2014

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

Purpose

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

- extend good character requirements;
- modify residency requirements and related matters;
- amend the circumstances in which a person's approval as an Australian citizen may or must be cancelled;
- modify the circumstances in which the minister may defer a person making the pledge of commitment to become an Australian citizen; for example, where the minister is considering cancelling the person's approval as an Australian citizen on the basis that the person would not now be approved as an Australian citizen because of identity, having been assessed as a risk to security or being subject to the bar on approval related to criminal offences;
- adjust the circumstances in which a person's Australian citizenship may be revoked; for example, if the person has been approved as an Australian citizen by descent and the minister is satisfied that the approval should not have been given (except in circumstances where the revocation decision would result in the person becoming stateless);
- provide a discretion to revoke a person's Australian citizenship in circumstances where the minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation, perpetrated by the Australian citizen themselves or by a third party;
- amend the rules for obtaining citizenship by adoption to stipulate that the adoption process must have commenced before the person turned 18;

- limit automatic acquisition of citizenship at 10 years of age to those persons born in Australia who have maintained lawful residence in Australia throughout the 10 years;
- require, for the purposes of the automatic acquisition of Australian citizenship, that a person is not taken to be ordinarily resident in Australia throughout the period of 10 years beginning on the day the person was born if they were born to a parent who had privileges or immunities under the *Diplomatic Privileges and Immunities Act 1967*, the *Consular Privileges and Immunities Act 1972*, the *International Organisations (Privileges and Immunities) Act 1963* and the *Overseas Missions (Privileges and Immunities) Act 1995*; and
- amend the provision giving citizenship to a child found abandoned in Australia.

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

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

Background

2.6 The committee previously considered the bill in its *Eighteenth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Immigration and Border Protection as to whether a number of measures in the bill were compatible with human rights.[1]

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

2.7 Currently under the Citizenship Act the power to revoke citizenship on the grounds of fraud requires a conviction for a relevant offence (for example, the offence of false statements or representations), proven in court to the criminal standard of beyond reasonable doubt.[2]

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

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 4-30.

2 See Citizenship Act, section 34.

a person be convicted.[3] The power to revoke citizenship is also available in relation to the citizenship of children.[4]

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

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

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

Obligation to consider the best interests of the child

2.11 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[5]

2.12 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.

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

4 EM, Attachment A, 3.

5 Article 3(1).

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

2.13 The previous report considered that removing the requirement of a conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and limits the obligation to consider the best interests of the child. This is because the proposed discretionary power may be exercised regardless of whether or not it is in the child's best interests for such a power to be exercised. As noted above, the enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may negatively impact upon what is in the child's best interests.

2.14 The statement of compatibility acknowledges that the proposed measure engages the obligation to consider the best interest of the child but argues that the limitation is justifiable. It states that the objective of the measure is to 'strengthen the integrity of the Australian citizenship programme by preventing its abuse through misrepresentation and fraud'.[6]

2.15 However, based on the information and analysis provided, the previous report noted that the statement of compatibility does not adequately demonstrate that the proposed measure addresses a legitimate objective.

2.16 Further, as currently drafted, the proposed amendments would allow the removal of a person's citizenship (including a child's citizenship) where the person concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves. This would mean that a child's citizenship could be revoked for conduct alleged to have been committed (but not necessarily proven) by a third party in relation to the child's application, including conduct of which the child had no knowledge, or was unable to prevent.[7] This raises further concerns in relation to whether the proposed power is rationally connected to, and a proportionate way to achieve, its stated objective so as to be justifiable under international human rights law.

2.17 The previous report therefore considered that the proposed discretionary power to revoke Australian citizenship without a court finding limits the obligation to consider the best interests of the child; and that the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law.

2.18 The committee therefore sought the advice of the Minister for Immigration and Border protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether

6 EM, Attachment A, 2.

7 EM, Attachment A, 2.

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 agrees that the obligation to consider the best interests of the child is engaged, however, it considers that the obligation is not limited by the proposed revocation power. Rather, the same obligation to consider the best interests of the child would attach to a revocation decision under proposed section 34AA of the *Australian Citizenship Act 2007* (the Citizenship Act) as it attaches to a revocation decision under current section 34 (as set out currently in Chapter 18 of the Australian Citizenship Instructions (ACI)). The fact that a decision-maker may decide to revoke a child's citizenship after considering all the factors, including the best interests of the child, does not mean the obligation to consider the best interests of the child has been limited. This was stated in the statement of compatibility accompanying the Bill at page 3 when the former Minister for Immigration and Border Protection, the Hon Scott Morrison MP, stated:
>
> > 'In exercising the discretion the Minister would give effect to Article 3 by considering the best interests of the child as a primary consideration.'
>
> The government is of the view that section 34AA does not limit the obligation to treat the best interests of children as a primary consideration and therefore it is not necessary to respond to the committee's further questions.[8]

Committee response

2.19 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.20 The committee notes that the minister does not consider that the measure limits the obligation to consider the child's best interests as the minister could still give effect to the obligation in deciding whether or not to exercise his discretion.

2.21 However, while the minister may choose to consider the best interests of the child as a matter of discretion, the proposed power to revoke a child's citizenship will be able to be exercised regardless of whether or not the minister has, in fact, considered the best interests of the child.

2.22 The power to revoke a child's citizenship could therefore be validly exercised regardless of whether it is in the best interests of the child, and it is for this reason that the measure limits the obligation to consider the best interests of the child.

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8 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) 2.

2.23 As noted above, the enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may negatively impact on what is in the child's best interests. It does not follow from the fact that the exercise of the present power to revoke citizenship is unconstrained by an obligation to consider the child's best interests that the new expanded power to revoke a child's citizenship does not limit the obligation.

2.24 International human rights law requires that states have sufficient safeguards in place to prevent violations of human rights occurring. In this context, unconstrained discretion is generally insufficient for human rights purposes to ensure that powers are exercised in a manner that is compatible with human rights.[9]

2.25 As noted above, the minister's response does not consider that the obligation to consider the best interest of the child is limited, and therefore provides no information as to whether the measure is nevertheless a justifiable limitation under international human rights law.

2.26 The minister's response in this respect does not appear to align with the assessment provided in the statement of compatibility for the bill which, while not explicitly acknowledging that the obligation to consider the best interests of the child was limited, provided information as to why a limitation could be considered to be justifiable. That is, the statement of compatibility stated that the measure pursued a legitimate objective, was rationally connected to that objective and was a proportionate means of achieving that objective.[10]

2.27 As noted above, the committee's previous report regarded this assessment as providing insufficient information to justify the limitation for the purposes of international human rights law.

2.28 **Some committee members noted the minister's advice that the measure does not limit the obligation to consider the best interests of the child as a primary consideration and consider that the expanded power to revoke citizenship for fraud or misrepresentation is justified to ensure the integrity of the citizenship system.**

2.29 **On the other hand, the previous report concluded that the proposed expanded power to revoke a child's citizenship without a court finding limits the obligation to consider the best interests of the child. Some committee members considered that the statement of compatibility had not provided sufficient information to justify that limitation for the purposes of international human rights law, and the minister's response has not provided any further information to justify**

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9 See, for example, Human Rights Committee, *Freedom of movement (Art.12)*, UN DocCCPR/C/21/Rev.1/Add.9, General Comment No.27, *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977.

10 EM, Attachment A, 2.

the limitation. The revocation power is able to be exercised regardless of whether or not there has been consideration of the best interests of the child. Some committee members therefore consider that the power to revoke a child's citizenship without a court finding is incompatible with the obligation to consider the best interests of the child.

The right to nationality

2.30 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the International Covenant on Civil and Political Rights (ICCPR).[11] Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

2.31 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and to not deprive a person of their nationality if such deprivation would render the person stateless.[12]

Compatibility of the measure with the right to nationality

2.32 As noted, the proposed power would allow for the removal of a child's Australian citizenship.[13]

2.33 The previous report considered that removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, therefore engages and may limit a child's right to nationality.

2.34 The statement of compatibility acknowledges the proposed measure engages the right to nationality but argues that any limitation is justifiable.[14]

2.35 As noted above at [2.15], the statement of compatibility does not provide sufficient reasoning or evidence to demonstrate that the stated objective constitutes a pressing or substantial concern as required to permissibly limit a right under international human rights law.

2.36 Further, the previous report considered that the statement of compatibility did not show that there is a rational connection between the measure and the stated objective and that the measure is proportionate for the achievement of that objective (see [2.16] above).

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11 Article 24(3) of the ICCPR.

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

13 See EM, Attachment A, 2.

14 See EM, Attachment A, 2.

2.37 The previous report noted that Australia has obligations under article 8 of the CRC to preserve the identity of children, including their nationality. Additionally, Australia's obligations under article 8 of the CRC should be read in accordance with Australia's obligations under article 3 of the CRC to consider the best interests of the child and article 8(1) of the Convention on the Reduction of Statelessness, which provides that a state shall not deprive a person of their nationality if such deprivation would render the person stateless.[15]

2.38 The previous report considered that the proposed discretionary power to revoke Australian citizenship without a court finding limits the right of the child to nationality. However, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law.

2.39 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked. In addition, the power to revoke only arises if the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen.
>
> In evidence before the Senate Legal and Constitutional Affairs Legislation Committee on 19 November 2014, my department noted that in 2013-14 its National Assessments and Allocations Team received over 26,000 allegations of fraud and other matters. Of those, just over 10,000 were recommended for further investigation for fraud specifically. 135 investigations conducted by the department resulted in 12 briefs of evidence to the Commonwealth DPP. There were 13 convictions for fraud in the same period. The low rate of prosecutions indicates that there is a low risk that individuals who acquired citizenship fraudulently will be called to account. This in turn may encourage further fraudulent applications while undermining public confidence in the citizenship and migration programmes.
>
> This amendment is intended to improve the integrity of the Australian citizenship programme and create stronger disincentives for people to provide false and misleading information. Strengthening the ability to

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

revoke citizenship would reinforce the principle that citizenship by application is a privilege and that there is a real prospect of that privilege being removed from those who have obtained citizenship consequent to fraud or misrepresentation in the visa or citizenship processes. The government is of the view that this is 'a pressing or substantial concern' and the proposed changes are aimed at achieving a legitimate objective. I note that other foreign governments are of a similar view with the proposed 34AA being comparable with Ministerial powers to revoke citizenship for fraud or false representation without conviction in Canada, New Zealand and the United Kingdom. I note that Canada has long allowed revocation of citizenship for fraud without conviction.

The government considers that there is a rational connection between the objective of the proposed revocation power and how it would operate in practice. While a child may not have been responsible for, or had no knowledge of the fraud or misrepresentation, the proposed power would provide a disincentive for a person acting on behalf of a child to engage in fraud or misrepresentation in relation to a migration or citizenship application by that child.

Appropriate safeguards have been built into the proposal through the discretionary nature of the decision to revoke and the requirement that any revocation be in the public interest. The decision-maker would consider international law obligations when making this discretionary decision, including the *1961 Convention on the Reduction of Statelessness* (Statelessness Convention) and the best interests of the child and this will be reflected through updates to the ACI. In addition, there is a time limit beyond which citizenship could not be revoked and the exercise of the power is subject to judicial review.

The committee also "considers that, in the absence of a definition of what constitutes 'fraud' or 'misrepresentation', the minister's power to revoke citizenship on the basis of, for example, minor or technical misrepresentations may not be proportionate to the stated objective of the measure". It is not proposed to provide a statutory definition of fraud or misrepresentation; rather those words will have their ordinary or common meaning. 'Fraud' is a well-known concept at common law with a plain and ordinary meaning. The Macquarie Dictionary gives the following common law definition of 'fraud': "advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false". The Macquarie Dictionary defines 'misrepresent' as "to represent incorrectly, improperly, or falsely". The department considers that these meanings provide sufficient certainty as to the types of conduct that would be regarded as fraud or misrepresentation.

The proposed section 34AA discretionary revocation power, like the existing section 34 discretionary revocation power, could only be exercised if the Minister is satisfied that it would be contrary to the public interest

for the person to remain an Australian citizen. The 'public interest' test would include consideration of such matters as whether the nature or severity of the fraud or misrepresentation was such that it would be contrary to the public interest to allow the person to retain their Australian citizenship. The decision would also take into account the best interests of the child.

The government is of the view that the proposed section 34AA does not limit the right to acquire a nationality under Article 7 of the *Convention on the Rights of the Child* (CRC) and Article 24(3) of the *International Covenant on Civil and Political Rights* (ICCPR). It does, however, provide an appropriate mechanism to consider whether an individual who acquired citizenship consequent to fraud or misrepresentation should continue to hold that citizenship and the privileges and responsibilities associated with it.

Article 8 of the CRC states:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

The government is of the view that the amendments are consistent with Article 8 because if the Bill is passed, any revocation would not constitute 'unlawful interference'. Further, any decision made under the proposed revocation power that impacted on a child would take into account, as a primary consideration, the best interests of that child.

The committee "observes that the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves". The committee "also notes that children have different capacities and levels of maturity than adults to make judgements. Given this, the committee considers that the measure may not be proportionate to its stated objective". The measure is proportionate to its objective as the decision whether it would be contrary to the public interest for the person to remain an Australian citizen would be informed by the facts of the case, which would include who was responsible for the fraud or misrepresentation and the nature or severity of the fraud or misrepresentation. Further, the best interests of the child would be a primary consideration in that decision-making process.[16]

Committee response

2.40 **The committee thanks the Minister for Immigration and Border Protection for his response.**

16 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) 3-5.

2.41 The terms 'nationality' and 'citizenship' are interchangeable in international law. As noted in its previous analysis, the committee considered that by allowing for the removal of a child's citizenship the measure engages and limits a child's right to nationality.

2.42 The committee notes that, while the minister does not consider that the measure limits a child's right to nationality, the response nevertheless provides a range of information as to why a child's right to nationality could be considered to be justifiably limited.

2.43 First, the response provides information to establish that the measure pursues a legitimate objective of improving the integrity of the Australian citizenship programme and create stronger disincentives for people to provide false and misleading information. Based on the information provided, the committee considers that this may be considered a legitimate objective for the purposes of international human rights law.

2.44 Second, the response argues that the proposed discretionary power to revoke citizenship is rationally connected to its objective. In particular, it states that, while a child may not have been responsible for, or had no knowledge of the fraud or misrepresentation, the proposed power would provide a disincentive for a person acting on behalf of a child to engage in fraud or misrepresentation in relation to a migration or citizenship application by that child. The committee acknowledges that in broad terms the measure could act as a disincentive to fraud and misrepresentation in this way, and therefore may be regarded as rationally connected to the stated legitimate objective of the measure.

2.45 However, the committee considers that the response does not demonstrate that the power to remove citizenship where the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation by themselves or a third party is a proportionate means of achieving the stated objective.

2.46 In particular, as the measure explicitly removes the requirement that fraud or misrepresentation be proven in court to the criminal standard of proof (beyond reasonable doubt), there is a greater risk that that citizenship may be removed in circumstances where the fraud or misrepresentation did not in fact occur.

2.47 Further, the power allows a child's citizenship to be removed even in circumstances where the child was unaware of the fraud or misrepresentation or may result in statelessness for some children. Given the extremely serious and lifelong consequences for a child in such circumstances, the breadth of the power is disproportionate to the aims sought.

2.48 The committee notes the minister's advice that appropriate safeguards have been built into the proposal through the discretionary nature of the decision to revoke and the requirement that any revocation be in the public interest.

2.49 However, under international human rights law ministerial discretion, in and of itself, does not constitute a sufficient safeguard against the risk that the power may be exercised in a manner which would not be proportionate to the stated objective of the measure. The same is true in relation to a requirement that a power be exercised in the public interest.[17]

2.50 **The previous report concluded that the proposed discretionary power to revoke Australian citizenship without a court finding limits the right of the child to nationality.**

2.51 **Based on the information provided, the committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding pursues the legitimate objective of improving the integrity of the Australian citizenship programme and is rationally connected to that objective.**

2.52 **Some members of the committee noted the minister's advice that consideration of the public interest by the minister in determining whether to revoke a child's citizenship would ensure the proportionality of the measure. These members of the committee therefore consider that the measure is justified.**

2.53 **However, some members of the committee consider that the limitation on a child's right to a nationality has not been sufficiently justified as proportionate. These committee members therefore consider that the proposed power is likely to be incompatible with the right of the child to a nationality, noting in particular that the power to revoke Australian citizenship may result in statelessness for some children and may occur in circumstances where fraud or misrepresentation has not been proven.**

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

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

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

17 See, for example, Human Rights Committee, *Freedom of movement (Art.12)*, UN DocCCPR/C/21/Rev.1/Add.9, General Comment No.27, *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977.

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

2.56 The statement of compatibility acknowledged that the proposed measure engages, but concluded that it does not limit, the right of the child to be heard.[18]

2.57 The previous report acknowledged that the minister's commitment to provide natural justice is an important aspect of the right of the child to be heard. However, natural justice is not equivalent, or a sufficient alternative, to having a court make a determination as to 'fraud' or 'misrepresentation', particularly in light of the serious consequences of a decision to revoke a child's citizenship.

2.58 The previous report therefore considered that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right of the child to be heard. The statement of compatibility does not sufficiently justify that potential limitation for the purposes of international human rights law.

2.59 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The government does not consider that the proposed section 34AA limits or may limit the right of the child to be heard in the administrative proceedings associated with consideration of revocation of citizenship.
>
> The statement of compatibility acknowledges that the proposed measure engages the right of the child to be heard but argues that the measure does not limit the right because prior to reaching a decision on whether to revoke a child's citizenship the Minister would afford the person natural justice, which would require giving the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12 of the CRC.
>
> The proposed revocation power requires the Minister to be satisfied, through an administrative process, of both the occurrence of relevant fraud or misrepresentation and that it would be contrary to the public interest for the person to remain an Australian citizen. The committee appears to consider the right to be heard in relation to the consideration of revocation requires a judicial process. However, it is common for significant findings of fact and decisions that affect individuals to be made

18 EM, Attachment A, 3.

administratively, with the right to be heard given effect through a natural justice process.[19]

Committee response

2.60 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.61 The committee notes that the minister's view that the proposed power does not limit the right of the child to be heard on the basis that the minister would afford the child natural justice prior to reaching a decision. However, no information is provided as to how a child would be afforded the opportunity to be heard in relation to such administrative processes.

2.62 Further, the minister's response does not engage with the fact that a court process leading to determination as to 'fraud' or 'misrepresentation' may afford particular children the ability to be heard. The removal of the requirement for this prior process places a limitation on the right.

2.63 As the minister does not consider the right of the child to be heard to be limited, the response does not provide any information as to whether the limitation is justifiable.

2.64 **Some members of the committee noted the minister's advice that prior to reaching a decision on whether to revoke a child's citizenship the minister would afford the person natural justice and considered that the measure is therefore justified.**

2.65 **Based on the information provided, other members of the committee considered that they were unable to conclude that the measure is compatible with the right of the child to be heard as required by article 12 of the Convention on the Rights of the Child.**

Right to a fair trial and fair hearing

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

2.67 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)).

19 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) 5.

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

2.68 The previous report considered that removing the requirement of a conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and may limit the right to a fair trial and fair hearing.

2.69 This is because, as noted at [2.7] above, the proposed amendments remove the requirement that there be a determination of guilt proven in court to the criminal standard of beyond reasonable doubt in relation to a relevant offence before the minister can exercise the power to revoke citizenship. This could, in effect, allow for punitive action against an individual based on the minister's determination of 'fraud' or 'misrepresentation' (either by the individual or a third party such as a migration agent).

2.70 However, this potential limitation of the right was not addressed in the statement of compatibility in relation to this measure.

2.71 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The government considers that the right to a fair trial and fair hearing are not limited by the proposal as:
>
> > i. in the event that the person is charged with a criminal offence related to the fraud or misrepresentation, the person retains the rights that are applicable to a criminal trial;
> >
> > ii. the consideration of whether to revoke the person's citizenship is a discrete administrative process that would be undertaken within the administrative law framework and in accordance with the principle of natural justice;
> >
> > iii. the revocation decision is subject to the right of judicial review. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. This would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether natural justice has been afforded and whether the reasons given provide an

evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.[20]

Committee response

2.72 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.73 The committee notes the minister's view that the right to a fair trial and fair hearing are not limited by the proposal.

2.74 The committee agrees that a person charged with a criminal offence would continue to enjoy the rights associated with a criminal trial in Australia.

2.75 However, both administrative processes and criminal processes are relevant in relation to the proposed power.

2.76 In particular, the Citizenship Act presently allows for the power to revoke citizenship on the grounds of fraud requires where there has been a conviction for a relevant offence (for example, the offence of false statements or representations), proven in court to the criminal standard of beyond reasonable doubt.

2.77 The effect of the measure is to replace current court processes and determinations of guilt beyond a reasonable doubt solely with the views of the minister as to whether 'fraud' or 'misrepresentation' has occurred.

2.78 The committee notes that the stripping of citizenship via administrative rather than criminal processes in this way may constitute punitive action against the individual; and may be considered to be a form of banishment,[21] which has historically been regarded as one of the most serious forms of punishment.[22]

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20 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) 6.

21 See, J Bleichmar, 'Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law', *Georgetown Immigration Law Journal* (1999) 27. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at http://philpapers.org/archive/BARCWC-3.pdf; Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists" 39(2) *Queen's Law Journal* (2014) 573; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' 40(1) Queen's Law Journal (2014) 1-54.

22 See, Rebecca Kingston, 'The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France', (2005) 9 *Citizenship Studies*23. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at http://philpapers.org/archive/BARCWC-3.pdf.

2.79 Accordingly, the removal of an Australian's citizenship in circumstances which may ultimately lead to their effective banishment may be considered to be a form of punishment under international human rights law.

2.80 The committee notes the minister's advice that the removal of citizenship would be an administrative process and would not be classified as criminal under Australian law.

2.81 However, as set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil or administrative under domestic law it may be nevertheless 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 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.

2.82 The criteria for determining whether a penalty may be considered 'criminal' under human rights law in circumstances where it is not classified as criminal under domestic law relates to both the nature and the severity of the penalty.

2.83 In relation to the nature 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).

2.84 The committee notes in this respect the minister's advice that the measure is intended to deter acts of fraud or misrepresentation. Further, the measure could apply to a broad number of naturalised citizens so that it may not be limited to a particular regulatory context.

2.85 These factors mean that the measure is more likely to be considered 'criminal' for the purposes of international human rights law.

2.86 However, even if both these aspects of the test were not fully satisfied, a penalty may be considered 'criminal' depending upon its severity. The serious consequences that ultimately may flow from the revocation of a person's citizenship may also mean that the penalty is considered 'criminal' for the purposes of international human rights law, thereby engaging the full range of criminal process rights under articles 14 and 15 of the ICCPR. Given that the proposed provision removes the requirement that there be prior determination of guilt to the criminal standard of beyond reasonable doubt, the measure limits the right to a fair trial. No justification has been provided in relation to this limitation.

2.87 Further, the right to a fair hearing applies regardless of whether the revocation of citizenship may be considered criminal.

2.88 In this regard, the committee notes the minister's advice that natural justice would be respected in relation to a ministerial decision to revoke a person's citizenship.

2.89 However, while natural justice is important in terms of fair hearing rights, it is not the only aspect of the right. In particular, internal administrative processes are not equivalent to external independent and impartial review and, accordingly, are not sufficient for the purposes of international human rights law. Also, other provisions of this bill remove the availability of merits review in relation to personal decisions of the minister stated to be in the public interest. This would mean that merits review may not be available in relation to a decision to revoke citizenship where it is made personally by the minister.

2.90 Finally, the committee notes the minister's advice that judicial review would still be available in relation to such decisions.

2.91 However, judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977*, and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

2.92 It is therefore clear that, in context, the proposed provision limits the right to a fair hearing. No information has been provided as to why this limitation is justifiable.

2.93 **Some members of the committee noted the minister's advice that individuals would still have access to judicial review which could consider whether the power to revoke citizenship was exercised in accordance with law. These members considered that the measure was therefore justified.**

2.94 **However, some members of the committee consider that the power to revoke citizenship without a court finding limits the right to a fair hearing. As set out above, these committee members consider that the minister's response does not sufficiently justify that limitation for the purposes of international human rights law. Accordingly, these committee members consider that the measure is incompatible with the right to a fair hearing. Additionally, these committee members consider that the power to revoke citizenship without a court finding as to guilt may be incompatible with the right to a fair trial.**

Right to take part in public affairs

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

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

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

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

2.98 As the proposed measure grants power to remove Australian citizenship the measure engages, and has a consequential impact on, the right to take part in public affairs. The measure may limit the right to take part in public affairs by acting as a disincentive (a 'chilling effect') for full participation in public affairs such as standing for public office. Individuals may be concerned that if they draw attention to themselves through participation in public affairs then their citizenship is open to scrutiny and may be liable to be revoked.[23] The previous report noted that the right to take part in public affairs was not addressed in the statement of compatibility.

2.99 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The government does not assess the proposed revocation power as limiting the right to take part in public affairs. Article 25 of the ICCPR states in full:
>
> > Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
> >
> > (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> >
> > (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

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

> (c) To have access, on general terms of equality, to public service in his country.
>
> Article 25 of the ICCPR is concerned with the right to take part in public life, not with the right of state parties to determine, subject to any other applicable treaties or conventions, the circumstances in which a person's citizenship may be revoked.[24]

Committee response

2.100 **The committee thanks the Minister for Immigration and Border Protection for his response. The committee considers that the measure is likely to be compatible with the right to take part in public affairs.**

Right to freedom of movement

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

2.102 The right to enter one's own country includes a right to remain in the country, return to it and enter it.[25] There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable. State parties cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

2.103 The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.[26]

Compatibility of the measure with the right to freedom of movement

2.104 If a person's citizenship is revoked under the proposed provisions then the person will be granted an ex-citizen visa.[27] This may limit the right to freedom of movement because, as noted in the statement of compatibility, an ex-citizen visa ceases on a person's departure from Australia.[28]

2.105 When a person who has an ex-citizen visa leaves Australia they may not be able to return, even in circumstances where Australia is their 'own country', a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties.

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24 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) 6-7.

25 Article 12 of the ICCPR.

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

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

28 EM, Attachment A, 3.

2.106 However, the right to freedom of movement and the right to return to one's own country were not addressed in the statement of compatibility.

2.107 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The government does not consider that the proposed revocation power limits Article 12.
>
> In particular the proposed revocation power does not limit the rights under paragraphs 1, 2 and 3 of Article 12 as a person whose citizenship has been revoked acquires an ex-citizen visa by operation of law and that visa does not restrict a person's movement within Australia; nor does it prevent a person leaving Australia.
>
> Similarly, even if the proposed revocation power engages Article 12(4), any deprivation of a person's right to enter Australia is not arbitrary. As noted by the committee, an ex-citizen visa ceases on a person's departure from Australia. However, a person whose citizenship was revoked has the opportunity to apply in Australia for a visa that permits them to re-enter Australia, or, while outside Australia, to apply for a visa. Whether a visa is granted will depend on whether the person meets the visa requirements. Of the 16 people whose citizenship has been revoked, 5 have subsequently applied for a visa with a travel facility and have been granted. While it is possible that a former citizen may be refused a visa to enter Australia, that refusal would be undertaken in accordance with the legislative requirements and principle of natural justice. Consequently, the deprivation of the right to enter Australia would not be arbitrary and the right is not limited.[29]

Committee response

2.108 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.109 The committee welcomes the minister's advice that a person on an ex-citizen visa will be able to apply for other visas which permit travel.

2.110 However, the committee notes that the grant of such a visa is by no means assured.

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29 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) 7.

2.111 Further, the committee notes that, a visa including an ex-citizen visa may be cancelled on a range of grounds, which means that the person may be subject to deportation.

2.112 The minister's response acknowledges that a former citizen may be refused a visa to return to Australia, and states that this refusal of entry would not be 'arbitrary' as it would be in accordance with legislative requirements and the principle of natural justice. On this basis, the minister states that the right to enter one's own country is not limited.

2.113 However, the committee notes that this is inconsistent with recent views expressed by the UN Human Rights Committee (HRC), including in relation to Australia.

2.114 In particular, the question of whether a person has been arbitrarily deprived of their right to enter one's own country under article 12 of the ICCPR is much broader than whether domestic laws and processes have been followed. In *Nystrom v. Australia* the UN Human Rights Committee noted the following in relation to 'arbitrariness' in article 12(4):

> even interference provided for by law should be in accordance with the provisions, the aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.[30]

2.115 It follows from this jurisprudence that the right to enter one's own country is limited by the measure. As the minister does not consider that the revocation of citizenship limits the right to enter or remain in one's own country, the minister does not provide any information as to why the limitation is justifiable.

2.116 **However, some committee members noted the minister's advice that any deprivation of a person's right to enter Australia is not arbitrary and, accordingly, consider that the expanded visa cancellation powers are justified.**

2.117 **Other committee members consider that revoking the citizenship of a person who may then be unable to enter, remain or return to their 'own country' is likely to be incompatible with the right to freedom of movement (which includes the right to enter, remain and return to one's own country).**

30 Views: Communications No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('Nystrom'), [7.6].

Quality of law

2.118 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measure which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

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

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

2.120 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed power to revoke citizenship is compatible with the 'quality of law' test.

Minister's response

> As noted earlier in my response, it is not proposed to provide a statutory definition of fraud or misrepresentation; rather those words will have their ordinary or common meaning. The government considers that these ordinary meanings provide sufficient certainty as to the types of conduct that would be regarded as fraud or misrepresentation.
>
> The government is of the view that that the proposed section 34AA is sufficiently certain and not overly broad The proposed section 34AA discretionary revocation power, like the existing section 34 discretionary revocation power, could only be exercised if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. The term 'public interest' is not defined in the Citizenship Act or in policy. The 'public interest' test would include consideration of such matters as whether the nature or severity of the fraud or misrepresentation was such that it would be contrary to the public interest to allow the person to retain their Australian citizenship. The decision would also take into account the best interests of the child.

31 See Australian Citizenship and Other Legislation Amendment Bill 2014.

Policy guidance regarding the above will be detailed in the ACI. The ACI is a publicly available document.[32]

Committee response

2.121 **The committee thanks the Minister for Immigration and Border Protection for his response and considers that the power is likely to satisfy the quality of law test.**

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

2.122 Currently the good character requirements under the Citizenship Act apply only to applicants aged 18 and over. The concept of 'good character' is undefined in the Citizenship Act but, as a matter of policy, is understood to cover the 'enduring moral qualities of a person' and 'whether they are likely to uphold and obey the laws of Australia, and other commitments they make through the Australian Citizenship Pledge'.[33]

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

2.124 The previous report noted that the proposed extension of the good character requirement to applicants for Australian citizenship under 18 years of age engages and limits the obligation to consider the best interests of the child and the right to protection of the family.

Obligation to consider the best interests of the child

2.125 Under the CRC, Australia is required to ensure that in all actions concerning children, the best interests of the child is a primary consideration; see [2.11] to [2.12] above.[34]

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

2.126 The statement of compatibility states that the measure engages and is consistent with the obligation to consider the best interests of the child.[35]

2.127 However, the previous report noted that the extension of the 'good character' test to child applicants would add an additional requirement for Australian citizenship which may not be compatible with the best interests of the child. This is

32 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) 8.

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

34 Article 3(1) of the CRC.

35 EM, Attachment A, 4.

because such a requirement may operate to deny child applicants Australian citizenship.

2.128 The previous report noted the policy intention that, in practice, the character requirement would be applied only to persons over the age of 16 for whom it is possible to obtain police records; and that the Australian Citizenship Instructions will instruct decision makers to consider the best interests of the child.[36] However, there are no such limitations in the proposed provision.

2.129 Further, the statement of compatibility advised that, 'if the department becomes aware of an applicant who has character issues and is younger than 16, it would be possible to assess that applicant against the character requirement.'[37]

2.130 Given this, an assessment of the human rights compatibility of the measure must take into account the possibility that, as currently drafted, children under 16 (including very young children) may be subject to the 'good character' test.

2.131 The statement of compatibility identified the objective of the measure as 'upholding the value of citizenship and ensuring uniformity and integrity across the citizenship programme.'[38] It argued that the measure is needed for consistency with the 'good character' requirements under the Migration Act. However, in the absence of any detailed explanation, it was not apparent whether the measure, in seeking such consistency, may be regarded as addressing a pressing or substantial concern for the purposes of international human rights law.

2.132 In relation to the proportionality of the measure, the previous report noted that both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[39]

2.133 In this context, the denial of Australian citizenship to a child on the basis of such conduct may not be in accordance with accepted understandings of the capacity and culpability of children under international human rights law. Further, international human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.

2.134 The denial of a child's citizenship on the basis of a 'good character' test, and its ongoing (and possibly lifelong) effect, may impose a disproportionately adverse

36 EM, Attachment A, 4.

37 EM, Attachment A, 4.

38 EM, Attachment A, 4.

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

effect on that child's best interests. As such, the measure may not be a proportionate way to achieving its stated objective.

2.135 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective having regard to the different capacities of children.

Minister's response

> The 'good character' requirement currently applies to all citizenship streams (conferral, descent, adoption and resumption), but only to applicants aged 18 and over. However, the department is aware of a number of applicants less than 18 years of age who have had serious character concerns but whose applications were not covered by the bar on approval concerning criminal offences in subsection 24(6) of the Citizenship Act. These applicants' criminal histories have included multiple convictions for common assault and stealing, robbery in company, reckless wounding in company and aggravated robbery.
>
> The Bill proposes to extend the good character requirement to include applicants under 18 years of age. The department would only seek criminal history records for children if they are 16 or 17 years of age, and this would be done with the client's consent. The department would only seek information on the character of applicants under 16 years of age if serious concerns came to attention. The proposed amendments would allow the Minister to refuse citizenship to minors with known criminal histories and insufficient evidence of rehabilitation. Guidance on the character requirement for citizenship is in the ACI. In determining if a person is of good character at a particular point in time, decision makers take into account a wide range of factors, including the age of the offender, the circumstances of the offence, patterns of behaviour, remorse, rehabilitation and any other mitigating factors.
>
> A legislative body is required to consider the best interests of the child as a primary consideration. The government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the citizenship programme and the effective and efficient use of government resources. The government is of the view that Australia should not negotiate on its good character requirements.
>
> Although in practice it would be extremely rare for the department to become aware of information showing that a child under the age of 16 is not of good character, it is the government's view that the good character requirement should not have a lower age limit of 16. The government notes that all Australian jurisdictions recognise that children under the age

> of 18 may commit offences, setting the age of criminal intent at 10. The Bill seeks to provide a legislative framework that facilitates the identification of children who may not be of good character, requires an assessment of character and where the child is found not to be of good character, refusal of citizenship.
>
> Guidance on the assessment of whether a person is of good character is provided in Chapter 10 of the ACI. One of the relevant factors set out in the ACI is the applicant's age at the time the offence was committed. If the applicant committed the offence at a young age, the commission of the offence may be given less weight, depending on the nature of the crime and any subsequent offences. The ACI recognises that the person may since have matured and gained greater respect for upholding the law, and as such, criminal offences committed as a juvenile may not be indicative of their current character.
>
> A finding that an applicant is not of good character does not prevent them from making a subsequent application for citizenship, if they are able to show that they are of good character at the time of the decision on their later application.[40]

Committee response

2.136 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.137 The committee notes that the minister's response provides some information as to why the measure pursues a legitimate objective of 'upholding the value of citizenship'.

2.138 However, the committee considers that the minister's response has not demonstrated that applying the good character test to children is a proportionate means of achieving this stated objective.

2.139 This is because, as noted above, both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions. To deny a child citizenship on the basis of criminal acts they have committed as a child is likely to be disproportionate to the objective.

2.140 The committee notes the minister's advice that a finding that an applicant is not of good character does not prevent them from making a subsequent application for citizenship, if they are able to show that they are of good character at the time of the decision on their later application.

2.141 However, this does not completely mitigate the serious consequences that follow for a child being denied Australian citizenship on character grounds.

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40 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) 8-9.

2.142 **Some members of the committee noted the importance of maintaining the value of Australian citizenship and determined that the measure is therefore justified.**

2.143 **However, some other members of the committee consider that applying the good character test to children when determining their citizenship application is not proportionate to the objective sought to be achieved and is therefore incompatible with the obligation to consider the best interests of the child as a primary consideration.**

Right to protection of the family

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

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

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

2.146 In circumstances where parents of minors successfully apply for citizenship, the citizenship of those minors may be denied on 'good character' grounds, thereby risking the permanent separation of the family. Therefore the measure engages and limits the right to the protection of the family. However, the right to protection of the family was not addressed in the statement of compatibility.

2.147 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether and on what basis there is a rational connection between the proposed extension of the good character requirement and that objective, and whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The government does not agree that the proposed amendment engages the right to protection of the family. The amendment is concerned with the requirements that must be met in order for a person to be approved for citizenship. Refusal of citizenship does not in itself affect a person's visa status or their right to enter or remain in Australia. The government does

not restrict the right of its permanent residents or citizens to depart Australia to be with other family members.

Article 17 of the ICCPR carries with it an obligation to ensure family members are not involuntarily separated from each other. Rather, it provides that "No one shall be subjected to arbitrary or unlawful interference with his ... family". Even if Article 17 is engaged, any limit on the right to protection of family would be neither arbitrary nor unlawful. A sovereign nation may determine the conditions under which a person may acquire that nation's citizenship, within any applicable principles in treaties or conventions to which it is a party. In the Australian context, each applicant for citizenship or a visa is assessed against the legislative requirements as an individual and in their own right. People do not acquire a right to citizenship simply because their family holds citizenship.[41]

Committee response

2.148 **The committee thanks the Minister for Immigration and Border Protection for his response and considers that, in light of the margin that states are given under international law with respect to the grant of citizenship, the measure may be compatible with the right to protection of the family.**

Citizenship to a child found abandoned in Australia

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

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

Obligation to consider the best interests of the child

2.151 Under the CRC, Australia is required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration; see [2.11] to [2.12] above.[44]

41 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) 10.

42 Citizenship Act, section 14.

43 EM, Attachment A, 12.

44 Article 3(1) of the CRC.

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

2.152 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child.[45] The proposed provision creates additional qualification requirements for Australian citizenship, which may not be in the best interests of the child; and therefore considered that the measure may limit the obligation.

2.153 The statement of compatibility states that the objective of replacing current section 14 of the Citizenship Act is to 'clarify the meaning of the abandoned child provision.'[46] However, it does not provide supporting reasons to demonstrate that this objective addresses a pressing or substantial concern.

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

2.155 In this regard, it is unclear whether there is a rational connection between the stated objective of the measure and the terms of the measure itself.

2.156 This is because, while the stated objective of the measure is to 'clarify' a provision (with the implication that there is no substantive change to the provision), the proposed measure in fact introduces a new factor that can disqualify an abandoned child from being an Australian citizen, which is that the child was 'outside Australia at any time before the [they were] found abandoned in Australia as a child'.

2.157 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed amendments to citizenship for an abandoned child are aimed at achieving a legitimate objective, and whether and on what basis the proposed amendments to citizenship for an abandoned child are rationally connected to achieving a legitimate objective, and whether the proposed amendments to citizenship for an abandoned child are a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> As noted in the statement of compatibility, the objective of replacing current section 14 of the Citizenship Act is to clarify the meaning of the abandoned child provision.
>
> Currently, section 14 of the Citizenship Act provides:
>
> > "A person is an Australian citizen if the person is found abandoned in Australia as a child, unless and until the contrary is proved."

45 EM, Attachment A, 12.

46 EM, Attachment A, 12.

In practice, the department is only required to make a finding of fact under section 14 when a person makes a claim to the department that they are an Australian citizen under that provision. For example, when the person or another party acting on their behalf applies for evidence of citizenship. In order to find that a person is an Australian citizen under section 14, the Minister must consider several matters:

- whether there is evidence the person is an Australian citizen under any other provision of the Citizenship Act - if so, section 14 is not relevant to the person's situation;
- whether the person was found abandoned as a child - if not, the presumption of citizenship is not available;
- whether there is evidence that the person is not an Australian citizen, for example, evidence of their birth outside Australia and no record that they acquired Australian citizenship - if so, the presumption is disproved. A relevant consideration is whether the child is known to have been outside Australia prior to being found abandoned and the circumstances and the circumstances of their entry or re-entry. For example, if the child entered Australia lawfully, their identity and citizenship status will be known. If the child entered Australia unlawfully, the fact of that unlawful entry would give rise to strong inference that the child is not an Australian citizen in the absence of contrary information.

The amendment to the abandoned child provision to state that the presumption of citizenship does not apply if the child is known to have been physically outside Australia on or before the day on which it is claimed the child was found abandoned does not introduce a new factor that can disqualify an abandoned child from being an Australian citizen. Rather, it explicitly states a current consideration. To the extent that the amendment removes the discretion of the Minister to determine that a person is a citizen under section 14 when that person is known to have been outside Australia prior to being found abandoned, the amendment may limit the obligation to consider the best interests of the child.

As noted in the statement of compatibility, Article 3 of the CRC sets out that the best interests of the child shall be a primary consideration in all actions concerning children. To that end, a legislative body is required to consider the best interests of the child as a primary consideration, and to determine whether these interests are outweighed by other primary considerations, such as the integrity of the citizenship programme. The proposed amendment to the abandoned child provision seeks to restore the original intent of the legislation and directly link the presumption of citizenship for abandoned children with the citizenship by birth provisions.

Any limitation on the obligation to consider the best interests of the child is both reasonable and proportionate, as a child who is known to have been outside Australia prior to being found abandoned:

- whose identity is known will have their visa or citizenship status assessed in accordance with the relevant provisions of the Migration and Citizenship Acts; or
- whose identity is unknown will not be presumed to be an Australian citizen and will have their status determined under the Migration Act, reducing the potential for the abandoned child provision to be incorrectly applied to unlawful non-citizens.[47]

Committee response

2.158 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.159 The committee notes the minister's advice that the amendment does not introduce a new factor that can disqualify an abandoned child from being an Australian citizen. Rather the change 'states a current consideration' as to how the law is being applied.

2.160 However, the committee notes that this 'current consideration' is not a mandatory consideration as a matter of statute but a matter of departmental policy.

2.161 Accordingly, the legislative change, by narrowing the statutory right of a child found abandoned in Australia to citizenship, does limit the obligation to consider the best interests of the child.

2.162 The committee considers that the response does not establish that the measure pursues a legitimate objective for the purposes of international human rights law. The response states only that the measure seeks to restore the original intent of the legislation and directly link the presumption of citizenship for abandoned children with the citizenship by birth provisions. However, no evidence is provided as to how the measure pursues a substantial or pressing concern.

2.163 Further, the response does not explain how the measure is rationally connected to its objective—that is, how it gives effect to the objective of directly linking the presumption of citizenship with citizenship by birth provisions.

2.164 **Some members of the committee noted the minister's advice that the objective of replacing current section 14 of the Citizenship Act is to clarify the meaning of the abandoned child provision and that any limitation on the obligation to consider the best interests of the child is justified.**

2.165 **However, other members of the committee considered that the introduction of a new statutory factor that can disqualify an abandoned child from being an Australia citizen is a limitation on the obligation to consider the best interests of the child. As set out above, these committee members consider that**

47 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) 11-12.

the minister's response does not sufficiently justify that limitation for the purposes of international human rights law as the response does not clearly demonstrate that the measure addresses a substantial and pressing concern or that the measure is rationally connected to that objective. These members of the committee therefore consider that the measure is likely to be incompatible with the obligation to consider the best interests of the child.

Limiting automatic citizenship at 10 years of age

2.166 Currently, section 12 of the Citizenship Act provides that a child born in Australia will automatically be an Australian citizen if either their parent is a citizen or permanent resident when they were born or the child is 'ordinarily resident' in Australia for their first 10 years of life.[48] There is a limited exception in cases where the child's parent is an enemy alien.

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

- one or both of the child's parents were foreign diplomats;
- the child did not hold a valid visa (that is, they were present in Australia as an unlawful non-citizen);
- the child travelled outside Australia and did not hold a visa permitting them to travel to, enter and remain in Australia (this will not apply to New Zealand citizens); or
- one or both of the child's parents came to Australia before the child was born, did not hold a substantive visa at the time of the child's birth and was an unlawful non-citizen at any time prior to the child's birth (a bridging visa, criminal justice visa or enforcement visa will not be considered to be a substantive visa).[49]

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

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

49 See item 12 of the bill.

Obligation to consider the best interests of the child

2.169 Under the CRC, Australia is required to ensure that in all actions concerning children the best interests of the child is a primary consideration; see [2.11] to [2.12] above.[50]

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

2.170 The statement of compatibility stated that the measure engages the obligation to consider the best interests of the child.[51]

2.171 However, while article 3 of the CRC requires the child's best interests to be considered as a primary consideration, the assessment of the measure did not explicitly state that it limits this consideration.[52] The statement of compatibility stated only that in introducing the provision the department is taking into account the best interests of the child.[53]

2.172 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The proposed amendment seeks to ensure that citizenship by operation of law is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth. It also provides that citizenship under the ten year rule is not available to a child whose birth in Australia followed the presence in Australia of the child's parent as an unlawful non-citizen.
>
> Article 3 of the CRC sets out that the best interests of the child shall be a primary consideration in all actions concerning children.
>
> Any limitation on the obligation to consider the best interests of the child is both reasonable and proportionate as:
>
> - Limiting application of the ten year rule to children who have maintained a lawful presence since birth sends a strong message that non-citizens are expected to comply with Australia's migration

50 Article 3(1) of the CRC.

51 EM, Attachment A, 12.

52 EM, Attachment A, 11.

53 EM, Attachment A, 10.

legislation and reduces the incentive to remain in Australia unlawfully.

- It is an inherent requirement of the migration legislation that a person on a temporary visa is responsible for maintaining their lawful status and is entitled to remain in Australia only for so long as the visa is in effect. An unlawful non-citizen is subject to removal if they do not voluntarily depart. Primary responsibility for a child's migration status and welfare rests with the child's parents or other responsible adult. It is incumbent on those adults to prepare a child who does not have permanent residence for life outside Australia, just as the parents or responsible adults must themselves prepare for life outside Australia when their temporary visa ceases to be in effect. This position is supported by Article 18(1) of the CRC, which states that "... Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."
- The Citizenship Act provides, and would continue to provide, that a person born in Australia who is stateless has access to citizenship through subsection 21(8) of the Citizenship Act. Eligibility under subsection 21 (8) is not in any way dependent on the migration status of the applicant's parents.
- The ten year rule amendments do not prohibit children from applying under other pathways to Australian citizenship, such as citizenship by conferral, should they become eligible.
- The amendment does not affect the child of a person who had been an unlawful non-citizen but had regularised their status by obtaining a substantive visa prior to the child's birth.
- A child born to unlawful non-citizens and who does not acquire a visa to remain in Australia is subject to removal along with their parents. Children subject to removal undergo a best interest of the child assessment prior to the removal decision being made.[54]

Committee response

2.173 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.174 In response to the committee's inquiry as to whether the measure had a legitimate objective, the minister advises:

> The proposed amendment seeks to ensure that citizenship by operation of law is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth. It also provides

54 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) 12-13.

> that citizenship under the ten year rule is not available to a child whose birth in Australia followed the presence in Australia of the child's parent as an unlawful non-citizen.

2.175 However, no evidence is provided as to how the measure addresses a substantial and pressing concern—for example, by providing evidence of any abuse of the 10-year rule.

2.176 Further, no evidence is provided as to how the measure is rationally connected to this objective.

2.177 In particular, the committee notes that the measure applies to children born in Australia who have lived their whole life in Australia and are just shy of their tenth birthday. It is unclear how legislating to deny such children an automatic right to citizenship is rationally connected to an objective of encouraging parents to regularise their status before having children in Australia.

2.178 The committee further notes that the minister's response provides a detailed justification for the proportionality of the measure.

2.179 However, while much of this information may demonstrate the proportionality of the measure, in the absence of a legitimate objective and a rational connection the measure cannot be compatible with international human rights law.

2.180 Further the committee notes the minister's comment that:

> Primary responsibility for a child's migration status and welfare rests with the child's parents or other responsible adult. It is incumbent on those adults to prepare a child who does not have permanent residence for life outside Australia, just as the parents or responsible adults must themselves prepare for life outside Australia when their temporary visa ceases to be in effect

2.181 The obligations of parents notwithstanding, Australia has an obligation under international law to ensure that, in preparing legislation and making administrative decisions under that legislation, the best interests of the child are a primary consideration. The extent to which parents meet their obligations in no way reduces the obligations on Australia as a party to the CRC.

2.182 **Some committee members noted the minister's advice that the proposed amendment seeks to ensure that citizenship is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth and considered that any limitation on the obligation to consider the best interests of the child is justified.**

2.183 **However, other members of the committee considered that the proposed amendment to the ten-year rule for citizenship limits the obligation to consider the best interests of the child. As set out above, those committee members consider that the minister's response does not sufficiently justify that limitation for the**

purposes of international human rights law, in particular that the measure seeks to achieve a legitimate objective. Accordingly, those committee members consider that the measure is likely to be incompatible with the obligation to consider the best interests of the child.

Personal ministerial decisions not subject to merits review

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

2.185 The bill proposes removing the power of the AAT to review a decision made by the minister personally under the Citizenship Act, if the minister has stated that the decision was made in the public interest.[55] No definition of what might constitute the public interest is included in the bill.[56] The removal of merits review by the AAT may engage the right to a fair hearing as discussed below.

Right to a fair hearing

2.186 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals; see [2.66] – [2.67] above.

Compatibility of the measure with the right to a fair hearing

2.187 The committee noted previously that, as described above, the right to a fair hearing applies in both criminal and civil proceedings, including where rights and obligations are to be determined.

2.188 While the bill would preserve judicial review under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*, judicial review cannot examine the merits of the decision and is limited to cases where there is an identifiable error of law. Judicial review is therefore not equivalent to, or a complete substitute for, access to merits review by the AAT, and so does not fully mitigate the possible limitation on the right to a fair hearing.

2.189 However, this issue was not identified in the statement of compatibility.

2.190 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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

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

Minister's response

The Bill proposes that any personal decision of the Minister be protected from merits review if the decision is made in the public interest, and that a statement be tabled in both Houses of Parliament within 15 sitting days if such a personal decision is made. It is anticipated that such decisions will be rarely made, but if they are made on public interest grounds, such decisions would not be reviewable by the AAT. The proposal preserves the significance of an elected official making a decision in the public interest by not allowing that decision to be subject to merits review. A similar protection is available under the Migration Act.

Currently, the only powers which the Minister cannot delegate under the Citizenship Act are approval of a citizenship test and application of an "alternative residence requirement" to an application for citizenship. However, in practice, decisions about revocation of citizenship for fraud or serious offences have not been delegated to departmental officers and have been made personally by the Minister. These are serious powers and have been used sparingly. Some cases currently under consideration for revocation involve convictions for murder, paedophilia, incest and fraud.

Also, on occasion it is appropriate for the Minister to personally exercise the power in subsection 24(2) of the Citizenship Act to refuse an application for citizenship by conferral where the Minister decides that the circumstances are such that it would not be in the public interest for the applicant to become a citizen at that time, despite the applicant being otherwise eligible.

In both revocation and discretionary refusals, the decisions involve consideration of the public interest and consideration of Australian community standards and values. In particular, the revocation provisions require the Minister to be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

The Bill provides that if a decision is made by the Minister personally, the notice of reasons for decision (under section 47) may include a statement that the Minister is satisfied that the decision was made in the public interest. It then provides that AAT review is not available when a notice under section 47 includes a statement that the Minister is satisfied that the decision was made in the public interest. Examples of personal decisions which could be made on public interest grounds are:

- refusing citizenship if the applicant is not of good character (whether conferral, descent, resumption or adoption);
- refusing citizenship on a discretionary basis despite the applicant being otherwise eligible;
- cancellation of approval of citizenship by conferral;
- revocation of citizenship for offences or fraud;
- overturning a decision of the AAT (see below).

To provide for transparency and accountability, the Bill proposes that the Minister report to Parliament if s/he makes a personal decision which is not subject to merits review, but that such a statement not disclose the name of the client. This is similar to sections 22A(9)-(10) and 22B(9)-(10) of the Citizenship Act, which require a report to be tabled if the personal discretion to apply the alternative residence requirements is applied, and for that report to not disclose the client's name.

The government notes that much of Article 14(1) of the ICCPR relates only to persons facing criminal charges or suits of law and may not be directly applicable to citizenship proceedings. Where appropriate, however, the government seeks to provide comparable arrangements for reviews involving administrative decisions that impact a person's rights, liberties or obligations.

The provision to protect personal decisions of the Minster from merits review may engage and limit the right to a fair hearing as the person will not enjoy the same right to merits review as a person who was subject of a decision by a delegate of the Minister. However, this limitation is a reasonable and proportionate measure as:

- The Minister's personal decision would be consequent to an administrative process that would be undertaken within the administrative law framework and in accordance with principles of natural justice.
- Judicial review is still available. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised. For a discretionary power such as personal decisions of the Minister under the Citizenship Act, this could include consideration of whether the power has been exercised in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.
- The department will enhance its current ACI and case escalation matrix to ensure that advice is consistent and that only appropriate cases are brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.[57]

Committee response

2.191 **The committee thanks the Minister for Immigration and Border Protection for his response.**

57 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) 14-15.

2.192 The committee agrees that article 14 fair hearing rights only apply in the case of criminal charges or determinations of rights and obligations at a suit at law.

2.193 However, the revocation of citizenship involves the removal of an existing right that would create a suit at law for the purposes of article 14; and a decision to cancel citizenship may create a suit at law having regard to the individual facts of each case.

2.194 As noted in the committee's initial analysis, the bill would preserve judicial review under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. However, judicial review cannot examine the merits of the decision, and is limited to cases where there is an identifiable error of law.

2.195 The committee therefore considered that judicial review is not equivalent to, or a complete substitute for, access to merits review by the AAT, and so does not fully mitigate the possible limitation on the right to a fair hearing.

2.196 The minister's response does not explain the legitimate objective of the measure and how it addresses a substantial and pressing concern.

2.197 In addition, the response does not explain how the measure is rationally connected to the objective.

2.198 In terms of proportionality, the response explains the administrative processes within the department and the changes to its case escalation processes. The committee notes that these internal administrative processes are not equivalent to external independent review and, accordingly, are not sufficient for the purposes of international human rights law.

2.199 **Some committee members noted the minister's advice that the measure preserves the significance of an elected official making a decision in the public interest, by not allowing that decision to be subject to merits review and accordingly considered that the measure was justified.**

2.200 **However, other committee members consider that, in relation to the cancellation or revocation of a person's citizenship, removal of a merits review process limits the right to a fair hearing. As set out above, these committee members consider that the minister's response does not provide a sufficient justification of 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 a fair hearing.**

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

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

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

Right to a fair hearing

2.203 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals; see [2.66] – [2.67] above.

Compatibility of the measure with the right to a fair hearing

2.204 The statement of compatibility noted that the measure engages the right to a fair hearing, but concluded that the measure does not limit the right to a fair hearing as affected applicants will still be entitled to seek judicial review.[58]

2.205 However, as set out at [2.187], judicial review is not equivalent to, or an effective substitute for, merits review.

2.206 As the measure allows the minister to substitute and therefore effectively overrule the decision of the AAT, the measure may limit the right to a fair hearing, by effectively removing a person's right to a hearing before an independent and impartial tribunal. Accordingly, the potential limitation on the right to a fair hearing by the measure needs to be justified for the purposes of international human rights law.

2.207 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the stated objective and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The Citizenship Bill provides the Minister with a power to personally set aside certain decisions of the AAT concerning character and identity if it is in the public interest to do so. It also provides that personal decisions made by the Minister in the public interest are not subject to merits review. Applicants affected by a personal decision would continue to have access to judicial review.

58 EM, Attachment A, 15.

> The government reiterates its view that the provision does not impact the enjoyment of the right to a fair hearing as applicants for citizenship who have been affected by the Minister's decision to set aside AAT decisions will still be entitled to seek judicial review of the Minister's decision under s 75(v) the Constitution and s 39B of the *Judiciary Act 1903* at the Federal and High Courts. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised. For a discretionary power such as personal decisions of the Minister under the Citizenship Act, this would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.[59]

Committee response

2.208 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.209 The response reiterates the minister's view that the measure does not limit fair hearing rights as judicial review is still available.

2.210 However, as set out at paragraph [2.187], the committee does not consider that judicial review is equivalent to, or an effective substitute for, merits review.

2.211 In particular, judicial review cannot examine the merits of the decision, and is limited to cases where there is an identifiable error of law.

2.212 As the measure allows the minister to substitute and therefore effectively overrule the decision of the AAT, the committee considers that the measure limits the right to a fair hearing by effectively removing a person's right to a hearing before an independent and impartial tribunal. Accordingly, the committee considers that the limitation on the right to a fair hearing by the measure needs to be justified for the purposes of international human rights law.

2.213 However, the minister's response does not provide a justification beyond noting the availability of judicial review.

2.214 **Some committee members noted the minister's advice that the measure does not impact on the enjoyment of the right to a fair hearing as applicants for citizenship who have been affected by the minister's decision to set aside AAT decisions will still be entitled to seek judicial review and accordingly considered that the measure is justified.**

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59 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) 16.

2.215 **However, other committee members consider that the proposed power to set aside AAT decisions in relation to the cancelation of approval for citizenship limits the right to a fair hearing. As set out above, these committee members consider that the minister's response does not sufficiently 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 a fair hearing.**

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

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

2.217 The proposed amendments would extend this bar on approval for citizenship to cases where a person is subject to home detention or a court order in connection with proceedings for a criminal offence, or that requires the person to participate in a residential scheme (including a residential drug rehabilitation scheme or a residential program for those experiencing mental illness).[60] As a result, the measure engages the rights to equality and non-discrimination on the grounds of mental illness or disability.

Right to equality and non-discrimination

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

2.219 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.220 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, on the basis of race, sex or disability),[61] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[62] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or

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

61 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.

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

without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[63]

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

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

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

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

2.224 The statement of compatibility identifies that the right to equality and non-discrimination is engaged by the measure because the proposed bar on approval for citizenship 'extends to people who have a mental illness and who have been subject to an order of the court requiring them to participate in a residential program for the mentally ill'.[64]

2.225 It states that the measure pursues the legitimate objective of 'ensuring that citizenship is only available to those people who are not subject to an obligation to the court,'[65] and argues that this is important as '[b]eing of good character is a fundamental tenet of the citizenship programme'.[66]

2.226 However, the information provided in the statement of compatibility did not adequately demonstrate that the proposed measure addresses a legitimate objective.

2.227 The statement of compatibility further argued that the amendments are proportionate to the stated aim because they reflect the criminal law, which imposes consequences for committing a criminal offence on all persons.[67]

2.228 However, there is no clear relationship between this explanation of the measure and the terms of the measure itself.

2.229 This is because, while the explanation of the measure refers to 'consequences for committing a criminal offence',[68] the measure is considerably

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

64 EM, Attachment A, 6.

65 EM, Attachment A, 6.

66 EM, Attachment A, 6.

67 EM, Attachment A, 6.

broader and would affect people who have not committed a criminal offence but are merely involved in 'proceedings for an offence'. This would include people who have not been convicted and who are on bail or on remand, or who have been determined to be unfit to plead or have been found not guilty of an offence by reason of mental illness. The measures as currently drafted would thus bar a person who is subject to a court order from citizenship whether or not they had been convicted of a crime.

2.230 Accordingly, the measure may not be proportionate to its objective.

2.231 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed extension of bars to citizenship where a person is subject to a court order is compatible with the right to equality and non-discrimination, and particularly whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The Citizenship Act includes various provisions that bar a person from being approved for citizenship at a time when they are affected by prescribed circumstances, such as when they are subject of an adverse or qualified security assessment, the Minister is not satisfied of the identity of the person and when the person falls under the *Offences* provision in subsection 24(6). A person who was refused citizenship because they were affected by one or more bars but who otherwise meets the requirements for citizenship will be eligible for citizenship once they are no longer affected by the bar/s on approval.
>
> In summary, the Offences provision currently provides that a person must not be approved for citizenship at a time:
>
> - when proceedings for an offence against an Australian law are pending in relation to the person;
> - when the person is confined to a prison in Australia;
> - during the period of 2 years after the end of a serious prison sentence, or the period of ten years after the end of any period of a serious prison sentence where the person is a serious repeat offender;
> - when the person can be required to serve the whole or part of a sentence after having been released on parole or licence;
> - when action can be taken against the person under an Australian law because of a breach of a condition of a security given to a court; or

68 EM, Attachment A, 6.

- during any period where the person is confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to that person.

The existing offence provisions were largely carried over from the *Australian Citizenship Act 1948* (the 1948 Act) and were not updated to reflect modem sentencing practices in 2007.

The Bill:

- updates paragraph 24(6)(f) to recognise that a court can release a person from serving the whole or part of a sentence of imprisonment subject to conditions relating to their behaviour;
- updates paragraph 24(6)(g) to recognise that in respect of proceedings for an offence against an Australian law, a court can release a person subject to conditions relating to their behaviour, including when a term of imprisonment may not be available; and
- inserts paragraphs 24(6)(i) and (j) to provide bars on approval when the person is subject to an order of a court for home detention or participation in residential schemes or programmes. Although sentencing practices such as home detention are a deliberate decision of the courts as an alternative to imprisonment, they are only used if a person has been convicted of a criminal offence and needs to remain under some form of obligation to the court. From a citizenship programme perspective, it is not appropriate to confer citizenship upon applicants while the obligation remains.

These amendments help maintain the integrity of the citizenship programme by preventing citizenship being conferred on people while they are subject of an ongoing matter before the courts or they are still under an obligation to a court in relation to a criminal offence.

The government's view is that the limitation is reasonable and proportionate as it upholds the value of citizenship by barring a person from becoming a citizen while they are before the courts or subject to an order of the courts, but does not prevent the person from acquiring citizenship once they are no longer subject to that bar.[69]

Committee response

2.232 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.233 The committee notes that the response provides a detailed summary of the existing law and as set out in the bill.

69 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) 17-18.

2.234 The response also explains the legitimate objective of the bill as maintaining the integrity of the citizenship program.

2.235 However, the response does not explicitly explain how the measure is rationally connected to its objective. That is, there is no clear relationship between the explanation of the measure and the terms of the measure itself. In particular, it does not show how denying citizenship to individuals who are confined on the basis of mental illness upholds the integrity of the citizenship program.

2.236 In terms of proportionality, the response explains that the bar on gaining citizenship is not necessarily permanent (that is, unless the individual is permanently confined in a psychiatric facility).

2.237 However, that the bar is potentially only temporary is insufficient to demonstrate proportionality, particularly, if it has not been demonstrated that it is proportionate to impose the bar in the first place.

2.238 **Some committee members noted the minister's advice that the measure helps maintain the integrity of the citizenship programme and is intended to uphold the value of citizenship by barring a person from becoming a citizen while they are before the courts or subject to an order of the courts, and does not prevent the person from acquiring citizenship once they are no longer subject to that bar. Accordingly, those committee members considered that the measure is justified.**

2.239 **However, other committee members consider that the extension of bars to citizenship limits rights to equality and non-discrimination. As set out above, those committee members consider that the minister's response does not sufficiently justify that limitation for the purposes of international human rights law. Accordingly, these committee members consider that the measure is likely to be incompatible with the right to equality and non-discrimination.**

Tabling statement

2.240 The bill proposes inserting a new section into the Citizenship Act to require the minister to cause a statement to be tabled in each House of Parliament when the minister makes a decision that is not reviewable by the AAT, or decides to set aside a decision of the AAT.[70] The committee considers that this measure may engage the right to privacy.

Right to privacy

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

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

Compatibility of the measure with the right to privacy

2.242 The proposed provision provides that the tabling statement must not include the name of the person affected by the decision.

2.243 However, there may be instances in which a person's identity could be inferred from the information in the tabling statement. In particular, the committee noted that the tabling statement will set out the minister's decision and give the reasons for the minister's decision. The reasons will set out a person's personal circumstances or the minister's opinion of a person's character.

2.244 The statement of compatibility did not identify the right to privacy as being engaged.

2.245 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the tabling statement in Parliament could lead to an individual being identified either directly or indirectly and how this is compatible with the right to privacy, and particularly, 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

> As noted by the committee, the Bill proposes inserting a new section into the Citizenship Act to require the Minister to cause a statement to be tabled in each House of Parliament when the Minister makes a decision that is not reviewable by the AAT, or decides to set aside a decision of the AAT. Proposed section 52B of the Bill provides that such a statement must not disclose the name of the applicant. It does not require the Minister to provide specific personal information about an applicant when tabling the statement of the Minister's personal decision in Parliament.
>
> The objective of this proposal is to provide for transparency and accountability in the decision-making process, while protecting the privacy of the applicant. While the proposal may engage a person's right to privacy, it does not impose a new limit on that right to privacy as it does not require the publication of any greater detail than may otherwise be published if the person's decision was subject to review at the AAT. Under section 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) and the AAT's privacy policy the AAT has the power to decide whether or not to publish personal information, including names. Decisions are required to be published under section 43 of the AAT Act, but the publication of evidence given before the Tribunal can be restricted or prohibited under section 35. However, the type of details published in an AAT decision record (such as birth date, place of birth, occupation, date of

arrival in Australia) may be enough to identify a person even if the name of that person were withheld.[71]

Committee response

2.246 **The committee thanks the Minister for Immigration and Border Protection for his response. The committee considers that the minister's response demonstrates that the limitation on the right to privacy is justified. In particular, the committee notes the minister's advice that information in the tabling statement will not be in any greater detail than may otherwise be published if the person's decision was subject to review at the Administrative Appeals Tribunal. Accordingly, the committee considers that the measure is likely to be compatible with the right to privacy.**

71 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) 18-19.

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

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

Purpose

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

- introduce mandatory minimum sentences of five years imprisonment for firearm trafficking;
- amend the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 to clarify internal operations and procedures of the Australian Transaction Reports and Analysis Centre; and
- amend the Proceeds of Crime Act 2002 (POC Act) to increase penalties for failing to comply with a production order or with a notice to a financial institution in proceeds of crime investigations.

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

Background

2.249 The amendments in Schedule 6 of the bill reintroduce measures related to mandatory minimum sentencing for trafficking in guns that were originally included in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 but which did not pass through the parliament.

2.250 The committee considered those measures in its *Tenth*, *Fifteenth* and *Nineteenth Reports* of the 44th Parliament.[1] In its *Fifteenth Report* the committee concluded that the mandatory minimum sentencing provisions were likely to be incompatible with the right to a fair trial and the right not to be arbitrarily detained.

2.251 The committee considered the bill in its *Twenty-second Report of the 44th Parliament*, and requested further information from the Minister for Justice as to whether the bill was compatible with Australia's international human rights obligations.[2]

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

2 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 35-41.

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

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

2.253 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[3] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

2.254 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.

2.255 The statement of compatibility identifies the right to freedom from arbitrary detention as being engaged by the introduction of mandatory minimum five year sentences.[4] The committee noted previously that detention may be considered arbitrary where it is disproportionate to the crime. This is why it is generally important for human rights purposes to allow courts discretion to ensure that punishment is proportionate to the seriousness of the offence and individual circumstances.

2.256 The committee reiterated its recommendation that the provision be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence. This would ensure that the scope of the discretion available to judges would be clear on the face of the provision itself,

3 See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

4 EM 26.

and thereby minimise the potential for disproportionate sentences that may be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

Minister's response

> I note the recommendation of the Committee that Schedule 6 of the Bill be amended to confirm that the mandatory minimum sentence is not intended to be used as a sentencing guidepost, and that there may be significant difference between the non-parole period and the head sentence. Advice of this nature, designed to clarify to the judiciary the intent of the provision, is best suited to the Explanatory Memorandum, which I note already includes wording to this effect.[5]

Committee response

2.257 **The committee thanks the Minister for Justice for his response and has concluded its examination of the measure.**

Anti-Money-Laundering and Counter Terrorism Financing Amendments

2.258 Schedule 10 of the bill would make a number of amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). Currently, section 169 of the AML/CTF Act provides that a person is not excused from giving information or producing a document under paragraph 167 on the grounds that compliance might be incriminating. Subsection 169 (2) currently provides a 'use immunity' for information that is given that may be self-incriminating with limited exceptions.[6] The bill would expand the exceptions thus reducing the scope and effect of the use immunity.

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

2.260 The statement of compatibility identifies that the measures engage the right to be free from self-incrimination. The statement of compatibility does not explicitly identify a legitimate objective for the measure or explain why they are necessary.

2.261 The statement of compatibility states that section 169 of the AML/CTFC Act provide both a 'use' and a 'derivative use' immunity.[7] However, the committee

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5 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Philip Ruddock MP (dated 15 June 2015) 5.

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

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

considered that section 169 only provides a 'use immunity' and not a 'derivative use immunity' as there is no prohibition on the use of any information, document or thing indirectly obtained as a consequence of the self-incriminating information. Whether the AML/CFT Act provides only a 'use immunity' rather than 'use immunity' and 'derivative use immunity' is relevant to an assessment of the proportionality of the measures.

2.262 The committee therefore sought the advice of the Minister for Justice as to whether the amendments to the AML/CFT Act are compatible with the right to a fair trial, and particularly whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The proposed amendment to section 169 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) allows for self-incriminating information gathered by the Australian Transaction Reports and Analysis Centre (AUSTRAC) under section 167 of the Act to be adduced in a broader range of civil and criminal proceedings.

The Committee has focused on the effect of these proposed amendments on the right to a fair trial and fair hearing contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). I consider the proposed amendments to be a reasonable and proportionate response to address significant limitations that inhibit AUSTRAC's ability to perform its statutory functions and, more generally, the prosecution of money laundering and terrorism financing offences under the *Criminal Code Act 1995* (the Criminal Code).

Current Provisions

AUSTRAC has two powers, under sections 167 and 202 of the AML/CTF Act, to compel the production of information. Section 167 has a broad application and purpose, but is only available to AUSTRAC. Section 202 has a narrow application and purpose, but is available to a broader range of issuers.

	Section 167	Section 202
Issuer	AUSTRAC – CEO/authorised officer	• AUSTRAC – CEO/authorised officer • AFP – Commissioner/Deputy Commissioner/authorised senior executive • ACC – CEO/examiner • approved examiner under the *Proceeds of Crime Act 2002* (POC Act)

	Section 167	Section 202
Application	a person believed on reasonable grounds to be or have been: • a reporting entity • an officer, employee or agent of a reporting entity, or • entered on the Remittance Sector Register	a person, believed on reasonable grounds to be a reporting entity
Purpose	• belief on reasonable grounds that the person has information or documents that are relevant to the operation of the AML/CTF Act, the regulations or the AML/CTF Rules	• determining whether a person is providing a designated service at or through a permanent establishment in Australia • ascertaining details relating to any permanent establishment in Australia at or through which that person provides a designated service, or • ascertaining details relating to the designated services provided by the person at or through the permanent establishment in Australia

Sections 169 and 205 provide that self-incrimination is precluded as a reason for refusing to provide information under sections 167 and 202 respectively. However, sections 169 and 205 limit the use of that information, although section 205 allows for information to be used in a broader range of proceedings than section 169.

Admissibility	Section 169	Section 205
Civil	proceedings under the POC Act that relate to the AML/CTF Act	• proceedings under the AML/CTF Act • proceedings under the POC Act that relate to the AML/CTF Act
Criminal	proceedings for an offence against: • AML/CTF Act – Complying with the notice to produce / providing false or misleading information or documents • Criminal Code – Providing false or misleading information or documents	proceedings for an offence against: • the AML/CTF Act • the Criminal Code that relate to the AML/CTF Act

Objective of the proposed amendments

The proposed amendments to section 169 enhance AUSTRAC's ability to fulfill its statutory role as Australia's AML/CTF regulator and financial intelligence unit. In particular, the amendments allow AUSTRAC to use relevant information to sanction breaches of the AML/CTF Act and bring

money laundering and terrorism financing charges under the Criminal Code.

The current inconsistency between the scope of sections 169 and 205 creates significant constraints for prosecuting serious offences under the Criminal Code and AML/CTF Act. As noted in the table above, section 167 notices can be issued to a broad range of persons or entities, but the information or documents obtained can only later be used in a narrow range of proceedings. Therefore, should AUSTRAC uncover pertinent material relating to criminal conduct through the ordinary exercise of its section 167 notice power, that evidence could not be adduced in later proceedings to prosecute money laundering or terrorism offences under the Criminal Code.

Section 202, which allows self-incriminating material to be used in a broader range of proceedings is not a substitute for section 167. It can only be issued to a person believed on reasonable grounds to be a reporting entity, which limits its utility. For example, AUSTRAC cannot use a section 202 notice to obtain information and documents from an entity that has had its registration suspended as they are no longer deemed to be a reporting entity once suspended - such a notice would need to be issued under section 167.

Given the significant threat posed to the Australian community by money laundering and terrorism financing, I consider that the proposed amendments fulfil a legitimate objective by closing an operational gap. The Australian Crime Commission's most recent public report on organised crime in Australia noted that money laundering is one of six 'intrinsic enablers' of serious and organised crime, with money laundering being carried out by 'most, if not all, organised crime groups'.[8] Money laundering is considered a 'critical risk because it enables serious and organised crime, it can undermine [Australia's] financial system and economy and it can corrupt individuals and businesses'.[9] AUSTRAC have noted that terrorism financing is a 'national security risk as it can directly enable terrorist acts both in Australia and overseas'.[10] To effectively combat these inherent risks, AUSTRAC must be able to efficiently and effectively exercise its enforcement powers. The proposed amendments achieve this objective.

AUSTRAC also considers that there is some uncertainty regarding its ability to use information and documents obtained under a section 167 notice in making administrative decisions. This is because those materials may later need to be adduced on administrative or judicial review, thereby engaging the privilege against self-incrimination contained in section 169. By

8 Australian Crime Commission, *Organised Crime in Australia 2015*, (ACC, 2015) 12.

9 AUSTRAC, *Money Laundering in Australia,* (AUSTRAC, 2011) 5.

10 AUSTRAC, *Terrorism financing in Australia 2014*, (AUSTRAC, 2014) 5.

rectifying the inconsistency between sections 169 and 205, this uncertainty will also be clarified.

Connection between the proposed amendments and the objective

There is a rational connection between the amendments and the objective outlined above. Currently, valuable information that potentially relates to serious criminal misconduct can only be used in very limited proceedings, being proceedings related to providing false or misleading information or failing to be supply information in accordance with the AML/CTF Act.

Consistency between sections 167 and 205 will allow AUSTRAC to more effectively utilise section 167 information and fulfil its role in enforcing compliance with the AML/CTF Act and combating money laundering and terror financing. AUSTRAC has indicated that it uses its powers under section 167 and 202 interchangeably, with the chief considerations being the type of person to whom the notice is to be issued, the nature of the information or documents sought and the admissibility of the materials received. Given that both powers can be issued to individuals and entities there is no apparent reason why these powers, which fulfil the same investigatory function, should be subject to two different regimes for determining privilege against self-incrimination.

Reasonableness and proportionality of the proposed amendments

I consider the proposed amendments to be a reasonable and proportionate response to the current limitations. As noted above, the amendments to section 169 maintain a use immunity for affected persons and only extend the range of proceedings from which the privilege is excluded to proceedings for offences that are directly related to AUSTRAC's functions. The power remains limited to use by the AUSTRAC CEO or an authorised officer, and can only be used where there is reasonable grounds to believe that the subject has information relevant to the operation of the AML/CTF Act.

The High Court has recognised the validity of abrogating the right against self-incrimination in some circumstances, noting that '[t]he legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained'.[11] The Queensland Law Reform Commission (QLRC) considers that an abrogation of the privilege 'may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community'.[12] The QLRC also concluded that '...if it is clear that the

11 Ibid 503.

12 Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No 59, (2004) 54.

abrogation is likely to substantially promote the public interest, it is more likely that the abrogation can be justified'.[13]

A further point to note is that the majority of notices to produce issued by AUSTRAC are to reporting entities (through bodies corporate). From 1 July 2012 to 26 May 2015, AUSTRAC has issued three section 167 notices and 31 section 202 notices. All notices were issued to reporting entities. The ICCPR is focused on protecting the rights of the individual. At common law, the High Court has concluded that corporations do not enjoy the protection of the privilege against self-incrimination. In particular, the Court has recognised the impracticality of extending the privilege given it would have a '...disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a criminal offence'.[14]

Offences against the AML/CTF Act and the Criminal Code as it relates to the AML/CTF Act (money laundering and terrorism financing) are serious crimes that pose a threat to the Australian community. Given the limited offences to which the extension applies, the serious nature of those offences and the safeguards that remain in place I consider the proposed additional restrictions on the privilege against self-incrimination in section 169 of the AML/CTF Act to be a justifiable limit on the right to a fair trial contained in Article 14 of the ICCPR.[15]

Committee response

2.263 **The committee thanks the Minister for Justice for his detailed and thorough response. The committee considers that the response has demonstrated that the measures are compatible with the right to a fair trial. In particular, the committee notes that:**

- **the measures support the legitimate objective of combating the serious crimes of money laundering and terrorism financing;**
- **the measures are rationally connected to that objective as the measures will assist AUSTRAC to fulfil its role in enforcing compliance with the AML/CTF Act; and**
- **the response outlines a number of factors relevant to assessing the proportionality of the measures including that the amendments maintain a 'use immunity' for affected persons and only extend the range of proceedings from which the privilege is excluded to proceedings for offences that are directly related to AUSTRAC's functions.**

13 Ibid.

14 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 504 (Mason CJ and Toohey J).

15 See Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Philip Ruddock MP (dated 15 June 2015) 1-4.

2.264 **The committee has concluded its examination of the measure.**

Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015

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

Purpose

2.265 The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* to allow an authorised officer to use such reasonable force against any person or thing as the authorised officer reasonably believes is necessary to:

- protect the life, health, or safety of any person in an immigration detention facility (IDF); or
- maintain the good order, peace or security of an IDF.

2.266 The bill also:

- provides for a statutory complaints mechanism; and
- imposes a bar on any action against the Commonwealth in the exercise of a power to use reasonable force if the power was exercised in good faith.

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

Background

2.268 The committee previously considered the bill in its *Twentieth Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether a number of measures in the bill were compatible with human rights.[1]

Use of force

2.269 Proposed section 197BA gives power to an authorised officer to use force in immigration detention facilities. An 'authorised officer' is one authorised in writing by the Minister for Immigration and Border Protection (the minister) or the Secretary of the Department of Immigration and Border Protection (the department) for that purpose.

2.270 The use of reasonable force is permitted when the 'authorised officer reasonably believes' it is necessary to protect the life, health or safety of any person or to maintain the good order, peace or security of an IDF.

2.271 Proposed new subsection 197BA(2) sets out a non-exhaustive list of factors as to when force may be used, including:

1 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 15-31.

- to protect a person from harm or from a threat of harm, including self-harm;
- to prevent the escape of a detainee;
- to prevent a person from damaging, destroying or interfering with property;
- to move a detainee within the facility; and
- to prevent action in the facility by any person that endangers life, health or safety or that disturbs the good order, peace or security of the facility.

2.272 There are limitations on the exercise of the power. The bill provides that the power must not be used to give nourishment or fluids to a detainee, and an authorised officer must not subject a person to greater indignity than the officer reasonably believes is necessary in the circumstances. An authorised officer must not, in exercising the power, do anything likely to cause grievous bodily harm unless the officer reasonably believes that doing the thing is necessary to protect the life of, or to prevent serious injury to, another person (including the officer).[2]

2.273 The committee considers that this measure engages and limits a number of rights, including the right to life; the prohibition against torture, cruel, inhuman or degrading treatment; the right to humane treatment in detention; the right to freedom of assembly; and the right to an effective remedy.

Right to life

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

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

2.275 The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances. For example, the use of force may be proportionate if it is in self-defence, for the defence of others or if necessary to effect arrest or prevent escape (but only if necessary and reasonable in the circumstances).

2.276 In order to effectively meet this obligation, states must have in place adequate legislative and administrative measures to ensure police and the armed forces are adequately trained to prevent arbitrary killings.

2 See proposed new subsections 197BA(4) and (5).

Compatibility of the measure with the right to life

2.277 The committee previously noted that empowering officers to use force against a person in an immigration detention facility engages and limits the right to life, as force may be used that could lead to a loss of life. However, a measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.278 The statement of compatibility acknowledged that the bill engages the right to life.[3] However, the committee considered that the statement of compatibility did not provide a sufficiently reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.[4]

2.279 In this respect, the statement of compatibility stated that the objective of the bill is to remove uncertainty for employees of an Immigration Detention Services Provider (IDSP) concerning their authority to use reasonable force.

2.280 However, it remained unclear to the committee that the objective of removing uncertainty for employees of an IDSP concerning their authority to use reasonable force, in and of itself, addresses a pressing or substantial concern.

2.281 The committee also considered that the proposed measures may not be a proportionate way to achieve their stated objective, and particularly that they are the least restrictive way to achieve the stated objective.

2.282 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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3 EM, Attachment A, 20.

4 See the committee's Guidance Note 1 (Appendix II; See Parliamentary Joint Committee on Human Rights, Guidance Note 1 - Drafting Statements of Compatibility (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf) and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important': Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

Minister's response

The legitimate objectives of the proposed amendment are to protect the life, health or safety of any person in an immigration detention facility, or to maintain the good order, peace or security of an immigration detention facility. The Department of lmmigration and Border Protection (the Department) and IDSP officers are responsible for people within immigration detention facilities, and the responsibility for providing public order management during critical incidents is a significant issue for the Department and IDSP officers. It is vital that officers have the clear power and authority to take necessary and proportionate measures to restore public order in detention centres. The amendment provides a certainty to officers that the common law and State and Territory legislation may be unable to provide in situations of urgency.

The threat of a large scale riot or other disturbance escalating out of control is a real possibility in some immigration detention facilities. The availability of the local police service to respond in a timely fashion cannot be guaranteed, placing detainees and others within the facility at real risk of harm should the response to the situation be delayed. The proposed amendment also, therefore, intends to protect the right to life of all people within immigration detention facilities, not just the person(s) against whom force may be used.

Strict safeguards will apply to the use of force in immigration detention facilities and will be spelled out in official Departmental instructions, policies and procedures.

Consistent with international human rights law, the Department requires that any use of force be necessary, reasonable and proportionate in the circumstances. All authorised officers will be trained accordingly to only apply force that is necessary, reasonable and proportionate to the threat being faced, and that is always at the minimum level required.

The Bill notes that an authorised officer may use such reasonable force against a person or thing as the authorised officer reasonably believes is necessary in the circumstances specified in the Bill. So both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable.

Official departmental instructions, policies and procedures will provide additional guidance and examples of what is considered reasonable. Similarly, the training that all authorised officers must have completed prior to becoming authorised officers, will address what is reasonably necessary.

> For these reasons, it is the Government's view that the proposed amendment is reasonable and proportionate and is compatible with the obligation to protecting a person's right to life.[5]

Committee response

2.283 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.284 In particular, the committee thanks the minister for his advice as to the objective of the bill, and the need for officers in immigration facilities to have clear power and authority to restore public order in detention facilities. The committee notes the minister's advice that the availability of local police to respond in a timely manner to a large scale riot or other disturbance in a detention facility cannot be guaranteed, and the bill intends to protect the right to life of all people within the facility and not just the person against whom the force may be used.

2.285 While the bill is not limited to permitting the use of force in the circumstances in the minister's examples, the committee considers that a statutory use of force power in relation to detention facilities may be considered to be a legitimate objective for the purposes of international human rights law.

2.286 However, the committee notes that the power to use force must be proportionate to this objective, and continues to be concerned that the bill is not sufficiently circumscribed so as to be proportionate to the objective sought to be achieved.

2.287 First, while the minister advises that 'departmental instructions, policies and procedures' will provide guidance and safeguards for the reasonable use of force, the placing of safeguards in departmental policies rather than in legislation is insufficient to protect human rights. Such administrative and discretionary safeguards are likely to be less stringent than the protection of statutory processes. For example, departmental instructions, policies and procedures can be amended at any time, are not subject to parliamentary scrutiny and, in respect of legal liability, if legislation authorising the use of force this would override any such policies or procedures.

2.288 As the committee previously noted, the bill lacks a number of safeguards that apply to analogous state and territory legislation governing the use of force in prisons. For example, there is no requirement that:

- the use of force only be used as a last resort;
- force should be used only if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force;
- the infliction of injury is to be avoided if possible;

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5 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 21 April 2015) 2-3.

- use of force to protect a person from a 'threat of harm' applies only to an 'imminent' threat;
- the use of force to 'prevent a person from damaging, destroying or interfering with property' is permissible only if the person is in the process of damaging the property and, if not, there must be a reasonable apprehension of an immediate attack; and
- the use of force be limited to situations where the officer cannot otherwise protect him or herself or others from harm.

2.289 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has also noted the breadth of the authorisation to use force, and has concluded that safeguards around the balance struck between the objectives of the legislation and the rights of detainees should be included in the legislation and not left to policies and procedures.[6]

2.290 Second, the committee considers that the powers in the bill are broader than strictly necessary to restrict the use of force in relation to protecting life and safety and quelling riots or other disturbances. This is because it would allow force to be used to prevent any action that disturbs the good order, peace or security of the facility. This provides an ill-defined and extremely broad authorisation for the use of force.

2.291 In contrast, analogous state and territory legislation governing the use of force in prisons generally limits the use of force to preventing or quelling a riot or disturbance.[7] In order to be proportionate in international human rights law, a measure limiting human rights must be the least rights restrictive approach, and these more limited powers in the context of prisons indicate that there is likely to be a less rights restrictive alternative to achieving the stated objective of the powers.

2.292 However, the minister's response does not provide any information as to why more expansive powers would be needed to deal with immigration detainees (who have not been convicted of any crime under Australian law) than those that have been convicted of crimes and sentenced to a term of imprisonment.

2.293 Third, as previously noted, the bill replaces the current test that reasonable force can only be used where it is objectively necessary with a test that incorporates a subjective element,[8] being the officer's 'reasonable belief' that the use of force is necessary.

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6 See, Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, 367.

7 See, for example, r 121 of the Crimes (Administration of Sentences) Regulation 2008 (NSW).

8 See EM, Attachment A.

2.294 On this matter, the minister's response sets out that 'both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable'. However, this does not address the concern that the measure would change a purely objective test and impose a lower threshold for the use of force.

2.295 As the committee previously noted, analogous legislation applies objective tests such that force may be used when it is 'reasonably necessary in the circumstances'. The committee also notes that the *Migration Act 1958* itself, which contains use of force powers in relation to carrying out identification tests, contains a purely objective test—that an authorised officer may use 'reasonable force'.

2.296 The Scrutiny of Bills Committee has also considered this issue, and found that, as drafted, the bill significantly increases the powers of employees of IDSPs. The minister's response to that committee gave a number of examples of similar powers to those proposed in the bill. However, the Scrutiny of Bills Committee found that those examples in fact illustrated the extraordinary breadth of the proposed powers. This was because the identified examples appeared to be more tightly constrained, including by the requirement that the powers be triggered by assessment of the reasonableness of the use of force (as opposed to an officer's subjective assessment that the use of force is reasonable).[9]

2.297 The committee considers that the introduction of a subjective assessment about whether the use of force is reasonable lowers the threshold as to when force may be used, and therefore lacks the necessary safeguards to ensure the limitation on human rights, including the right to life, are proportionate to its objective.

2.298 The committee also notes that, as set out below at paragraphs [2.334] to [2.340], the level of training required to be undertaken by authorised officers exercising the proposed use of force powers is insufficient to justify the conferral of these powers on non-government officials.

2.299 **Noting the minister's advice that it is essential that authorised officers have clear powers to use force where necessary in immigration detention facilities and that strict safeguards will be incorporated into departmental instructions, policies and procedures, some committee members consider that any limitation on the right to life is justified.**

2.300 **However, other committee members consider that the use of force provisions limit the right to life. Those committee members consider that this limitation has not been sufficiently justified for the purposes of international human rights law. In particular, they consider it has not been established that the measure is proportionate to the objective sought to be achieved in that there are**

9 See, Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, 357 and 363-364.

insufficient safeguards setting out when force may reasonably be used. On this basis, these committee members conclude that the measure, as currently drafted, is incompatible with the right to life.

Prohibition against torture, cruel, inhuman or degrading treatment

2.301 Article 7 of the ICCPR and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering. Prolonged solitary confinement, indefinite detention without charge, corporal punishment, and medical or scientific experiment without the free consent of the patient, have all been found to breach the prohibition on torture or cruel, inhuman or degrading treatment.

2.302 The prohibition contains a number of elements, including:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention; and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

Compatibility of the measure with the prohibition against torture, cruel, inhuman or degrading treatment

2.303 As noted above at [2.301], the prohibition against torture, cruel, inhuman or degrading treatment is an absolute obligation, which means that such treatment can never be justified in any circumstance, regardless of the objective sought to be achieved.

2.304 The committee noted in its previous analysis that proposed paragraph 197BA(5)(a) provides that in exercising the use of force power an authorised officer must not subject a person to 'greater indignity' than the officer reasonably believes is necessary. It appears then that an officer may therefore subject a person to a degree of indignity, dependent on the circumstances and the officer's reasonable belief.

2.305 The committee previously set out its concerns that the powers in the bill are not sufficiently circumscribed, there is insufficient oversight of the powers and the breadth of the proposed powers may lead to an officer taking action that may constitute degrading treatment for the purposes of international human rights law.

2.306 In addition, the committee raised concerns that the bill makes inadequate provision for the monitoring and investigation of any instances or allegations of cruel, inhuman or degrading practices in detention. The committee also noted that the proposed bar on proceedings, giving immunity that could prevent the prosecution of an authorised officer accused of inflicting degrading treatment, may

limit the obligation to investigate and prosecute alleged violations of the prohibition on degrading treatment.

2.307 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the use of force provisions in the bill are sufficiently circumscribed to ensure that they are compatible with the prohibition on degrading treatment.

2.308 The committee also considered that the basis for monitoring the use of force provisions and the bar on criminal proceedings in proposed section 197BF may limit the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment. The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the arrangements for monitoring the use of force and the bar on proceedings in proposed section 197BF are compatible with the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

Minister's response

Safeguards for the treatment of detainees

The Department will have in place policies and procedures, reflected in the IDSP contract, regarding the use of reasonable force in an immigration detention facility. These safeguards will ensure that the use of force:

- Will be used only as a measure of last resort;
- Must only be used for the shortest amount of time possible;
- Must not include cruel, inhuman or degrading treatment; and
- Must not be used for the purposes of punishment.

Conflict resolution (negotiation and de-escalation) must be considered and used before the use of force, wherever practicable. In practice, and wherever possible, de-escalating through engagement and negotiation will be the first response to maintain operational safety. Extensive guidance for authorised officers will be contained in policy and procedural documentation to ensure that a broad range of details and scenarios are canvassed in a format that is easily understood and accessed by operational staff. This guidance is also referenced in the IDSP contract.

All policy and procedural guidelines will be contained in the Department's Detention Services Manual and the Detention Operational Procedures. These documents are stored electronically in the Department's centralised departmental instructions system (CDIS) and in the Department's publicly available online subscription database (LEGEND). The IDSP incorporates these policies in their Policy and Procedure Manuals that are also approved by the Department.

Monitoring mechanisms

The Department has staff on duty or on call in all immigration detention facilities at all times. While this does not give the Department's staff the ability to monitor all activity at an immigration detention facility, it does give the Department general oversight of the activities of the IDSP and of the immigration detention facility.

In addition, the contract for the provision of immigration detention services requires IDSPs to report all incidents of the use of force in an immigration detention facility, from very minor incidents to critical incidents. Current contractual obligations require the IDSP to:

- Gain prior approval from the departmental regional manager for planned use of reasonable force;
- Video record the entire event when planned use of reasonable force is applied, retain these recordings in accordance with the *Archives Act 1983* and make them available to the Department within 24 hours of request;
- Verbally inform the Department immediately (no later than 60 minutes) on becoming aware of an instance of the unplanned use of reasonable force;
- Provide a written incident report for review by the Department within six hours of the Department being informed verbally;
- Internally audit one hundred percent of such incidents to continuously improve the IDSP's response to incidents; and
- Record the incident report in the Department's IT portal.

The Department will use this information to monitor and review the IDSP's compliance with the conditions of the contract and with its obligations under relevant legislation, policies and procedures.

On 10 November 2014, the Department established the Detention Assurance Team (DAT) to strengthen assurance in the integrity and management of immigration detention services. Operating independently of IDSPs and current contract management arrangements within the Department, the DAT is designed to:

- Provide advice to the Secretary of the Department and, from 1 July 2015, the Australian Border Force Commissioner on assurance in the management and performance of detention service providers;
- Undertake investigations and support commissioned inquiries into allegations of incidents in the onshore and offshore detention network, including investigation of inappropriate behaviour by staff of the IDSP;
- Monitor recommendations for improvement in detention contractor management processes and provide assurance that they are implemented and their effectiveness reviewed;

- Audit the effectiveness of contractual and other detention service performance measures;
- Ensure the effectiveness of integrity and other risk controls;
- Review detention practices for compliance against international conventions; and
- Identify trends and emerging issues in detention contract management and recommend strategies for improvement.

The DAT will be involved in the review of incidents of the use of force to identify operational, procedural and policy improvements applicable to the Departmental and IDSPs.

The Bill directly provides for a complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary of the Department about the exercise of the powers under new section 197BA to use reasonable force. Outside this internal process, if detainees would prefer to bring issues to the attention of external authorities and/or they believe that an issue that has been reported is not being dealt with effectively, there is capacity for detainees to bring any problems or complaints to the attention of external authorities, including police forces, the Commonwealth Ombudsman, the Australian Human Rights Commission, the Australian Red Cross or other advocacy groups. Within immigration detention facilities there is a comprehensive system in place to provide detainees with a variety of assistance and options to raise problems or make complaints regarding their immigration detention. On entering an immigration detention facility detainees are also provided with information about their rights to make a complaint and the avenues available to them to make such a complaint. This information is reinforced during induction sessions detainees undertake.

Detainees have access to telephone, facsimile, mail and photocopying services. Detainees are given reasonable access to communication services unless it presents a serious safety or security concern. Detainees are afforded the same level of privacy when communicating externally as they would have in the community. Neither the IDSP nor the Department may record, intercept, read, copy or otherwise listen to a person's communication without their explicit invitation.

Detainees can also contact Ministers of Parliament, State or Territory police, State or Territory welfare agencies and community groups to make a complaint about their immigration detention. This access to external bodies provides assurance that any issues from the perspective of a detainee will be open to scrutiny.

Finally, the public interest disclosure scheme (under the *Public Interest Disclosure Act 2013*) applies to immigration detention facilities. The public interest disclosure scheme operates to encourage public officials (which will include authorised officers in the immigration detention facility) to report suspected wrongdoing in the Australian public sector. The public

interest disclosure scheme allows public officials (which includes Commonwealth contracted service providers and authorised officers) who make a disclosure of suspected wrongdoing to be supported and protected from adverse consequences, and ensures that a disclosure is properly investigated and dealt with. The public interest disclosure scheme is an additional means by which any wrongdoing or other issue in an immigration detention facility regarding the use of force could come to light.

Section 197BF - bar on proceedings relating to immigration detention facilities

Proposed new section 197BF is intended to place a partial bar on the institution or continuation of proceedings in any Australian court against the Commonwealth in relation to the exercise of power under proposed section 197BA, where the power was exercised in good faith.

This does not, and is not intended to, bar all possible proceedings against the Commonwealth. Legal proceedings by way of judicial review are available in the High Court under section 75(v) of the Constitution. Further, it is always the case that Federal, State or Territory police may institute criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding this provision - it would be up to the court to determine whether this provision had any application in the particular circumstances.

As noted previously, proposed section 197BF contemplates that the Commonwealth will only have protection from criminal and civil action in all courts except the High Court if the power under proposed section 197BA is exercised in good faith. As a threshold question, the court would need to consider the following matters to decide if it has jurisdiction:

- Was the action complained about an exercise of power under proposed section 197BA?
- Did the authorised officer act in good faith in the use of reasonable force under proposed section 197BA?

If the use of reasonable force was not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF, and court proceedings could be instituted or continued.

Similarly, if a court decides that the use of reasonable force was not to:

- Protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
- Maintain the good order, peace or security of an immigration detention facility

then it is not captured by the partial bar in proposed section 197BF.

> Further, if a court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer (for example).
>
> As described above, there are a number of ways by which a misuse of the power to use reasonable force in proposed section 197BA may come to the attention of the Department or to a police force or other authority. This, in addition to the fact that the partial bar on proceedings is limited in its application, means that the Bill does not place a restriction on the police's capacity to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.
>
> For these reasons, it is the Government's view that this proposed amendment is compatible with the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.[10]

Committee response

2.309 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.310 As already noted, the committee welcomes the intention that a number of safeguards will be included in policies and procedures regarding the use of force.

2.311 The committee also notes the advice that the current contract with IDSPs contains procedural requirements around the use of force.

2.312 However, as noted above at paragraph [2.287], placing safeguards in departmental policies rather than in legislation is insufficient to protect human rights. Contractual safeguards are similarly insufficient because, for example, contracts with IDSPs can be changed with the agreement of the parties at any time and there is no guarantee that future contracts would include any such safeguards.

2.313 The committee considers that the breadth of the proposed powers may facilitate an authorised officer taking action that may constitute degrading treatment for the purposes of international human rights law. As previously noted, this risk is compounded given that what amounts to degrading treatment depends on all the circumstances of the case (including the particular vulnerabilities of the victim), and that people detained in immigration detention in many cases may be particularly vulnerable (such as persons seeking asylum).

2.314 In addition, the committee considers that there may be inadequate provision for the monitoring and investigation of any instances or allegations of cruel, inhuman or degrading practices in immigration detention facilities. The obligation is not only to prohibit the state from subjecting a person to degrading practices, particularly in

10 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 21 April 2015) 3-6.

places of detention, but also to provide effective investigation of any credible allegations of such treatment and take steps to prevent it reoccurring.

2.315 As previously noted, the bill provides no legislated requirement for an independent review of the use of force. Rather, it provides that a complaint may be made to the secretary of the department, who may investigate the complaints at his or her discretion.[11] This process does not comply with the standards of an adequate, effective, independent and impartial investigation under international human rights law.

2.316 Similarly, the Scrutiny of Bills Committee has noted that the complaints mechanism would not appear to act as an 'accountability measure' as there is no indication that it will result in any additional remedy being available to detainees. On that basis, it considered that the complaints mechanism is not sufficient 'to ameliorate the various scrutiny concerns which have been identified in relation to this bill'.[12]

2.317 In contrast, New South Wales and Western Australia have an independent inspectorate providing external scrutiny of the standards and operational practices of custodial services.[13]

2.318 The committee notes the minister's advice as to the establishment of the Detention Assurance Team (DAT) in 2014 to strengthen the integrity and management of immigration detention services. DAT will undertake investigations and support commissioned inquiries into allegations of incidents in detention facilities, including reviewing detention practices for compliance against international conventions.

2.319 However, while the DAT will go some way towards meeting Australia's obligations to investigate allegations of cruel, inhuman or degrading treatment, the committee notes that the DAT is set up within the department, so that in effect it is the department itself that will undertake such an investigation. The DAT's recommendations will be made internally to the department and the minister and there is no requirement that they be made public or subject to parliamentary scrutiny. There is also nothing to require the department to respond to any recommendations made by the DAT.

2.320 Accordingly, the committee does not consider that the DAT satisfies the requirement for impartiality and, on its own, would not satisfy the duty to investigate allegations of ill-treatment.

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11 See *Ombudsman Act 1976*.

12 See Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, 376.

13 See *Inspector of Custodial Services Act 2003* (WA) and *Inspector of Custodial Services Act 2012* (NSW).

2.321 The committee notes the minister's advice that detainees have numerous opportunities to bring problems or complaints to the attention of external authorities.

2.322 However, the committee notes that the Australian government is responsible for the security of any person under detention. Accordingly, the duty to investigate in good faith all credible allegations of ill-treatment in detention rests on the Australian government. It is not appropriate to require the person who may have been subjected to the degrading treatment to seek external assistance. Equally, it is not sufficient to rely on authorised officers to report suspected wrongdoing, even where there is legislation that may protect them from adverse consequences, as the minister advises.

2.323 The committee also notes that proposed section 197BF provides an immunity such that no proceedings may be instituted or continued in any court against the Commonwealth in relation to the use of force if it was exercised in good faith. The definition of the Commonwealth includes an officer of the Commonwealth or any other person acting on behalf of the Commonwealth.

2.324 As set out below in more detail at paragraphs [2.373] to [2.385], the committee considers that the availability of judicial review and police prosecutions, and restricting of the immunity only to acts done in good faith, are not adequate safeguards.

2.325 The committee therefore considers that this immunity, which, for example, could prevent the prosecution of an authorised officer accused of inflicting degrading treatment, limits the obligation to investigate and prosecute alleged violations of the prohibition on degrading treatment.

2.326 **Noting the minister's advice that strict safeguards will be incorporated into departmental instructions, policies and procedures and in the contract with immigration detention service providers, and noting the availability of existing monitoring mechanisms, some committee members consider that the use of force provisions do not limit the prohibition on torture, cruel, inhuman and degrading treatment.**

2.327 **However, other committee members consider that, for the reasons set out above, the use of force provisions in the bill limit the prohibition on torture, cruel, inhuman and degrading treatment. As this is an absolute right which can never be justifiably limited, those committee members consider that the measure, as currently drafted, is incompatible with the prohibition on torture, cruel, inhuman and degrading treatment.**

Right to humane treatment in detention

2.328 The right to humane treatment in detention is protected by article 10 of the ICCPR. It provides that all people deprived of their liberty must be treated with humanity and dignity.

2.329 The right applies to everyone in any form of state detention, including prisons, immigration detention and forced hospital detention (including psychiatric wards). It also applies to private detention centres where it is administered under the law and authority of the state (for example, privately run prisons). The right provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty.

2.330 The obligation on the state includes:

- a prohibition on subjecting a person in detention to inhumane treatment (including lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with a disability and pregnant women.

Compatibility of the measure with the right to humane treatment in detention

2.331 The statement of compatibility acknowledged that the right to humane treatment in detention is engaged by the bill, to the extent that force is employed.

2.332 The committee previously noted that it was unclear that the safeguards in the bill and the level of training for officers are adequate to ensure that force will only be used as a last resort. The committee was also concerned that the monitoring of the use of force may be insufficient to ensure that detainees are treated appropriately and to support effective complaint and review mechanisms for any allegations of inhuman treatment.

2.333 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly, whether there are any less restrictive ways to achieve the objective, whether the training provided to authorised officers will be sufficient to minimise the risk of violation and whether there is adequate monitoring and supervision of the exercise of the use of force.

Minister's response

> The Department considers that reasonable use of force is the least amount of force necessary to achieve the required outcomes, which are the

legitimate objectives of protecting the life, health or safety of any person in an immigration detention facility, or of maintaining the good order, peace or security of an immigration detention facility. It is acknowledged that the use of force is a last resort, and this will be reflected appropriately in Departmental policy documents. Safeguards for the treatment of detainees require that force will not be used where there are less restrictive ways to achieve the legitimate objectives set out in proposed section 197BA, such as discussion, de-escalation or negotiation with possible subjects of the use of reasonable force. In the few cases where the reasonable use of force is required in accordance with proposed section 197BA, the authorised officer may be able to plan for its use, including contingency planning for a greater or lesser degree of reasonable force to be used if circumstances change. For example, the transfer of an uncooperative detainee from one precinct to another within an immigration detention facility should include a plan to use reasonable force if it becomes necessary; it is not a plan to use force as part of the transfer.

It will be the decision of the Minister to determine the training and qualification requirements for authorised officers. It is expected that the Minister, at a minimum, will require authorised officers to maintain current qualifications to enable them to use reasonable force.

Note that Tier 1 and Tier 2 IDSP officers are currently trained in the national unit of competency CPPSEC2017A 'Protect Self and Others using Basic Defensive Techniques'. This is also part of the required refresher training for these officers. This training is identified as providing the outcomes required to apply basic defensive techniques in a security risk situation and gives the ability to use basic lawful defensive techniques to protect the safety of self and others. The IDSP is expected to engage the assistance of the relevant police service to assist in managing escalated or high risk situations.

Any instance of any use of reasonable force and/or restraint must be reported pursuant to section 28 of the *Work Health and Safety Act 2011*. Under this provision every worker is required to:

- Take reasonable care for his or her own health and safety; and
- Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- Comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this act; and
- Co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

In addition, current contractual obligations require the IDSP to comply with a number of items intended to safeguard the use of reasonable force,

> as set out above under the discussion relating to the prohibition against torture, cruel, inhuman or degrading treatment on page 4.
>
> The Department considers that disproportionate, excessive or inappropriate use of force is not authorised by this Bill. A person is not protected from legal action by the proposed section 197BF in relation to the use of such force. Any excessive or inappropriate use of force will incur the appropriate disciplinary action and expose the person to possible criminal prosecution.[14]

Committee response

2.334 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.335 As noted above at paragraphs [2.287] to [2.296], the committee does not consider that safeguards contained in departmental policies rather than legislation sufficiently protects human rights, and notes that the bill does not of itself contain adequate safeguards.

2.336 International human rights law requires that the state train relevant personnel to minimise the chance that a person's rights will be violated, and in this regard the committee notes the minister's advice that officers are currently trained to use basic defensive techniques.

2.337 However, as the committee previously noted, this Certificate Level II training is the equivalent to that required for crowd controllers and security guards (a qualification commonly attainable with two weeks training).

2.338 The Scrutiny of Bills Committee also considered the level of training and noted that, given the breadth of the authorisation to use force, it is a matter of concern that the base level qualifications fall short of that associated with police training. The Scrutiny of Bills Committee remained concerned about the conferral of police like powers on non-government employees and the lack of Parliamentary scrutiny of training and qualification requirements.[15]

2.339 The committee considers the level of training required for authorised officers to be granted broad powers to use force is insufficient to justify the conferral of these powers on non-government officials.

2.340 The committee reiterates its previous statement that, while immigration detention facilities are currently privately operated, under international human

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14 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 21 April 2015) 7.

15 See Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, 373.

rights law the Australian government remains responsible in all circumstances for adherence to Australia's human rights obligations.[16]

2.341 The conferral of use of force powers on employees of private detention centre operators therefore may not be sufficient to ensure that Australia effectively meets its international human rights obligations, to the extent that there may be inadequate oversight and control of private detention facilities by the Australian government.

2.342 **Noting the minister's advice that strict safeguards will be incorporated into departmental instructions, policies and procedures and that the training required of authorised officers will be appropriate, some committee members consider that any limitation on the right to humane treatment in detention is justified.**

2.343 **Other committee members consider that the use of force provisions limit the right to humane treatment in detention. Those committee members consider that this limitation has not been sufficiently justified for the purposes of international human rights law. In particular, they consider it has not been established that the measure is proportionate to the objective sought to be achieved in that there are insufficient safeguards setting out when force may reasonably be used. On this basis, these committee members conclude that the measure, as currently drafted, is incompatible with the right to humane treatment in detention.**

Right to freedom of assembly

2.344 The right to freedom of assembly is protected by article 21 of the ICCPR. It provides that all people have the right to peaceful assembly. This is the right of people to gather as a group for a specific purpose. It is strongly linked to the right to freedom of expression, as it is a means for people together to express their views.

2.345 The right applies regardless of where people are assembling–it may be inside or outside, on public or private property, it may be a protest march or demonstration that moves from place to place or it may be stationary, such as sit-ins, meetings or motionless protests. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies.

2.346 The right only applies to peaceful protest and does not protect intentionally violent protests.

2.347 The right to freedom of assembly may be limited for certain prescribed purposes. Any limitation of the right must be necessary to respect the rights of others, to protect national security, public safety, public order, public health or

16 See, for example, the Human Rights Committee, Concluding Observations on the United Kingdom, 1995, CCPR/C/79/Add. 55 and Concluding Observations on New Zealand, 2010, CCPR/C/NZL/CO/5.

morals. Additionally, such limitations must be prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

Compatibility of the measure with the right to freedom of assembly

2.348 The committee noted in its previous analysis that the use of force provisions would allow force to be used by an authorised officer when they reasonably believe it is necessary to maintain the good order of an immigration detention facility.

2.349 However, what constitutes the 'good order' of the facility is not defined in the legislation. This could mean, for example, that an authorised officer could use force in relation to a peaceful protest if the authorised officer reasonably believes force is necessary to maintain good order.

2.350 The committee considered that the use of force provisions limit the right to freedom of association. However, the statement of compatibility did not justify that limitation for the purposes of international human rights law.

2.351 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The Government supports the right of an individual to engage in peaceful protest but does not condone participation in violent protests, particularly where the violent protest might impact on public order or the protection of the rights or freedoms of others.
>
> At common law, those responsible for managing an immigration detention facility have a duty of care towards people within and in the vicinity of those premises. Those responsible for managing an immigration detention facility must have the legal authority to lawfully take appropriate action to ensure the safety and well-being of those people.
>
> The Department considers that the proposed powers to be granted to authorised officers to enable them to use reasonable force to protect the life, health or safety of any person in an immigration detention facility, or to maintain the good order, peace and security of an immigration detention facility are reasonable and proportionate.[17]

17 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 21 April 2015) 8.

Committee response

2.352 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.353 The committee acknowledges that a person does not have a right to participate in violent protests. As set out above, the right to freedom of assembly applies only to peaceful protests and does not protect intentionally violent protests.

2.354 However, as previously noted, the use of force provisions in the bill are broadly drafted to allow force to be used to maintain 'good order'. What constitutes the maintenance of 'good order' is not defined in the legislation and would allow, for example, force to be used to break up a peaceful protest if it was considered by an authorised officer that the protest was affecting the 'good order' of the detention facility.

2.355 The minister's response did not address this concern.

2.356 In addition, as previously noted, proposed subsection 197BA(2)(e) specifically provides that force may be used to move a detainee within the facility, which could, for example, include moving someone who is forming part of a peaceful 'sit-in'. There are no additional constraints on the exercise of the power for this purpose, such as a requirement that the person is unreasonably refusing to move or that the officer has first issued a lawful request for the person to move.

2.357 Similarly, the minister's response did not address this concern.

2.358 The committee therefore remains concerned that the use of force powers granted by the bill are unconstrained by any requirement to respect a person's right to peacefully protest.

2.359 **Noting the minister's advice that strict safeguards will be incorporated into departmental instructions, policies and procedures and that the right to freedom of assembly does not apply to violent protests, some committee members consider that any limitation on the right to freedom of assembly is justified.**

2.360 **Other committee members consider that the use of force provisions limit the right to freedom of assembly. Those committee members consider that this limitation has not been sufficiently justified for the purposes of international human rights law. In particular, they consider it has not been established that the measure is proportionate to the objective sought to be achieved in that there are insufficient safeguards or controls to ensure that force is not used as a first resort in respect of peaceful protests. On this basis, these committee members conclude that the measure, as currently drafted, is incompatible with the right to freedom of assembly.**

Bar on proceedings relating to use of force

2.361 The bill would also impose a bar on proceedings relating to the use of force in immigration detention facilities. Proposed new section 197BF provides that no

proceedings may be instituted or continued against the Commonwealth in relation to the use of force if the power was exercised in good faith. The 'Commonwealth' is defined as including any officer of the Commonwealth and any other person acting on behalf of the Commonwealth.

2.362 As set out above, the bill engages a number of human rights which include a concomitant obligation to ensure the right to an effective remedy for any violation of those rights.

2.363 In imposing a bar on proceedings against the Commonwealth when an authorised officer uses force the bill therefore engages and limits the right to an effective remedy.

Right to an effective remedy

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

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

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

Compatibility of the measure with the right to an effective remedy

2.367 The committee considered in its previous analysis that imposing a bar on proceedings relating to the use of force in immigration detention facilities limits the right to an effective remedy. This is because, as set out above, the use of force provisions engage and limit a number of human rights, and, under article 2 of the ICCPR, a person is entitled to an effective remedy if their human rights are violated. The bar on proceedings for action occurring in immigration detention facilities therefore limits this right.

2.368 The committee noted that the UN Human Rights Committee has stated that the right to an effective remedy is an obligation inherent in the ICCPR as a whole and so, while limitations may be placed in particular circumstances on the nature of the

remedy provided (judicial or otherwise), there is an absolute obligation to provide a remedy that is effective.[18]

2.369 While the bill provides for complaints to be made to the secretary, the investigation of complaints will be at the discretion of the secretary, who may decide not to investigate the complaint on a number of grounds, including the broad ground that the investigation 'is not justified in all the circumstances'. At the conclusion of the investigation the secretary may refer the complaint to the Ombudsman, but does not have the power to grant any other remedies. The Ombudsman may make non-enforceable recommendations to government.

2.370 The committee considered that the complaints mechanism provided by the bill (when considered together with the bar on proceedings against the Commonwealth) did not meet the obligation to provide an effective remedy.

2.371 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the measure is compatible with the right to an effective remedy. In particular, the committee wished to understand why it is necessary to provide immunity for the Commonwealth as a whole rather than personal immunity for the authorised officer, and what remedies (including compensation) are available to a person whose complaint about the use of force is substantiated.

Minister's response

> The bar on proceedings in proposed section 197BF of the Bill is modelled on existing subsection 245F(9B) of the *Migration Act 1958* (the Migration Act). The definition of 'Commonwealth' is modelled on existing sections 494AA and 494AB of the Migration Act which concern a bar on certain legal proceeding relating to unauthorised maritime arrivals and transitory persons respectively.
>
> The bar on proceedings will not result in aggrieved persons being unable to obtain an effective remedy.
>
> Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Further, it is always the case that Federal, State or Territory police may institute a criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding this provision - it would be up to the court to determine whether this provision has any application in the particular circumstances. Police have access to immigration detention facilities and may be called to an incident by the IDSP, a detainee or a witness. This gives the police capacity to decide if a prosecution is warranted in the circumstances.

18 See UN Human Rights Committee, *General Comment No. 29, States of Emergency (article 4)*, (2001), [14].

It is worth noting that the court will have the jurisdiction to consider the threshold issues of:

- If the use of reasonable force was an exercise of power under section 197BA; and
- If the power was exercised in good faith.

In circumstances where the use of reasonable force has been used in a manner that is not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. Similarly, in circumstances where the use of reasonable force has been found not to have been exercised in good faith, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

In less serious circumstances, where the use of reasonable force has been found to be exercised in good faith and the person has not suffered an injury but there is some other failing, there may be circumstances in which it is appropriate for the Department to provide details to the aggrieved person of any proposed changes to policy or procedure that may result from the incident, as part of the follow up to that incident to demonstrate that a situation or circumstance has been addressed.[19]

Committee response

2.372 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.373 The committee notes the minister's advice that the bar on proceedings will not result in an affected person being unable to obtain an effective remedy. This is because:

- proceedings are available through judicial review under section 75(v) of the Constitution;
- police may institute a criminal prosecution against an individual;
- where the use of force has been found not to have been exercised in good faith, the bar on proceedings will not apply; and
- where a failing has been identified there may be circumstances where the department informs the affected person of any proposed changes to policy or procedure that may result from the incident.

2.374 Dealing with these points in turn, the committee first notes that it is questionable whether judicial review under the Constitution would be available in

19 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 21 April 2015) 8-9.

relation to authorised officers of privately run detention facilities, as they may not be considered to be 'officers of the Commonwealth'.[20]

2.375 In any event, even if judicial review were available, it is unclear what a person affected by an officer's use of force could achieve by judicial review. This is because judicial review only provides for prohibition, mandamus or injunction, which are remedies to prevent the Commonwealth from taking further action in relation to the action complained of, or ordering the Commonwealth to perform its statutory duty. These remedies do not provide for compensation or reparation, or require changes to existing legislation, policies or practices.

2.376 The committee considers that the availability of judicial review in relation to the use of force therefore does not provide an avenue by which a person affected by the use of force can gain an effective remedy.

2.377 Second, while bringing the perpetrators of human rights violations to justice is an important element of the right to an effective remedy, it is just one aspect of the right. As the UN Human Rights Committee has explained, the obligation also encompasses, where appropriate:

- compensation;
- restitution;
- rehabilitation; and
- measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices.[21]

2.378 Therefore, while the police could bring prosecutions for the use of force in detention facilities, this alone would not satisfy the requirements for an effective remedy.

2.379 Further, it is not clear whether the bar on proceedings may affect such a prosecution – as the minister's confirms, 'it would be up to the court to determine whether this provision has any application to the particular circumstances'. This may discourage the bringing of a police prosecution in cases where it was unclear that the bar on proceedings would apply.

2.380 Third, while the bar on proceedings will not apply if the use of force was not exercised in good faith, as the Scrutiny of Bills Committee has pointed out, bad faith is a very difficult allegation to prove. Given the breadth of the use of force powers, it

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20 See Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, 380-381.

21 UN Human Rights Committee, *General Comment No.31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [16].

is doubtful that showing that the use of force was disproportionate would amount to bad faith.[22]

2.381 Fourth, while the minister advises that changes may be made to policies or procedures where a failing has been identified, changes in practices or policies form only one part of the right to an effective remedy and will not necessarily provide an effective remedy for a person against whom the use of force has already been exercised.

2.382 Further, the committee also notes the minister's advice that this intention is restricted to situations where force has been found to have been exercised in good faith and the person has not suffered an injury. It is not clear to the committee why changes to policies or procedures would not occur following any incident, especially where injuries have occurred as a result. Also, the review of any incident or failing, and any subsequent changes to policies and procedures, is wholly at the discretion of the department and is not required by any statute.

2.383 As the committee previously noted, barring any proceedings against the Commonwealth in relation to the exercise of the use of force exercised in good faith removes the opportunity for an affected person to seek compensation in a broad range of circumstances. It remains unclear as to why it is necessary to bar proceedings against the Commonwealth as a whole rather than provide limited personal immunity to authorised officers.

2.384 The committee therefore considers that the measure limits the right to an effective remedy and that the limitation has not been sufficiently justified by the minister.

2.385 **Some committee members consider that the bar on proceedings will not result in an affected person being unable to obtain an effective remedy because, as set out in the minister's advice, there are other mechanisms available to ensure that an affected person will have access to a remedy. Those committee members consider that the bar on proceedings is therefore justified.**

2.386 **Other committee members consider that the bar on proceedings limits the right to an effective remedy. Those committee members note that there is an absolute obligation to provide a remedy that is effective (that is, while limitations may be placed on the nature of the remedy available, it is an absolute obligation to provide an effective remedy). Those committee members consider that as the bar on proceedings removes the ability for an affected person to obtain an effective remedy, the measure, as currently drafted, is likely to be incompatible with the right to an effective remedy.**

22 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, 377.

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence

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 Philip,

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

Power to revoke Australian citizenship due to fraud or misrepresentation

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

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

The government agrees that the obligation to consider the best interests of the child is engaged, however, it considers that the obligation is not limited by the proposed revocation power. Rather, the same obligation to consider the best interests of the child would attach to a revocation decision under proposed section 34AA of the *Australian Citizenship Act 2007* (the Citizenship Act) as it attaches to a revocation decision under current section 34 (as set out currently in Chapter 18 of the Australian Citizenship Instructions (ACI)). The fact that a decision-maker may decide to revoke a child's citizenship after considering all the factors, including the best interests of the child, does not mean the obligation to consider the best interests of the child has been limited. This was stated in the statement of compatibility accompanying the Bill at page 3 when the former Minister for Immigration and Border Protection, the Hon Scott Morrison MP, stated:

> 'In exercising the discretion the Minister would give effect to Article 3 by considering the best interests of the child as a primary consideration.'

The government is of the view that section 34AA does not limit the obligation to treat the best interests of children as a primary consideration and therefore it is not necessary to respond to the committee's further questions.

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

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

Currently under the Citizenship Act, a conviction for a specified offence is required before citizenship can be revoked. In addition, the power to revoke only arises if the offence was committed prior to the Minister giving approval for the citizenship application, or the offence was committed in relation to the person's application to become an Australian citizen.

In evidence before the Senate Legal and Constitutional Affairs Legislation Committee on 19 November 2014, my department noted that in 2013-14 its National Assessments and Allocations Team received over 26,000 allegations of fraud and other matters. Of those, just over 10,000 were recommended for further investigation for fraud specifically. 135 investigations conducted by the department resulted in 12 briefs of evidence to the Commonwealth DPP. There were 13 convictions for fraud in the same period. The low rate of prosecutions indicates that there is a low risk that individuals who acquired citizenship fraudulently will be called to account. This in turn may encourage further fraudulent applications while undermining public confidence in the citizenship and migration programmes.

This amendment is intended to improve the integrity of the Australian citizenship programme and create stronger disincentives for people to provide false and misleading information. Strengthening the ability to revoke citizenship would reinforce the principle that citizenship by application is a privilege and that there is a real prospect of that privilege being removed from those who have obtained citizenship consequent to fraud or misrepresentation in the visa or citizenship processes. The government is of the view that this is 'a pressing or substantial concern' and the proposed changes are aimed at achieving a legitimate objective. I note that other foreign governments are of a similar view with the proposed 34AA being comparable with Ministerial powers to revoke citizenship for fraud or false representation without conviction in Canada, New Zealand and the United Kingdom. I note that Canada has long allowed revocation of citizenship for fraud without conviction.

The government considers that there is a rational connection between the objective of the proposed revocation power and how it would operate in practice. While a child may not have been responsible for, or had no knowledge of the fraud or misrepresentation, the proposed power would provide a disincentive for a person acting on behalf of a child to engage in fraud or misrepresentation in relation to a migration or citizenship application by that child.

Appropriate safeguards have been built into the proposal through the discretionary nature of the decision to revoke and the requirement that any revocation be in the public interest. The decision-maker would consider international law obligations when making this discretionary decision, including the *1961 Convention on the Reduction of Statelessness* (Statelessness Convention) and the best interests of the child and this will be reflected through updates to the ACI. In addition, there is a time limit beyond which citizenship could not be revoked and the exercise of the power is subject to judicial review.

The committee also "considers that, in the absence of a definition of what constitutes 'fraud' or 'misrepresentation', the minister's power to revoke citizenship on the basis of, for example, minor or technical misrepresentations may not be proportionate to the stated objective of the measure". It is not proposed to provide a statutory definition of fraud or misrepresentation; rather those words will have their ordinary or common meaning. 'Fraud' is a well-known concept at common law with a plain and ordinary meaning. The Macquarie Dictionary gives the following common law definition of 'fraud': "advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false". The Macquarie Dictionary defines 'misrepresent' as "to represent incorrectly, improperly, or falsely". The department considers that these meanings provide sufficient certainty as to the types of conduct that would be regarded as fraud or misrepresentation.

The proposed section 34AA discretionary revocation power, like the existing section 34 discretionary revocation power, could only be exercised if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. The 'public interest' test would include consideration of such matters as whether the nature or severity of the fraud or misrepresentation was such that it would be contrary to the public interest to allow the person to retain their Australian citizenship. The decision would also take into account the best interests of the child.

The government is of the view that the proposed section 34AA does not limit the right to acquire a nationality under Article 7 of the *Convention on the Rights of the Child* (CRC) and Article 24(3) of the *International Covenant on Civil and Political Rights* (ICCPR). It does, however, provide an appropriate mechanism to consider whether an individual who acquired citizenship consequent to fraud or misrepresentation should continue to hold that citizenship and the privileges and responsibilities associated with it.

Article 8 of the CRC states:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

The government is of the view that the amendments are consistent with Article 8 because if the Bill is passed, any revocation would not constitute 'unlawful interference'. Further, any decision made under the proposed revocation power that impacted on a child would take into account, as a primary consideration, the best interests of that child.

The committee "observes that the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves". The committee "also notes that children have different capacities and levels of maturity than adults to make judgements. Given this, the committee considers that the measure may not be proportionate to its stated objective". The measure is proportionate to its objective as the decision whether it would be contrary to the public interest for the person to remain an Australian citizen would be informed by the facts of the case, which would include who was responsible for the fraud or misrepresentation and the nature or severity of the fraud or misrepresentation. Further, the best interests of the child would be a primary consideration in that decision-making process.

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

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

The government does not consider that the proposed section 34AA limits or may limit the right of the child to be heard in the administrative proceedings associated with consideration of revocation of citizenship.

The statement of compatibility acknowledges that the proposed measure engages the right of the child to be heard but argues that the measure does not limit the right because prior to reaching a decision on whether to revoke a child's citizenship the Minister would afford the person natural justice, which would require giving the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12 of the CRC.

The proposed revocation power requires the Minister to be satisfied, through an administrative process, of both the occurrence of relevant fraud or misrepresentation and that it would be contrary to the public interest for the person to remain an Australian citizen. The committee appears to consider the right to be heard in relation to the consideration of revocation requires a judicial process. However, it is common for significant findings of fact and decisions that affect individuals to be made administratively, with the right to be heard given effect through a natural justice process.

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

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

The government considers that the right to a fair trial and fair hearing are not limited by the proposal as:

i. in the event that the person is charged with a criminal offence related to the fraud or misrepresentation, the person retains the rights that are applicable to a criminal trial;

ii. the consideration of whether to revoke the person's citizenship is a discrete administrative process that would be undertaken within the administrative law framework and in accordance with the principle of natural justice;

iii. the revocation decision is subject to the right of judicial review. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law. This would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

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

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

The government does not assess the proposed revocation power as limiting the right to take part in public affairs. Article 25 of the ICCPR states in full:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Article 25 of the ICCPR is concerned with the right to take part in public life, not with the right of state parties to determine, subject to any other applicable treaties or conventions, the circumstances in which a person's citizenship may be revoked.

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

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

The government does not consider that the proposed revocation power limits Article 12.

In particular the proposed revocation power does not limit the rights under paragraphs 1, 2 and 3 of Article 12 as a person whose citizenship has been revoked acquires an ex-citizen visa by operation of law and that visa does not restrict a person's movement within Australia; nor does it prevent a person leaving Australia.

Similarly, even if the proposed revocation power engages Article 12(4), any deprivation of a person's right to enter Australia is not arbitrary. As noted by the committee, an ex-citizen visa ceases on a person's departure from Australia. However, a person whose citizenship was revoked has the opportunity to apply in Australia for a visa that permits them to re-enter Australia, or, while outside Australia, to apply for a visa. Whether a visa is granted will depend on whether the person meets the visa requirements. Of the 16 people whose citizenship has been revoked, 5 have subsequently applied for a visa with a travel facility and have been granted. While it is possible that a former citizen may be refused a visa to enter Australia, that refusal would be undertaken in accordance with the legislative requirements and principle of natural justice. Consequently, the deprivation of the right to enter Australia would not be arbitrary and the right is not limited.

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

As noted earlier in my response, it is not proposed to provide a statutory definition of fraud or misrepresentation; rather those words will have their ordinary or common meaning. The government considers that these ordinary meanings provide sufficient certainty as to the types of conduct that would be regarded as fraud or misrepresentation.

The government is of the view that that the proposed section 34AA is sufficiently certain and not overly broad The proposed section 34AA discretionary revocation power, like the existing section 34 discretionary revocation power, could only be exercised if the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen. The term 'public interest' is not defined in the Citizenship Act or in policy. The 'public interest' test would include consideration of such matters as whether the nature or severity of the fraud or misrepresentation was such that it would be contrary to the public interest to allow the person to retain their Australian citizenship. The decision would also take into account the best interests of the child.

Policy guidance regarding the above will be detailed in the ACI. The ACI is a publicly available document.

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

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

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

The 'good character' requirement currently applies to all citizenship streams (conferral, descent, adoption and resumption), but only to applicants aged 18 and over. However, the department is aware of a number of applicants less than 18 years of age who have had serious character concerns but whose applications were not covered by the bar on approval concerning criminal offences in subsection 24(6) of the Citizenship Act. These applicants'

criminal histories have included multiple convictions for common assault and stealing, robbery in company, reckless wounding in company and aggravated robbery.

The Bill proposes to extend the good character requirement to include applicants under 18 years of age. The department would only seek criminal history records for children if they are 16 or 17 years of age, and this would be done with the client's consent. The department would only seek information on the character of applicants under 16 years of age if serious concerns came to attention. The proposed amendments would allow the Minister to refuse citizenship to minors with known criminal histories and insufficient evidence of rehabilitation. Guidance on the character requirement for citizenship is in the ACI. In determining if a person is of good character at a particular point in time, decision makers take into account a wide range of factors, including the age of the offender, the circumstances of the offence, patterns of behaviour, remorse, rehabilitation and any other mitigating factors.

A legislative body is required to consider the best interests of the child as a primary consideration. The government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the citizenship programme and the effective and efficient use of government resources. The government is of the view that Australia should not negotiate on its good character requirements.

Although in practice it would be extremely rare for the department to become aware of information showing that a child under the age of 16 is not of good character, it is the government's view that the good character requirement should not have a lower age limit of 16. The government notes that all Australian jurisdictions recognise that children under the age of 18 may commit offences, setting the age of criminal intent at 10. The Bill seeks to provide a legislative framework that facilitates the identification of children who may not be of good character, requires an assessment of character and where the child is found not to be of good character, refusal of citizenship.

Guidance on the assessment of whether a person is of good character is provided in Chapter 10 of the ACI. One of the relevant factors set out in the ACI is the applicant's age at the time the offence was committed. If the applicant committed the offence at a young age, the commission of the offence may be given less weight, depending on the nature of the crime and any subsequent offences. The ACI recognises that the person may since have matured and gained greater respect for upholding the law, and as such, criminal offences committed as a juvenile may not be indicative of their current character.

A finding that an applicant is not of good character does not prevent them from making a subsequent application for citizenship, if they are able to show that they are of good character at the time of the decision on their later application.

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

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

The government does not agree that the proposed amendment engages the right to protection of the family. The amendment is concerned with the requirements that must be met in order for a person to be approved for citizenship. Refusal of citizenship does not in itself affect a person's visa status or their right to enter or remain in Australia. The government does not restrict the right of its permanent residents or citizens to depart Australia to be with other family members.

Article 17 of the ICCPR carries with it an obligation to ensure family members are not involuntarily separated from each other. Rather, it provides that "No one shall be subjected to arbitrary or unlawful interference with his … family". Even if Article 17 is engaged, any limit on the right to protection of family would be neither arbitrary nor unlawful. A sovereign nation may determine the conditions under which a person may acquire that nation's citizenship, within any applicable principles in treaties or conventions to which it is a party. In the Australian context, each applicant for citizenship or a visa is assessed against the legislative requirements as an individual and in their own right. People do not acquire a right to citizenship simply because their family holds citizenship.

Citizenship to a child found abandoned in Australia

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

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

As noted in the statement of compatibility, the objective of replacing current section 14 of the Citizenship Act is to clarify the meaning of the abandoned child provision.

Currently, section 14 of the Citizenship Act provides:

> "A person is an Australian citizen if the person is found abandoned in Australia as a child, unless and until the contrary is proved."

In practice, the department is only required to make a finding of fact under section 14 when a person makes a claim to the department that they are an Australian citizen under that provision. For example, when the person or another party acting on their behalf applies for evidence of citizenship. In order to find that a person is an Australian citizen under section 14, the Minister must consider several matters:

- whether there is evidence the person is an Australian citizen under any other provision of the Citizenship Act – if so, section 14 is not relevant to the person's situation;
- whether the person was found abandoned as a child – if not, the presumption of citizenship is not available;
- whether there is evidence that the person is not an Australian citizen, for example, evidence of their birth outside Australia and no record that they acquired Australian citizenship – if so, the presumption is disproved. A relevant consideration is whether the child is known to have been outside Australia prior to being found abandoned and the circumstances and the circumstances of their entry or re-entry. For example, if the child entered Australia lawfully, their identity and citizenship status will be known. If the child entered Australia unlawfully, the fact of that unlawful entry would give rise to strong inference that the child is not an Australian citizen in the absence of contrary information.

The amendment to the abandoned child provision to state that the presumption of citizenship does not apply if the child is known to have been physically outside Australia on or before the day on which it is claimed the child was found abandoned does not introduce a new factor that can disqualify an abandoned child from being an Australian citizen. Rather, it explicitly

states a current consideration. To the extent that the amendment removes the discretion of the Minister to determine that a person is a citizen under section 14 when that person is known to have been outside Australia prior to being found abandoned, the amendment may limit the obligation to consider the best interests of the child.

As noted in the statement of compatibility, Article 3 of the CRC sets out that the best interests of the child shall be a primary consideration in all actions concerning children. To that end, a legislative body is required to consider the best interests of the child as a primary consideration, and to determine whether these interests are outweighed by other primary considerations, such as the integrity of the citizenship programme. The proposed amendment to the abandoned child provision seeks to restore the original intent of the legislation and directly link the presumption of citizenship for abandoned children with the citizenship by birth provisions.

Any limitation on the obligation to consider the best interests of the child is both reasonable and proportionate, as a child who is known to have been outside Australia prior to being found abandoned:

- whose identity is known will have their visa or citizenship status assessed in accordance with the relevant provisions of the Migration and Citizenship Acts; or
- whose identity is unknown will not be presumed to be an Australian citizen and will have their status determined under the Migration Act, reducing the potential for the abandoned child provision to be incorrectly applied to unlawful non-citizens.

Limiting automatic citizenship at 10 years of age

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

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

The proposed amendment seeks to ensure that citizenship by operation of law is only accorded to those persons who have maintained a lawful right to remain in Australia during the ten years from their birth. It also provides that citizenship under the ten year rule is not available to a child whose birth in Australia followed the presence in Australia of the child's parent as an unlawful non-citizen.

Article 3 of the CRC sets out that the best interests of the child shall be a primary consideration in all actions concerning children.

Any limitation on the obligation to consider the best interests of the child is both reasonable and proportionate as:

- Limiting application of the ten year rule to children who have maintained a lawful presence since birth sends a strong message that non-citizens are expected to comply with Australia's migration legislation and reduces the incentive to remain in Australia unlawfully.
- It is an inherent requirement of the migration legislation that a person on a temporary visa is responsible for maintaining their lawful status and is entitled to remain in Australia only for so long as the visa is in effect. An unlawful non-citizen is subject to removal if they do not voluntarily depart. Primary responsibility for a child's migration status and welfare rests with the child's parents or other responsible adult. It is incumbent on those adults to prepare a child who does not have permanent residence for life outside Australia, just as the parents or responsible adults must themselves prepare for life outside Australia when their temporary visa ceases to be in effect. This position is supported by Article 18(1) of the CRC, which states that "...Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."
- The Citizenship Act provides, and would continue to provide, that a person born in Australia who is stateless has access to citizenship through subsection 21(8) of the Citizenship Act. Eligibility under subsection 21(8) is not in any way dependent on the migration status of the applicant's parents.
- The ten year rule amendments do not prohibit children from applying under other pathways to Australian citizenship, such as citizenship by conferral, should they become eligible.
- The amendment does not affect the child of a person who had been an unlawful non-citizen but had regularised their status by obtaining a substantive visa prior to the child's birth.
- A child born to unlawful non-citizens and who does not acquire a visa to remain in Australia is subject to removal along with their parents. Children subject to removal undergo a best interest of the child assessment prior to the removal decision being made.

Personal decisions of the Minister not subject to merits review

1.104 The committee considers that the measure may limit the right to a fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

The Bill proposes that any personal decision of the Minister be protected from merits review if the decision is made in the public interest, and that a statement be tabled in both Houses of Parliament within 15 sitting days if such a personal decision is made. It is anticipated that such decisions will be rarely made, but if they are made on public interest grounds, such decisions would not be reviewable by the AAT. The proposal preserves the significance of an elected official making a decision in the public interest by not allowing that decision to be subject to merits review. A similar protection is available under the Migration Act.

Currently, the only powers which the Minister cannot delegate under the Citizenship Act are approval of a citizenship test and application of an "alternative residence requirement" to an application for citizenship. However, in practice, decisions about revocation of citizenship for fraud or serious offences have not been delegated to departmental officers and have been made personally by the Minister. These are serious powers and have been used sparingly. Some cases currently under consideration for revocation involve convictions for murder, paedophilia, incest and fraud.

Also, on occasion it is appropriate for the Minister to personally exercise the power in subsection 24(2) of the Citizenship Act to refuse an application for citizenship by conferral where the Minister decides that the circumstances are such that it would not be in the public interest for the applicant to become a citizen at that time, despite the applicant being otherwise eligible.

In both revocation and discretionary refusals, the decisions involve consideration of the public interest and consideration of Australian community standards and values. In particular, the revocation provisions require the Minister to be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

The Bill provides that if a decision is made by the Minister personally, the notice of reasons for decision (under section 47) may include a statement that the Minister is satisfied that the decision was made in the public interest. It then provides that AAT review is not available when a notice under section 47 includes a statement that the Minister is satisfied that the decision was made in the public interest. Examples of personal decisions which could be made on public interest grounds are:

- refusing citizenship if the applicant is not of good character (whether conferral, descent, resumption or adoption);

- refusing citizenship on a discretionary basis despite the applicant being otherwise eligible;
- cancellation of approval of citizenship by conferral;
- revocation of citizenship for offences or fraud;
- overturning a decision of the AAT (see below).

To provide for transparency and accountability, the Bill proposes that the Minister report to Parliament if s/he makes a personal decision which is not subject to merits review, but that such a statement not disclose the name of the client. This is similar to sections 22A(9)-(10) and 22B(9)-(10) of the Citizenship Act, which require a report to be tabled if the personal discretion to apply the alternative residence requirements is applied, and for that report to not disclose the client's name.

The government notes that much of Article 14(1) of the ICCPR relates only to persons facing criminal charges or suits of law and may not be directly applicable to citizenship proceedings. Where appropriate, however, the government seeks to provide comparable arrangements for reviews involving administrative decisions that impact a person's rights, liberties or obligations.

The provision to protect personal decisions of the Minster from merits review may engage and limit the right to a fair hearing as the person will not enjoy the same right to merits review as a person who was subject of a decision by a delegate of the Minister. However, this limitation is a reasonable and proportionate measure as:

- The Minister's personal decision would be consequent to an administrative process that would be undertaken within the administrative law framework and in accordance with principles of natural justice.
- Judicial review is still available. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised. For a discretionary power such as personal decisions of the Minister under the Citizenship Act, this could include consideration of whether the power has been exercised in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.
- The department will enhance its current ACI and case escalation matrix to ensure that advice is consistent and that only appropriate cases are brought to the Minister's personal attention, so that merits review is not excluded as a matter of course.

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

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

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

The Citizenship Bill provides the Minister with a power to personally set aside certain decisions of the AAT concerning character and identity if it is in the public interest to do so. It also provides that personal decisions made by the Minister in the public interest are not subject to merits review. Applicants affected by a personal decision would continue to have access to judicial review.

The government reiterates its view that the provision does not impact the enjoyment of the right to a fair hearing as applicants for citizenship who have been affected by the Minister's decision to set aside AAT decisions will still be entitled to seek judicial review of the Minister's decision under s 75(v) the Constitution and s 39B of the *Judiciary Act 1903* at the Federal and High Courts. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been properly exercised. For a discretionary power such as personal decisions of the Minister under the Citizenship Act, this would include consideration of whether the power has been exercised in a reasonable manner. It would also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

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

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

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

The Citizenship Act includes various provisions that bar a person from being approved for citizenship at a time when they are affected by prescribed circumstances, such as when they are subject of an adverse or qualified security assessment, the Minister is not satisfied of the identity of the person and when the person falls under the *Offences* provision in subsection 24(6). A person who was refused citizenship because they were affected by one or more bars but who otherwise meets the requirements for citizenship will be eligible for citizenship once they are no longer affected by the bar/s on approval.

In summary, the Offences provision currently provides that a person must not be approved for citizenship at a time:

- when proceedings for an offence against an Australian law are pending in relation to the person;
- when the person is confined to a prison in Australia;
- during the period of 2 years after the end of a serious prison sentence, or the period of ten years after the end of any period of a serious prison sentence where the person is a serious repeat offender;
- when the person can be required to serve the whole or part of a sentence after having been released on parole or licence;
- when action can be taken against the person under an Australian law because of a breach of a condition of a security given to a court; or
- during any period where the person is confined in a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law in relation to that person.

The existing offence provisions were largely carried over from the *Australian Citizenship Act 1948* (the 1948 Act) and were not updated to reflect modern sentencing practices in 2007.

The Bill:

- updates paragraph 24(6)(f) to recognise that a court can release a person from serving the whole or part of a sentence of imprisonment subject to conditions relating to their behaviour;

- updates paragraph 24(6)(g) to recognise that in respect of proceedings for an offence against an Australian law, a court can release a person subject to conditions relating to their behaviour, including when a term of imprisonment may not be available; and
- inserts paragraphs 24(6)(i) and (j) to provide bars on approval when the person is subject to an order of a court for home detention or participation in residential schemes or programmes. Although sentencing practices such as home detention are a deliberate decision of the courts as an alternative to imprisonment, they are only used if a person has been convicted of a criminal offence and needs to remain under some form of obligation to the court. From a citizenship programme perspective, it is not appropriate to confer citizenship upon applicants while the obligation remains.

These amendments help maintain the integrity of the citizenship programme by preventing citizenship being conferred on people while they are subject of an ongoing matter before the courts or they are still under an obligation to a court in relation to a criminal offence.

The government's view is that the limitation is reasonable and proportionate as it upholds the value of citizenship by barring a person from becoming a citizen while they are before the courts or subject to an order of the courts, but does not prevent the person from acquiring citizenship once they are no longer subject to that bar.

Tabling statement

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

- **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.**

As noted by the committee, the Bill proposes inserting a new section into the Citizenship Act to require the Minister to cause a statement to be tabled in each House of Parliament when the Minister makes a decision that is not reviewable by the AAT, or decides to set aside a decision of the AAT. Proposed section 52B of the Bill provides that such a statement must not disclose the name of the applicant. It does not require the Minister to provide specific personal information about an applicant when tabling the statement of the Minister's personal decision in Parliament.

The objective of this proposal is to provide for transparency and accountability in the decision-making process, while protecting the privacy of the applicant.

While the proposal may engage a person's right to privacy, it does not impose a new limit on that right to privacy as it does not require the publication of any greater detail than may otherwise be published if the person's decision was subject to review at the AAT. Under section 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) and the AAT's privacy policy the AAT has the power to decide whether or not to publish personal information, including names. Decisions are required to be published under section 43 of the AAT Act, but the publication of evidence given before the Tribunal can be restricted or prohibited under section 35. However, the type of details published in an AAT decision record (such as birth date, place of birth, occupation, date of arrival in Australia) may be enough to identify a person even if the name of that person were withheld.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister on Counter-Terrorism

MC15-000285

15 JUN 2015

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

Dear Mr Ruddock Philip

Thank you for your letter of 13 May 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (the Bill). I welcome this opportunity to address the Committee's questions on the Bill as presented in the *Twenty-Second Report of the 44th Parliament*.

Your Committee has sought my advice in relation to the compatibility of certain amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* with human rights, and recommended amendments to the provisions of Schedule 6 of the Bill (mandatory minimum sentencing for trafficking in firearms).

My responses to these matters are enclosed.

Should your office require any further information, the responsible adviser for this matter in my office is Sarah Wood, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Responses to matters raised in the 22nd Report of the 44th Parliament, 13 May 2015.

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7290 Facsimile: (02) 6273 7098

Enclosure

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

Responses to the Parliamentary Joint Committee on Human Rights

Twenty-Second Report of the 44th Parliament (tabled 13 May 2015)

Compatibility of measures in Schedule 10

Committee comment (p. 41)

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

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

Minister for Justice's response

The proposed amendment to section 169 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) allows for self-incriminating information gathered by the Australian Transaction Reports and Analysis Centre (AUSTRAC) under section 167 of the Act to be adduced in a broader range of civil and criminal proceedings.

The Committee has focused on the effect of these proposed amendments on the right to a fair trial and fair hearing contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). I consider the proposed amendments to be a reasonable and proportionate response to address significant limitations that inhibit AUSTRAC's ability to perform its statutory functions and, more generally, the prosecution of money laundering and terrorism financing offences under the *Criminal Code Act 1995* (the Criminal Code).

Current Provisions

AUSTRAC has two powers, under sections 167 and 202 of the AML/CTF Act, to compel the production of information. Section 167 has a broad application and purpose, but is only available to AUSTRAC. Section 202 has a narrow application and purpose, but is available to a broader range of issuers.

	Section 167	Section 202
Issuer	AUSTRAC – CEO/authorised officer	• AUSTRAC – CEO/authorised officer • AFP – Commissioner/Deputy Commissioner/authorised senior executive • ACC – CEO/examiner • approved examiner under the *Proceeds of Crime Act 2002* (POC Act)

	Section 167	Section 202
Application	a person believed on reasonable grounds to be or have been: • a reporting entity • an officer, employee or agent of a reporting entity, or • entered on the Remittance Sector Register	a person, believed on reasonable grounds to be a reporting entity
Purpose	• belief on reasonable grounds that the person has information or documents that are relevant to the operation of the AML/CTF Act, the regulations or the AML/CTF Rules	• determining whether a person is providing a designated service at or through a permanent establishment in Australia • ascertaining details relating to any permanent establishment in Australia at or through which that person provides a designated service, or • ascertaining details relating to the designated services provided by the person at or through the permanent establishment in Australia

Sections 169 and 205 provide that self-incrimination is precluded as a reason for refusing to provide information under sections 167 and 202 respectively. However, sections 169 and 205 limit the use of that information, although section 205 allows for information to be used in a broader range of proceedings than section 169.

Admissibility	Section 169	Section 205
Civil	proceedings under the POC Act that relate to the AML/CTF Act	• proceedings under the AML/CTF Act • proceedings under the POC Act that relate to the AML/CTF Act
Criminal	proceedings for an offence against: • AML/CTF Act – Complying with the notice to produce / providing false or misleading information or documents • Criminal Code – Providing false or misleading information or documents	proceedings for an offence against: • the AML/CTF Act • the Criminal Code that relate to the AML/CTF Act

Objective of the proposed amendments

The proposed amendments to section 169 enhance AUSTRAC's ability to fulfill its statutory role as Australia's AML/CTF regulator and financial intelligence unit. In particular, the amendments allow AUSTRAC to use relevant information to sanction breaches of the AML/CTF Act and bring money laundering and terrorism financing charges under the Criminal Code.

The current inconsistency between the scope of sections 169 and 205 creates significant constraints for prosecuting serious offences under the Criminal Code and AML/CTF Act. As noted in the table above, section 167 notices can be issued to a broad range of persons or entities, but the information or documents obtained can only later be used in a narrow range of proceedings. Therefore, should AUSTRAC uncover pertinent material relating to criminal conduct through the ordinary exercise of its section 167 notice power, that evidence could not be adduced in later proceedings to prosecute money laundering or terrorism offences under the Criminal Code.

Section 202, which allows self-incriminating material to be used in a broader range of proceedings is not a substitute for section 167. It can only be issued to a person believed on reasonable grounds to be a reporting entity, which limits its utility. For example, AUSTRAC cannot use a section 202 notice to obtain information and documents from an entity that has had its registration suspended as they are no longer deemed to be a reporting entity once suspended – such a notice would need to be issued under section 167.

Given the significant threat posed to the Australian community by money laundering and terrorism financing, I consider that the proposed amendments fulfil a legitimate objective by closing an operational gap. The Australian Crime Commission's most recent public report on organised crime in Australia noted that money laundering is one of six 'intrinsic enablers' of serious and organised crime, with money laundering being carried out by 'most, if not all, organised crime groups'.[1] Money laundering is considered a 'critical risk because it enables serious and organised crime, it can undermine [Australia's] financial system and economy and it can corrupt individuals and businesses'.[2] AUSTRAC have noted that terrorism financing is a 'national security risk as it can directly enable terrorist acts both in Australia and overseas'.[3] To effectively combat these inherent risks, AUSTRAC must be able to efficiently and effectively exercise its enforcement powers. The proposed amendments achieve this objective.

AUSTRAC also considers that there is some uncertainty regarding its ability to use information and documents obtained under a section 167 notice in making administrative decisions. This is because those materials may later need to be adduced on administrative or judicial review, thereby engaging the privilege against self-incrimination contained in section 169. By rectifying the inconsistency between sections 169 and 205, this uncertainty will also be clarified.

Connection between the proposed amendments and the objective

There is a rational connection between the amendments and the objective outlined above. Currently, valuable information that potentially relates to serious criminal misconduct can only be used in very limited proceedings, being proceedings related to providing false or misleading information or failing to be supply information in accordance with the AML/CTF Act.

Consistency between sections 167 and 205 will allow AUSTRAC to more effectively utilise section 167 information and fulfil its role in enforcing compliance with the AML/CTF Act and combating money laundering and terror financing. AUSTRAC has indicated that it uses its powers under section 167 and 202 interchangeably, with the chief considerations being the type of person to whom the notice is to be issued, the nature of the information or documents

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[1] Australian Crime Commission, *Organised Crime in Australia 2015*, (ACC, 2015) 12.
[2] AUSTRAC, *Money Laundering in Australia*, (AUSTRAC, 2011) 5.
[3] AUSTRAC, *Terrorism financing in Australia 2014*, (AUSTRAC, 2014) 5.

sought and the admissibility of the materials received. Given that both powers can be issued to individuals and entities there is no apparent reason why these powers, which fulfil the same investigatory function, should be subject to two different regimes for determining privilege against self-incrimination.

Reasonableness and proportionality of the proposed amendments

I consider the proposed amendments to be a reasonable and proportionate response to the current limitations. As noted above, the amendments to section 169 maintain a use immunity for affected persons and only extend the range of proceedings from which the privilege is excluded to proceedings for offences that are directly related to AUSTRAC's functions. The power remains limited to use by the AUSTRAC CEO or an authorised officer, and can only be used where there is reasonable grounds to believe that the subject has information relevant to the operation of the AML/CTF Act.

The High Court has recognised the validity of abrogating the right against self-incrimination in some circumstances, noting that '[t]he legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained'.[4] The Queensland Law Reform Commission (QLRC) considers that an abrogation of the privilege 'may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community'.[5] The QLRC also concluded that '...if it is clear that the abrogation is likely to substantially promote the public interest, it is more likely that the abrogation can be justified'.[6]

A further point to note is that the majority of notices to produce issued by AUSTRAC are to reporting entities (through bodies corporate). From 1 July 2012 to 26 May 2015, AUSTRAC has issued three section 167 notices and 31 section 202 notices. All notices were issued to reporting entities. The ICCPR is focused on protecting the rights of the individual.
At common law, the High Court has concluded that corporations do not enjoy the protection of the privilege against self-incrimination. In particular, the Court has recognised the impracticality of extending the privilege given it would have a '...disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a criminal offence'.[7]

Offences against the AML/CTF Act and the Criminal Code as it relates to the AML/CTF Act (money laundering and terrorism financing) are serious crimes that pose a threat to the Australian community. Given the limited offences to which the extension applies, the serious nature of those offences and the safeguards that remain in place I consider the proposed additional restrictions on the privilege against self-incrimination in section 169 of the AML/CTF Act to be a justifiable limit on the right to a fair trial contained in Article 14 of the ICCPR.

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[4] Ibid 503.
[5] Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No 59, (2004) 54.
[6] Ibid.
[7] *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 504 (Mason CJ and Toohey J).

Mandatory minimum sentencing for trafficking in firearms

Committee comment (p. 38)

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

Minister for Justice's response

I note the recommendation of the Committee that Schedule 6 of the Bill be amended to confirm that the mandatory minimum sentence is not intended to be used as a sentencing guidepost, and that there may be significant difference between the non-parole period and the head sentence. Advice of this nature, designed to clarify to the judiciary the intent of the provision, is best suited to the Explanatory Memorandum, which I note already includes wording to this effect.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001280

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

Dear Mr Philip Ruddock

I refer to your letter of 18 March 2015 concerning the comments of the Parliamentary Joint Committee on Human Rights (the committee), in relation to the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

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

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

Yours sincerely

PETER DUTTON 21/4/15

Right to life

1.78 The committee considers that the conferral of power on [Immigration Detention Services Provider] IDSP officers to use force in immigration detention facilities on the basis of their reasonable belief engages and limits the right to life... the statement of compatibility has not, for the purposes of international human rights law, established that the measure is aimed at achieving a legitimate objective and, if so, whether it may be regarded as a proportionate means of achieving that objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The legitimate objectives of the proposed amendment are to protect the life, health or safety of any person in an immigration detention facility, or to maintain the good order, peace or security of an immigration detention facility. The Department of Immigration and Border Protection (the Department) and IDSP officers are responsible for people within immigration detention facilities, and the responsibility for providing public order management during critical incidents is a significant issue for the Department and IDSP officers. It is vital that officers have the clear power and authority to take necessary and proportionate measures to restore public order in detention centres. The amendment provides a certainty to officers that the common law and State and Territory legislation may be unable to provide in situations of urgency.

The threat of a large scale riot or other disturbance escalating out of control is a real possibility in some immigration detention facilities. The availability of the local police service to respond in a timely fashion cannot be guaranteed, placing detainees and others within the facility at real risk of harm should the response to the situation be delayed. The proposed amendment also, therefore, intends to protect the right to life of all people within immigration detention facilities, not just the person(s) against whom force may be used.

Strict safeguards will apply to the use of force in immigration detention facilities and will be spelled out in official Departmental instructions, policies and procedures.

Consistent with international human rights law, the Department requires that any use of force be necessary, reasonable and proportionate in the circumstances. All authorised officers will be trained accordingly to only apply force that is necessary, reasonable and proportionate to the threat being faced, and that is always at the minimum level required.

The Bill notes that an authorised officer may use such reasonable force against a person or thing as the authorised officer reasonably believes is necessary in the circumstances specified in the Bill. So both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable.

Official departmental instructions, policies and procedures will provide additional guidance and examples of what is considered reasonable. Similarly, the training that all authorised

officers must have completed prior to becoming authorised officers, will address what is reasonably necessary.

For these reasons, it is the Government's view that the proposed amendment is reasonable and proportionate and is compatible with the obligation to protecting a person's right to life.

Prohibition against torture, cruel, inhuman or degrading treatment

1.92 The committee considers that the use of force provisions in the bill as currently drafted are insufficiently circumscribed and risk empowering an authorised officer to use force against detainees in a way that may be incompatible with the prohibition on degrading treatment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the use of force provisions in the bill are sufficiently circumscribed to ensure that they are compatible with the prohibition on degrading treatment.

1.93 The committee considers that the basis for monitoring the use of force provisions and the bar on criminal proceedings in proposed section 197BF may limit the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the arrangements for monitoring the use of force and the bar on proceedings in proposed section 197BF are compatible with the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

Safeguards for the treatment of detainees

The Department will have in place policies and procedures, reflected in the IDSP contract, regarding the use of reasonable force in an immigration detention facility. These safeguards will ensure that the use of force:

- Will be used only as a measure of last resort;
- Must only be used for the shortest amount of time possible;
- Must not include cruel, inhuman or degrading treatment; and
- Must not be used for the purposes of punishment.

Conflict resolution (negotiation and de-escalation) must be considered and used before the use of force, wherever practicable. In practice, and wherever possible, de-escalating through engagement and negotiation will be the first response to maintain operational safety. Extensive guidance for authorised officers will be contained in policy and procedural documentation to ensure that a broad range of details and scenarios are canvassed in a format that is easily understood and accessed by operational staff. This guidance is also referenced in the IDSP contract.

All policy and procedural guidelines will be contained in the Department's Detention Services Manual and the Detention Operational Procedures. These documents are stored electronically in the Department's centralised departmental instructions system (CDIS) and in the Department's publicly available online subscription database (LEGEND). The IDSP incorporates these policies in their Policy and Procedure Manuals that are also approved by the Department.

Monitoring mechanisms

The Department has staff on duty or on call in all immigration detention facilities at all times. While this does not give the Department's staff the ability to monitor all activity at an immigration detention facility, it does give the Department general oversight of the activities of the IDSP and of the immigration detention facility.

In addition, the contract for the provision of immigration detention services requires IDSPs to report all incidents of the use of force in an immigration detention facility, from very minor incidents to critical incidents. Current contractual obligations require the IDSP to:

- Gain prior approval from the departmental regional manager for planned use of reasonable force;
- Video record the entire event when planned use of reasonable force is applied, retain these recordings in accordance with the *Archives Act 1983* and make them available to the Department within 24 hours of request;
- Verbally inform the Department immediately (no later than 60 minutes) on becoming aware of an instance of the unplanned use of reasonable force;
- Provide a written incident report for review by the Department within six hours of the Department being informed verbally;
- Internally audit one hundred percent of such incidents to continuously improve the IDSP's response to incidents; and
- Record the incident report in the Department's IT portal.

The Department will use this information to monitor and review the IDSP's compliance with the conditions of the contract and with its obligations under relevant legislation, policies and procedures.

On 10 November 2014, the Department established the Detention Assurance Team (DAT) to strengthen assurance in the integrity and management of immigration detention services. Operating independently of IDSPs and current contract management arrangements within the Department, the DAT is designed to:

- Provide advice to the Secretary of the Department and, from 1 July 2015, the Australian Border Force Commissioner on assurance in the management and performance of detention service providers;
- Undertake investigations and support commissioned inquiries into allegations of incidents in the onshore and offshore detention network, including investigation of inappropriate behaviour by staff of the IDSP;
- Monitor recommendations for improvement in detention contractor management processes and provide assurance that they are implemented and their effectiveness reviewed;
- Audit the effectiveness of contractual and other detention service performance measures;
- Ensure the effectiveness of integrity and other risk controls;
- Review detention practices for compliance against international conventions; and
- Identify trends and emerging issues in detention contract management and recommend strategies for improvement.

The DAT will be involved in the review of incidents of the use of force to identify operational, procedural and policy improvements applicable to the Departmental and IDSPs.

The Bill directly provides for a complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary of the Department about the exercise of the powers under new section 197BA to use reasonable force. Outside this internal process, if detainees would prefer to bring issues to the attention of external authorities and/or they believe that an issue that has been reported is not being dealt with effectively, there is capacity for detainees to bring any problems or complaints to the attention of external authorities, including police forces, the Commonwealth Ombudsman, the Australian Human Rights Commission, the Australian Red Cross or other advocacy groups. Within immigration detention facilities there is a comprehensive system in place to provide detainees with a variety of assistance and options to raise problems or make complaints regarding their immigration detention. On entering an immigration detention facility detainees are also provided with information about their rights to make a complaint and the avenues available to them to make such a complaint. This information is reinforced during induction sessions detainees undertake.

Detainees have access to telephone, facsimile, mail and photocopying services. Detainees are given reasonable access to communication services unless it presents a serious safety or security concern. Detainees are afforded the same level of privacy when communicating externally as they would have in the community. Neither the IDSP nor the Department may record, intercept, read, copy or otherwise listen to a person's communication without their explicit invitation.

Detainees can also contact Ministers of Parliament, State or Territory police, State or Territory welfare agencies and community groups to make a complaint about their immigration detention. This access to external bodies provides assurance that any issues from the perspective of a detainee will be open to scrutiny.

Finally, the public interest disclosure scheme (under the *Public Interest Disclosure Act 2013*) applies to immigration detention facilities. The public interest disclosure scheme operates to encourage public officials (which will include authorised officers in the immigration detention facility) to report suspected wrongdoing in the Australian public sector.
The public interest disclosure scheme allows public officials (which includes Commonwealth contracted service providers and authorised officers) who make a disclosure of suspected wrongdoing to be supported and protected from adverse consequences, and ensures that a disclosure is properly investigated and dealt with. The public interest disclosure scheme is an additional means by which any wrongdoing or other issue in an immigration detention facility regarding the use of force could come to light.

Section 197BF – bar on proceedings relating to immigration detention facilities

Proposed new section 197BF is intended to place a partial bar on the institution or continuation of proceedings in any Australian court against the Commonwealth in relation to the exercise of power under proposed section 197BA, where the power was exercised in good faith.

This does not, and is not intended to, bar all possible proceedings against the Commonwealth. Legal proceedings by way of judicial review are available in the High Court under section 75(v) of the Constitution. Further, it is always the case that Federal, State or Territory police may institute criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding this provision – it would be up to the court to determine whether this provision had any application in the particular circumstances.

As noted previously, proposed section 197BF contemplates that the Commonwealth will only have protection from criminal and civil action in all courts except the High Court if the power under proposed section 197BA is exercised in good faith. As a threshold question, the court would need to consider the following matters to decide if it has jurisdiction:

- Was the action complained about an exercise of power under proposed section 197BA?
- Did the authorised officer act in good faith in the use of reasonable force under proposed section 197BA?

If the use of reasonable force was not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF, and court proceedings could be instituted or continued.

Similarly, if a court decides that the use of reasonable force was not to:

- Protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
- Maintain the good order, peace or security of an immigration detention facility

then it is not captured by the partial bar in proposed section 197BF.

Further, if a court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer (for example).

As described above, there are a number of ways by which a misuse of the power to use reasonable force in proposed section 197BA may come to the attention of the Department or to a police force or other authority. This, in addition to the fact that the partial bar on proceedings is limited in its application, means that the Bill does not place a restriction on the police's capacity to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

For these reasons, it is the Government's view that this proposed amendment is compatible with the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment.

Right to humane treatment in detention

1.102 The committee considers that the use of force provisions limit the right to humane treatment in detention. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly, whether there are any less restrictive ways to achieve the objective, whether the training provided to authorised officers will be sufficient to minimise the risk of violation and**

whether there is adequate monitoring and supervision of the exercise of the use of force.

The Department considers that reasonable use of force is the least amount of force necessary to achieve the required outcomes, which are the legitimate objectives of protecting the life, health or safety of any person in an immigration detention facility, or of maintaining the good order, peace or security of an immigration detention facility. It is acknowledged that the use of force is a last resort, and this will be reflected appropriately in Departmental policy documents. Safeguards for the treatment of detainees require that force will not be used where there are less restrictive ways to achieve the legitimate objectives set out in proposed section 197BA, such as discussion, de-escalation or negotiation with possible subjects of the use of reasonable force. In the few cases where the reasonable use of force is required in accordance with proposed section 197BA, the authorised officer may be able to plan for its use, including contingency planning for a greater or lesser degree of reasonable force to be used if circumstances change. For example, the transfer of an uncooperative detainee from one precinct to another within an immigration detention facility should include a plan to use reasonable force if it becomes necessary; it is not a plan to use force as part of the transfer.

It will be the decision of the Minister to determine the training and qualification requirements for authorised officers. It is expected that the Minister, at a minimum, will require authorised officers to maintain current qualifications to enable them to use reasonable force.

Note that Tier 1 and Tier 2 IDSP officers are currently trained in the national unit of competency CPPSEC2017A 'Protect Self and Others using Basic Defensive Techniques'. This is also part of the required refresher training for these officers. This training is identified as providing the outcomes required to apply basic defensive techniques in a security risk situation and gives the ability to use basic lawful defensive techniques to protect the safety of self and others. The IDSP is expected to engage the assistance of the relevant police service to assist in managing escalated or high risk situations.

Any instance of any use of reasonable force and/or restraint must be reported pursuant to section 28 of the *Work Health and Safety Act 2011*. Under this provision every worker is required to:

- Take reasonable care for his or her own health and safety; and
- Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- Comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this act; and
- Co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

In addition, current contractual obligations require the IDSP to comply with a number of items intended to safeguard the use of reasonable force, as set out above under the discussion relating to the prohibition against torture, cruel, inhuman or degrading treatment on page 4.

The Department considers that disproportionate, excessive or inappropriate use of force is not authorised by this Bill. A person is not protected from legal action by the proposed section 197BF in relation to the use of such force. Any excessive or inappropriate use of force will incur the appropriate disciplinary action and expose the person to possible criminal prosecution.

Right to freedom of assembly

1.109 The committee considers that the use of force provisions limit the right to freedom of association. The statement of compatibility does not justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

The Government supports the right of an individual to engage in peaceful protest but does not condone participation in violent protests, particularly where the violent protest might impact on public order or the protection of the rights or freedoms of others.

At common law, those responsible for managing an immigration detention facility have a duty of care towards people within and in the vicinity of those premises. Those responsible for managing an immigration detention facility must have the legal authority to lawfully take appropriate action to ensure the safety and well-being of those people.

The Department considers that the prosed powers to be granted to authorised officers to enable them to use reasonable force to protect the life, health or safety of any person in an immigration detention facility, or to maintain the good order, peace and security of an immigration detention facility are reasonable and proportionate.

Bar on proceedings

1.122 The committee...considers that the bar on proceedings relating to the use of force in immigration detention facilities limits the right to an effective remedy. As set out above, the statement of compatibility does not address the limitation on the right to an effective remedy. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measure is compatible with the right to an effective remedy. In particular, the committee wishes to understand why it is necessary to provide immunity for the Commonwealth as a whole rather than personal immunity for the authorised officer, and what remedies (including compensation) are available to a person whose complaint about the use of force is substantiated.

The bar on proceedings in proposed section 197BF of the Bill is modelled on existing subsection 245F(9B) of the *Migration Act 1958* (the Migration Act). The definition of 'Commonwealth' is modelled on existing sections 494AA and 494AB of the Migration Act which concern a bar on certain legal proceeding relating to unauthorised maritime arrivals and transitory persons respectively.

The bar on proceedings will not result in aggrieved persons being unable to obtain an effective remedy.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Further, it is always the case that Federal, State or Territory police

may institute a criminal prosecution against an individual, for example for assault or other criminal conduct, notwithstanding this provision – it would be up to the court to determine whether this provision has any application in the particular circumstances. Police have access to immigration detention facilities and may be called to an incident by the IDSP, a detainee or a witness. This gives the police capacity to decide if a prosecution is warranted in the circumstances.

It is worth noting that the court will have the jurisdiction to consider the threshold issues of:

- If the use of reasonable force was an exercise of power under section 197BA; and
- If the power was exercised in good faith.

In circumstances where the use of reasonable force has been used in a manner that is not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. Similarly, in circumstances where the use of reasonable force has been found not to have been exercised in good faith, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

In less serious circumstances, where the use of reasonable force has been found to be exercised in good faith and the person has not suffered an injury but there is some other failing, there may be circumstances in which it is appropriate for the Department to provide details to the aggrieved person of any proposed changes to policy or procedure that may result from the incident, as part of the follow up to that incident to demonstrate that a situation or circumstance has been addressed.

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