

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

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.**

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.**

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.

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,

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

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

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 Joint 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 Joint 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

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.