Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-fifth report of the 44th Parliament

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Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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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 22 to 25 June 2015 and legislative instruments received from 29 May to 11 June 2015.

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

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

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

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

Bills not raising human rights concerns

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

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

- Acts and Instruments (Framework Reform) (Consequential Provisions) Bill 2015;
- Customs Tariff Amendment (Fuel Indexation) Bill 2015;
- Excise Tariff Amendment (Fuel Indexation) Bill 2015;
- Fuel Indexation (Road Funding) Bill 2015;
- Fuel Indexation (Road Funding) Special Account Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 2) Bill 2015;
- Tax Laws Amendment (Small Business Measures No. 3) Bill 2015;

- Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015; and
- Voice for Animals (Independent Office of Animal Welfare) Bill 2015.

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

- Aboriginal Land Rights (Northern Territory) Amendment Bill 2015;
- Australian Defence Force Cover Bill 2015;
- Australian Defence Force Superannuation Bill 2015;
- Australian Government Boards (Gender Balanced Representation) Bill 2015;
- Civil Law and Justice (Omnibus Amendments) Bill 2015;
- Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015;
- Higher Education Support Amendment (New Zealand Citizens) Bill 2015;
- Social Security (Administration) Amendment (Consumer Lease Exclusion) Bill 2015; and
- Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015.

Instruments not raising human rights concerns

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

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

Deferred bills and instruments

1.11 The committee has deferred its consideration of the Shipping Legislation Amendment Bill 2015.

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]

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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.

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]

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).

New matters

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 24 June 2015

Purpose

1.14 The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the bill) proposes to amend the *Australian Citizenship Act 2007* (Citizenship Act) to expand the basis on which a dual citizen's Australian citizenship will cease. The bill includes two broad bases on which the citizenship of dual nationals will cease:

(a) Automatic cessation on the basis of conduct:

- if the person engages in specified conduct; or
- if the person fights for, or is in the service of, a declared terrorist organisation; and

(b) Automatic cessation on the basis of conviction:

- if the person is convicted of a specified offence.

1.15 The bill also provides that the minister may revoke the citizenship of a child of a parent whose citizenship has automatically ceased under any of these new provisions.[1]

1.16 Proposed new section 33AA operates so that a dual Australian citizen will automatically cease to be an Australian citizen if they engage in specified conduct, as defined in the *Criminal Code Act 1995* (Criminal Code) such as:

- engaging in international terrorist activities using explosive or lethal devices;[2]
- engaging in a terrorist act;[3]
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;[4]
- directing the activities of a terrorist organisation;[5]
- recruiting for a terrorist organisation;[6]

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1 See amendments in item 6 of the bill to paragraph 36(1)(a) of the Citizenship Act.

2 See section 72.3 of the Criminal Code.

3 See section 101.1 of the Criminal Code.

4 See section 101.2 of the Criminal Code.

5 See section 102.2 of the Criminal Code.

- financing terrorism;[7]
- financing a terrorist;[8] and
- engaging in foreign incursions and recruitment.

1.17 The term 'engaging in foreign incursions and recruitment', includes:

- entering a foreign country with the intention of engaging in hostile activity, engaging in, or preparing to engage in, hostile activity (which includes intending to overthrow by force or violence the government of a foreign country; intimidating the public of a foreign country; and unlawfully destroying or damaging property belonging to the government of a foreign country);[9]
- entering or remaining in an area declared by the Foreign Affairs Minister;[10]
- providing or receiving military training (or being present at a meeting intending to provide or receive training), in order to prepare for engaging in hostile activity;[11]
- giving money, goods or services with the intention of supporting or promoting the offence of engaging in hostile activity;[12]
- allowing a building to be used to hold a meeting with the intention of committing, supporting or promoting military training or the giving of money or goods to support or promote engagement in hostile activity;[13] and
- publishing an advertisement or an item of news (for money or other consideration) and either being reckless as to whether it is for the purpose of recruiting persons to serve in any capacity with foreign armed forces; or the advertisement or news item contains information relating to where applications or information can be sought regarding serving with the armed forces in a foreign country; or relating to how a person can travel to another country in order to serve with the armed forces of a foreign country.[14]

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6 See section 102.4 of the Criminal Code.

7 See section 103.1 of the Criminal Code.

8 See section 103.2 of the Criminal Code.

9 See section 119.1 and 119.4 of the Criminal Code.

10 See section 119.2 of the Criminal Code.

11 See subsections 119.4(3) and (4) of the Criminal Code.

12 See subsection 119.4(5) of the Criminal Code.

13 See section 119.5 of the Criminal Code.

14 See section 119.7 of the Criminal Code.

1.18 Under proposed section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of one of 57 offences under either the Criminal Code or the *Crimes Act 1914* (Crimes Act). In addition to the type of conduct that will give rise to automatic cessation of citizenship under proposed section 33AA, citizenship will also cease following conviction for numerous offences, including:

- knowing that another person intends to commit treason (including harming the Prime Minister) and failing to inform the police within a reasonable time;[15]
- advocating terrorism and being reckless as to whether another will engage in a terrorist act or commit a terrorist offence (this includes advocating that someone make an asset available to a proscribed person under the *Charter of the United Nations Act 1945*);[16]
- communicating or making available (or recording or copying) information concerning the security or defence of Australia or another country without lawful authority and intending to give an advantage to another country's security or defence;[17]
- making funds directly or indirectly available to another person and being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act;[18]
- destroying, damaging or impairing any article used by the Defence Force or in connection with the manufacture of weapons of war, where 'from the circumstances of the case, from his or her conduct or from his or her known character as proved' it appears the intention was to prejudice the safety or defence of Australia;[19]
- assisting prisoners of war to escape;[20] and
- intentionally destroying or damaging any property belonging to the Commonwealth.[21]

1.19 Under subsections 33AA(6) and 35A(6), the Minister for Immigration and Border Protection must give written notice to an Australian citizen whose conduct or

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15 See paragraph 80.1(2)(b) of the Criminal Code.

16 See section 80.2C of the Criminal Code and the definition of terrorism offence in subsection 3(1) of the Crimes Act.

17 See section 91.1 of the Criminal Code.

18 See section 103.2 of the Criminal Code.

19 See section 24AB of the Crimes Act.

20 See section 26 of the Crimes Act.

21 See section 29 of the Crimes Act.

conviction has resulted in the cessation of their citizenship, as soon as the minister becomes aware of that conduct. The minister may also either rescind this notice or exempt the person from the effect of these sections if he or she considers it in the public interest to do so. The bill provides that the minister's powers are personal, non-compellable and the rules of natural justice do not apply.

1.20 The amendments in the bill will apply to all Australian citizens holding dual citizenship, regardless of how the person became an Australian citizen. Accordingly, the provisions will not render a person stateless.

1.21 A person who has lost their citizenship under the provisions in the bill is prohibited from ever obtaining Australian citizenship again unless the minister allows it.

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

Background

1.23 This analysis of the bill's engagement of human rights consists of three parts:

- Part 1 considers the bill's engagement of substantive human rights (such as the right to freedom of movement) flowing from the loss of citizenship under the bill. This part of the analysis considers the loss of citizenship by both conduct and conviction together, as the consequences of loss of citizenship is the same regardless of the method by which the individual's citizenship is lost.
- Part 2 of the analysis considers the bill's engagement of procedural or process rights (right to a fair hearing, right to a fair trial and right to an effective remedy). This part of the analysis considers provisions providing for the automatic loss of citizenship from conduct, separately from the loss of citizenship on conviction, as the measures engage the process and procedural rights in different ways.
- Part 3 considers how the measures particularly impact on children, both in terms of the substantive loss of citizenship provisions and the provision that gives the minister the power to remove the citizenship of a child whose parents have lost their citizenship.

Part 1—Substantive human rights engaged by the bill

Automatic cessation of citizenship

1.24 As set out above, the bill seeks to amend the Citizenship Act to expand the basis on which Australian citizenship will cease. The bill includes two broad bases on which the citizenship of dual nationals will cease: automatic cessation on the basis of conduct and automatic cessation on the basis of conviction.

1.25 Currently under the Citizenship Act, citizenship can be lost in limited circumstances. The principal exception to this is section 35 of the Citizenship Act which allows for automatic cessation of citizenship if the person serves in the armed

forces of a country at war with Australia. This provision has never been used to deprive a person of citizenship.

1.26 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.

Multiple rights

1.27 The proposed cessation of citizenship provisions engage and may limit the following human rights and human rights standards:

- right to freedom of movement;[22]
- right to a private life;[23]
- protection of the family;[24]
- right to take part in public affairs;[25]
- right to liberty;[26]
- obligations of non-refoulement;[27]
- right to equality and non-discrimination;[28]
- right to a fair hearing and criminal process rights;[29]
- prohibition against retrospective criminal laws;[30]
- prohibition against double punishment;[31]
- rights of children;[32]
- right to work;[33]

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22 Article 12 of the International Covenant on Civil and Political Rights (ICCPR).

23 Article 17 of the ICCPR.

24 Articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

25 Article 25 of the ICCPR.

26 Article 9 of the ICCPR.

27 Articles 6 and 7 of the ICCPR and the Convention Against Torture (CAT).

28 Article 26 of the ICCPR.

29 Article 14 of the ICCPR.

30 Article 15 of the ICCPR.

31 Article 14(7) of the ICCPR.

32 Convention on the Rights of the Child (CRC).

33 Articles 6, 7 and 8 of the ICESCR.

- right to social security;[34]
- right to an adequate standard of living;[35]
- right to health;[36] and
- right to education.[37]

1.28 While the cessation of citizenship may affect numerous human rights, the analysis focuses on the immediate consequences of loss of citizenship and does not consider the broader economic, social and cultural rights which may be limited as a consequence of loss of citizenship.[38]

1.29 As set out above, this Part 1 of the analysis considers the impact of the bill as a whole on the substantive human rights engaged, without distinguishing how citizenship is lost (i.e. if it is an automatic loss on the basis of conduct or on the basis of conviction).

Right to freedom of movement (right to leave any country)

1.30 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 leave any country. The right may be restricted in certain circumstances.

Compatibility of the measures with the right to freedom of movement (right to leave any country)

1.31 The automatic loss of an Australian's citizenship engages and limits their right to freedom of movement, including the right of a person to leave any country.

1.32 The statement of compatibility acknowledges the right is engaged but considers that it is nevertheless not limited because:

> ….the person is a dual citizen, either a travel document from the person’s other country of nationality, a temporary document issued by Australia, or some other facility could potentially be used.[39]

1.33 However, this analysis assumes that the person's other country of nationality would issue (or has previously issued and would not cancel) a passport or the person

34 Article 9 of the ICESCR.

35 Article 11 of the ICESCR.

36 Article 12 of the ICESCR.

37 Article 13 and 14 of the ICESCR and article 28 of the CRC.

38 For example, full access to a range of benefits, such as social security, health care, education and work rights, may only be available to citizens (or those holding permanent residency visas) and loss of citizenship, and a consequential loss of a right to full residence in Australia, would constitute a limit on the ex-citizen's economic, social and cultural rights.

39 Explanatory Memorandum (EM), Attachment A, 29.

is in a situation where they could apply for alternative travel documents. For those whose citizenship ceases when they are outside Australia, and in a country which they do not hold nationality, their right to leave another country may be particularly limited in the absence of any valid travel documents.

1.34 In addition, if a person is in Australia at the time it is recognised that their citizenship ceases, they are entitled to an ex-citizen visa. This visa allows them to remain in Australia but it prohibits any travel from Australia as a person who leaves Australia on an ex-citizen visa loses any entitlement to return to Australia.

1.35 Accordingly, the automatic cessation of citizenship clearly engages and limits the right to freedom of movement (right to leave any country).

1.36 For a limitation on a right to be justifiable, it is necessary to demonstrate that the measure seeks to achieve a legitimate objective, the measure is rationally connected to that objective and is a proportionate means of achieving the stated objective.

1.37 The statement of compatibility states that the legitimate objective of the bill, in effectively stripping someone of citizenship, is to ensure the safety of the Australian community. It does not assess whether the measures are rationally connected, or proportionate, to this objective.

1.38 Under international human rights law, ensuring the safety of the community would be considered a legitimate objective provided that such an objective is founded on reasoned and evidence-based explanations of why the measures address a pressing or substantial concern. As the Attorney-General's Department's guidance on the preparation of statements of compatibility states, the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.

1.39 The statement of compatibility does not provide reasoning or evidence that the measures support a pressing or substantial concern. Instead the statement of compatibility contains statements about 'threat[s] to Australian security', 'Australia's national security', 'security and safety considerations of Australians', 'necessary to ensure the integrity of the citizenship programme' and the 'protection of the Australian community'.[40] No evidence is given of what these threats are, beyond references to 'existing and emerging threats to national security' and reducing the possibility of a person engaging in acts or further acts that harm Australians or Australian interests.[41]

1.40 In order to determine that the bill pursues a legitimate objective the legislation proponent needs to provide evidence and reasoning as to the nature of the threat to national security including information about how many people are

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40 EM, Attachment A, see 29, 33, 34 and 35.

41 EM, Attachment A, 28.

likely to be affected by the cessation of citizenship powers and why existing methods of keeping the community safe and protecting national safety are insufficient.

1.41 In addition, if it were assumed that the bill pursued a legitimate objective, it is not clear that the automatic cessation of citizenship is rationally connected to that objective, that is that the measures are likely to be effective in achieving the objective being sought. The automatic cessation of citizenship applies to a very broad range of activities, many of which do not appear to fall within the description of 'serious terrorism-related activities'.[42] For example, citizenship will automatically cease in relation to the following activities:

- damaging Commonwealth property;[43]
- damaging property belonging to the government of a foreign country (or entering a country with the intent of damaging such property);[44]
- entering or remaining in a declared area (with no requirement for any intent to carry out unlawful activity);[45]
- publishing an item of news (for consideration of any kind) which relates to how a person can travel to another country in order to serve with the armed forces of a foreign country (including the legitimate forces of an ally);[46] and
- damaging Defence Force property.[47]

1.42 It is not clear that removing citizenship from a person who has damaged property or who has published an item of news would protect national security or the Australian community.

1.43 In addition, in order for a limitation on a right to be justifiable, it needs to be demonstrated that the measures are proportionate to the objective sought to be achieved. It is not clear that the measures, in automatically depriving a person of citizenship in relation to a broad range of circumstances, can be said to be proportionate. In order to be proportionate a limitation on a right must be the least rights restrictive means of achieving a legitimate objective and must include appropriate safeguards.

1.44 As set out above, the bill would remove citizenship automatically on the basis of a broad range of conduct thus limiting the right to freedom of movement

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42 See Second Reading Speech, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, 24 June 2015.

43 See section 29 of the *Crimes Act 1914* (Crimes Act).

44 See section 119.1 and 119.4 of the Criminal Code.

45 See section 119.2 of the Criminal Code.

46 See section 119.7 of the Criminal Code.

47 See section 24AB of the Crimes Act.

(right to leave any country). As listed above at paragraphs [1.15] to [1.18] and [1.41], there are numerous listed offences for which citizenship will automatically cease which are not related to terrorism or national security. The statement of compatibility justifies the cessation of citizenship on the basis that the person, in engaging in such conduct, has repudiated their allegiance to Australia.[48] However, not all of the types of conduct that will cause citizenship to cease would appear to reflect a repudiation of allegiance, for example, graffitiing Commonwealth property or damaging Defence Force property. Accordingly, the measure appears significantly broader than necessary.

1.45 In addition, the loss of citizenship is automatic. The only exception is in circumstances where the minister exercises his discretion to exempt a person. This power is personal, non-delegable and not subject to the rules of natural justice. This would not appear a robust safeguard to ensure that individuals do not lose their citizenship and thus freedom of movement in circumstances that would be unjust.

1.46 The loss of citizenship is also permanent. A person who has lost their citizenship is ineligible under section 36A, to resume citizenship at any time. This permanency underlies the extraordinary nature of the provisions, particularly as many of the offences for which citizenship may be lost carry a maximum prison term of no more than 5 years under the Criminal Code. The statement of compatibility does not explain how such a measure is proportionate to the legitimate objective.

1.47 In terms of safeguards, the automatic cessation of citizenship, would occur at the time conduct occurred and not on the basis of a conviction. Accordingly, there may be a genuine contest as to whether or not that conduct has in fact occurred. An individual may have their freedom of movement limited, not only in the absence of a conviction, but prior to or during their attempt to challenge whether the conduct occurred. How this is reasonable and proportionate is not explained in the statement of compatibility.

1.48 Further, the bill expressly excludes section 39 of the *Australian Security Intelligence Organisation Act 1979*. This provision provides that a Commonwealth agency must not take any action on the basis of any communication from ASIO that does not amount to a security assessment. Accordingly, the effect of the bill is that a Commonwealth agency can act on preliminary ASIO information that is less certain than a security assessment when determining whether someone is an Australian citizen or whether in fact they have lost that citizenship based on conduct outlined by ASIO. In practice, a decision may be made that a person has lost their citizenship on the basis of supposition and conjecture as to whether they may have engaged in specified conduct. This could apply when the person is not in Australia and not in a practical position to challenge the lawfulness or correctness of this decision.

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48 EM, Attachment A, 28.

1.49 **The committee's assessment of the automatic cessation of citizenship powers against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) raises questions as to whether restricting the freedom of movement of a person deprived of citizenship is justifiable.**

1.50 **As set out above, the automatic cessation of citizenship engages and limits 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 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. In particular, how many people are likely to be affected by these measures and why existing laws and powers are insufficient to protect national security and the safety of the Australian community;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to effectively decide that a person's citizenship has ceased and whether this is the least rights restrictive approach. In addition, specific advice is sought in relation to each of the following offences or conduct, as to how each offence operates in practice and whether it is proportionate that citizenship should cease on the basis of each offence or conduct:**
    - **engaging in foreign incursions and recruitment as defined in Division 119 of the Criminal Code (with specific information given in relation to each offence provision in Division 119);**
    - **sections 80.1(2), 80.2, 80.2A, 80.2B, 80.2C, 91.1, 102.6(2), 102.7(2), 103.1, 103.2 of the Criminal Code; and**
    - **sections 24AB, 27 and 29 of the Crimes Act.**

1.51 **The committee also seeks the minister's advice on these questions regarding each of the human rights set out in Part 1 below (articles 9, 12, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights).**

Right to freedom of movement (right to enter one's 'own country')

1.52 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to enter one's own country—including a right to remain in the country, return to it and enter it. 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.

1.53 There are few, if any, circumstances in which depriving a person of the right to enter their own country could be justified. Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

Compatibility of the measure with the right to freedom of movement (right to enter one's own country)

1.54 The statement of compatibility acknowledges that the right to enter one's 'own country' could apply to people whose citizenship has ceased:

> While a person whose citizenship has ceased or has been renounced would no longer be a citizen under Australian law, under international law Australia may still be considered their 'own country' for the purposes of Article 12(4). The phrase 'his own country' has been interpreted broadly by the UN Human Rights Committee and the drafting history of the provisions supports the interpretation that 'own country' goes beyond mere nationality.[49]

1.55 This is consistent with recent views expressed by the UN Human Rights Committee (HRC), including in relation to Australia. In *Nystrom v. Australia*[50] the HRC interpreted the right to freedom of movement under article 12(4) of the ICCPR as applying to non-citizens where they had sufficient ties to a country, and noting that 'close and enduring connections' with a country 'may be stronger than those of nationality'.[51]

1.56 In this context, the interpretation of 'own country' is clearly one that imports a significantly broader meaning to the phrase than the term 'citizenship'. As such, even if a person has a second citizenship, if they are deprived of their Australian citizenship in circumstances where Australia is their 'own country' they would have a right to remain in, and return to, Australia.

1.57 The statement of compatibility states that the 'own country' provisions do not apply in relation to a person whose citizenship has automatically ceased by their own conduct as by those very actions that person will have repudiated their allegiance to Australia and any ties they may have to Australia will have been voluntarily severed.[52]

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49 EM, Attachment A, 29.

50 See *Nystrom v Australia*, (1557/07), UN Human Rights Committee, 18 July 2011 (*Nystrom*).

51 *Nystrom* at [7.4]. The HRC subsequently affirmed this view in *Warsame v Canada* (1959/2010), UN Human Rights Committee, 21 July 2011.

52 EM, Attachment A, 29.

1.58 However, the automatic cessation of citizenship provisions do not require a person to specifically repudiate their citizenship of Australia – rather, the provisions operate automatically (including in relation to the commission of offences which would not appear to result in the repudiation of allegiance, such as that of damaging government property).[53] Accordingly, the statement of compatibility provides insufficient information to demonstrate that the 'own country' provisions do not apply.

1.59 The statement of compatibility goes on to assess the compatibility of the measure should a person still be able to consider Australia their 'own country':

> Should circumstances arise where a person whose citizenship has ceased or has been renounced can properly consider Australia to be "his [or her] country", depriving them of the right to enter Australia would not be arbitrary. It would be based on a genuine threat to Australia's security posed by a person who is fighting on behalf of or is in the service of a terrorist organisation or is convicted of particular terrorism-related offences and has repudiated their allegiance to Australia. The cessation or renunciation of Australian citizenship (**thereby preventing return to Australia**) is, in the Government's view, proportionate to the legitimate goal of ensuring the security of the Australian community.[54]

1.60 It is clear from the statement of compatibility that the intention is to exclude Australian citizens who are outside Australia at the time their citizenship ceases from being able to return to Australia. This clearly limits the right to return to one's own country. The UN Human Rights Committee has said, in relation to limitations on the right to return to one's own country:

> **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.[55]

1.61 It therefore seems difficult to justify depriving an Australian who has become an 'ex-citizen' as a result of conduct that is deemed to result in automatic loss of citizenship of the right to return to Australia. It is clear that the deprivation of citizenship therefore engages and limits the right to freedom of movement, and as such this limitation needs to be justified. Much of the analysis at paragraphs [1.36] to [1.48] in relation to the legitimate objective, rational connection and proportionality

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53 See proposed section 35A of the bill which provides that citizenship ceases if a person is convicted of an offence against section 29 of the Crimes Act, which makes it an offence to damage property belonging to the Commonwealth.

54 EM, Attachment A, 29, emphasis added.

55 Human Rights Committee, *General Comment 27, Freedom of Movement*, 1999, [21], emphasis added.

of the measures applies equally (and even more forcefully given the UN Human Rights Committee's statement that there are few circumstances in which it could be reasonable to deprive a person of access to their own country) in relation to this aspect of the right to freedom of movement.

Right to a private life

1.62 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.63 A private life is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.64 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to a private life

1.65 The statement of compatibility makes no reference to the right to a private life. However, there is a strong argument that the bill engages and limits the right to a private life. The term 'private life' has been interpreted broadly, encompassing notions of a person's identity, which has been said to be linked to a person's nationality.

1.66 The European Court of Human Rights, in interpreting the right to a private life, has stated:

> [T]he concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity…the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under [the right to a private life] because of the impact of such a denial on the private life of the individual.[56]

1.67 The United Kingdom Joint Committee on Human Rights, when examining the United Kingdom's laws enabling citizenship to be removed, stated that 'nationality is

56 *Genovese v Malta*, European Court of Human Rights, Application no. 5314/09, 11 November 2011. This is based on article 8 of the European Convention on Human Rights which is in substantially similar terms to article 17 of the ICCPR.

part of a person's identity and therefore, potentially at least, their private life'.[57] The United Kingdom government acknowledged in its supplementary memorandum on the bill that gave additional powers to the Secretary of State to strip a person of citizenship, that 'deprivation of citizenship is capable of engaging [the right to a private life]'. The United Kingdom government referred to the case of *Genovese v Malta* cited above and concluded:

> This is because nationality is part of a person's identity and, therefore, potentially their private life. This applies to all deprivation, not just deprivation rendering some stateless.[58]

1.68 Accordingly, the deprivation of citizenship therefore engages and limits the right to a private life, and as such this limitation needs to be justified. The analysis at paragraphs [1.36] to [1.48] in relation to the legitimate objective, rational connection and proportionality of the measures applies equally in relation to the limitations on the right to a private life.

Protection of the family

1.69 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, is entitled to protection.

1.70 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

1.71 The statement of compatibility acknowledges that the right to the protection of the family is engaged by the bill:

> The cessation or renunciation of the Australian citizenship of a parent may engage the right of a child to be cared for by his or her parents in Article 7(1) and the right to family in Article 23(1). However, they would only be engaged in circumstances where the actions of the parent whose citizenship has ceased or been renounced casts serious doubt on their

57 UK Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (second report), Twelfth Report of Session 2013-14*, 26 February 2014, available at: http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/142.pdf.

58 Immigration Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, January 2014, [12], available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf.

> suitability as a parent, and where the safety and security considerations and Australia's national security are likely to justify a limitation of the right.
>
> The right to family may also be engaged in circumstances without children, for example in circumstances where a husband's Australian citizenship ceases or renounces but his wife's citizenship does not. The Government has considered this right and has assessed that the security and safety considerations of Australians and national security outweigh the rights of the individuals affected.[59]

1.72 As set out above, the offences and conduct for which citizenship will automatically cease is extremely broad and does not support the generalised and emotive statement that such conduct 'casts serious doubts on their suitability as a parent'. For example, damaging property (including graffiti) or travelling to a location declared to be off limits by the Minister for Foreign Affairs does not necessarily suggest that such a person is not a suitable parent, or whether it is reasonable and proportionate to separate that person from their family.

1.73 The statement of compatibility appears only to identify the objective of the measure—being security and safety considerations—and does not assess the question of rational connection or, importantly, the proportionality of the measures. In particular, no information is given as to whether due consideration will be given to maintaining the family unit when decisions are made to deny an ex-citizen re-entry to Australia or to deport a person from Australia.

1.74 In addition, the analysis at paragraphs [1.36] to [1.48] in relation to the legitimate objective, rational connection and proportionality of the measures applies equally in relation to the limitations on the right to protection of the family.

Right to take part in public affairs

1.75 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. The right to take part in public affairs applies only to citizens.

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

1.76 One of the consequences of losing citizenship is that a person who was previously entitled to the right to take part in public affairs would be denied that right. Aside from the right to vote, this also results in a person not being entitled to stand for public office or to hold positions in the public service. The statement of compatibility does not assess the effect of the cessation of citizenship on the right to take part in public affairs.

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59 EM, Attachment A, 33-34.

Right to equality and non-discrimination

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

1.78 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.

1.79 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[60] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[61] 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.[62]

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

1.80 The statement of compatibility states the right to equality and non-discrimination is engaged by these measures, but states that any limitation on this right is justifiable on the following bases:

> Differentiation on the basis of dual nationality is the consequence of obligations relating to statelessness, and as such represents a measure of extra protection for those without dual nationality, rather than a means of possibly selecting those who may be subject to the new provisions.
>
> The broader differentiation at the heart of the cessation and renunciation amendments, i.e. that by acting against the interests of Australia by choosing to engage in terrorism, they have evidently repudiated their allegiance to Australia, thereby renouncing their Australia citizenship, is proportionate to the seriousness of the conduct.[63]

1.81 However, aside from the direct discrimination on the basis of dual nationality, there is also the possibility of indirect discrimination on the basis of race or religion.

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60 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.

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

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

63 EM, Attachment A, 32.

1.82 International human rights law recognises that a measure may be neutral on its face but in practice have a disproportionate impact on groups of people with a particular attribute such as race, colour, sex, language, religion, political or other status. Where this occurs without justification it is called indirect discrimination.[64] Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice.

1.83 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

1.84 The statement of compatibility did not address the issue of indirect discrimination, and in relation to direct discrimination, simply stated that the cessation of citizenship was proportionate to the seriousness of the conduct, without providing any analysis about how it is proportionate (given the range of offences it applies to). It is not clear whether these measures would impact disproportionately on persons from a particular race or religion.

Right to liberty and obligations of non-refoulement

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

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

1.87 Article 9 applies to all forms of deprivations of liberty, including immigration detention.

1.88 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are

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

found not to be refugees.[65] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[66]

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

1.90 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[67]

Compatibility of the measures with the right to liberty and Australia's non-refoulement obligations

1.91 The statement of compatibility explains that a person whose citizenship ceases under these provisions and who is in Australia at the time their citizenship ceases, acquires an ex-citizen visa by operation of law.[68] This is a permanent visa allowing the holder to remain in, but not re-enter, Australia. It is subject to cancellation at any time. The statement of compatibility also explains that expulsion from Australia may be the outcome of a process that begins with cessation of citizenship.[69] The statement of compatibility states that this is most likely under section 189 of the *Migration Act 1958* (Migration Act) (but presumably this should read section 198), which provides that an unlawful non-citizen can be removed from Australia.

1.92 The statement of compatibility identifies that removal may be a consequence of the cancellation of citizenship, but states:

> any decision to remove a person from Australia may be the result of decisions about visas following the automatic cessation or renunciation of citizenship in this circumstance, it is clearly linked to compelling reasons of

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65 CAT article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.

66 See Refugee Convention article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

67 ICCPR article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 513.

68 See section 35 of the Migration Act.

69 EM, Attachment A, 30.

national security. Judicial pathways would be available for the review of such decisions.[70]

1.93 The statement of compatibility does not identify that the automatic cancellation of citizenship engages and may limit the right to liberty and the obligations of non-refoulement.

1.94 The right to liberty is engaged by the automatic cancellation of citizenship as it appears likely that any person whose citizenship has ceased because of having engaged in, or been convicted of, specified conduct, is likely to have their ex-citizen visa cancelled on character grounds. Following cancellation of this visa the ex-citizen would then be subject to mandatory immigration detention pending their deportation.

1.95 The detention of a non-citizen on cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, as the committee has previously noted, there may be situations where the detention could become arbitrary under international human rights law.[71] This is most likely to apply in cases where the person cannot be returned to their country of nationality on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). This may apply to ex-citizens who have had their citizenship cancelled on the basis of having engaged in specified conduct and whose country of dual nationality may be unwilling to allow the person entry.

1.96 Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. It is the blanket and mandatory nature of detention for those whose visa has been cancelled but to whom Australia cannot deport that makes such detention arbitrary. In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that invokes the right to liberty in article 9 of the ICCPR.

1.97 In addition, even if a person can be deported to their country of dual nationality or a third country, deportation in certain situations may raise concerns around Australia's obligations of non-refoulement. As set out at paragraphs [1.88] to

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70 EM, Attachment A, 30.

71 For example, see *A v Australia* (Human Rights Committee Communication No. 560/1993) and *C v Australia* (Human Rights Committee Communication No. 900/1999). See also *F.K.A.G et al v Australia* (Human Rights Committee Communication No. 2094/2011) and *M.M.M et al v Australia* (Human Rights Committee Communication No. 2136/2012).

[1.90], Australia has an obligation not to return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[72] These obligations are absolute and may not be subject to any limitations.

1.98 There is nothing in Australian law that would prevent an unlawful non-citizen, including ex-citizens, from being removed to a place where they may face persecution. Rather, section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

1.99 The obligation of non-refoulement and the right to an effective remedy requires an opportunity (before removal) for effective, independent and impartial review of the decision to expel or remove.[73] Applied to the Australian context, there is no provision for merits review in relation to removal of non-citizens from Australia. Rather, access is only to judicial review which represents a considerably limited form of review, allowing 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.

1.100 Accordingly, in the Australian context, judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not relate to whether that decision was correct or preferable. The ineffectiveness of judicial review is particularly apparent when considered against the purpose of effective review of non-refoulement decisions under international law, which is to 'avoid irreparable harm to the individual'.

1.101 **The committee's assessment of the automatic cessation of citizenship powers against articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) (obligations of non-refoulement) raises questions as to whether depriving a person of citizenship, and therefore potentially exposing them to deportation, is compatible with Australia's**

72 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

73 Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7] and *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000. See also *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006)) [11.8].

non-refoulement obligations, given the lack of statutory protection and lack of 'independent, effective and impartial' review of decisions to remove a person.

1.102 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the cessation of citizenship provisions and decisions to remove an ex-citizen will be subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.**

Part 2 – Procedural and process rights

1.103 Part 2 addresses procedural and process rights in relation to proposed powers to automatically remove citizenship.

1.104 As discussed above, the enjoyment of a range of rights and entitlements under Australian law is tied to Australian citizenship. The processes by which citizenship may be stripped, and the safeguards that exist in relation to this process, are therefore of great importance to the question of compatibility with human rights.

1.105 The proposed provisions for the loss of citizenship engage and limit a number of procedural and process rights including:

- the right to a fair trial;
- the right to a fair hearing; and
- the right to an effective remedy.

1.106 Each measure which removes the citizenship of adults are addressed in turn. Particular human rights concerns in relation to loss of a child's citizenship are set out in Part 3 below.

Automatic loss of citizenship through conduct

1.107 As noted at [1.16] to [1.17] above, under proposed section 33AA a dual Australian citizen will automatically lose their Australian citizenship if they engage in specified conduct.

1.108 In addition, under new subsection 35(1) a person automatically ceases to be an Australian citizen if the person is a dual national and the person, outside of Australia, serves in the armed forces of a country at war with Australia or fights for, or is in the services of, a declared terrorist organisation. A 'declared terrorist organisation' is any terrorist organisation as defined by the Criminal Code and declared by the Minister for Immigration and Border Protection.

Right to a fair hearing

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

Compatibility of the measure with the right to a fair hearing

1.110 The statement of compatibility states that the right to a fair hearing is not limited by the measure as:

> The proposal does not limit the application of judicial review of decisions that might be made as a result of the cessation or renunciation of citizenship. 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. A person also has a right to seek declaratory relief as to whether the conditions giving rise to the cessation have been met.[74]

1.111 However, the statement of compatibility does not fully explain how the availability of judicial review and the potential for declaratory relief would be sufficient for compatibility with the right to a fair hearing.

1.112 The statutory scheme for judicial review in Australia is the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), and represents a considerably limited form of review in that it allows a court to consider only whether a decision was lawful (that is, was within the power of the decision maker).

1.113 However, the construction of the proposed provisions mean that it is unclear that the minister does in fact make a decision to remove a person's citizenship. Rather, a person's citizenship is automatically lost from the time an individual engages in any of the conduct outlined above under proposed section 33AA or 35(1).

1.114 Given this, it appears very unlikely that the ADJR Act will apply to the automatic loss of citizenship under section 33AA or 35(1).

1.115 However, an individual whose citizenship has been lost may still seek declaratory relief from a court. A declaration by a court is not 'judicial review' as commonly understood in the Australian context, but rather a statement of the law or of the rights and duties of a party,[75] and in the present case would presumably require the court to consider whether or not the conduct leading to the automatic loss of citizenship had actually occurred. The court could therefore, in effect, declare that an individual's citizenship was never lost.

1.116 However, it should be noted that there is significant uncertainty as to how an application for declaratory relief in relation to the automatic loss of citizenship would operate in practice.

1.117 This is because of the unusual construction of proposed section 33AA and amended section 35, whereby particular conduct is deemed to be a renunciation of citizenship, with the consequent automatic loss of citizenship. This mechanism is to

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74 EM 31.

75 Mark Robinson (ed), *Judicial Review: the Laws of Australia* (2009) 685. Declarations by courts therefore do not create rights and duties but indicate what they have always been.

be contrasted with the loss of citizenship occurring, for example, directly through the decision of a court or the executive.[76]

1.118 First, it is unclear whether, in the absence of a decision, the onus of proof in such a matter would rest with the respondent or with the plaintiff (that is, with the person whose citizenship has purportedly been lost). If the latter, the plaintiff may be placed in the difficult position of having to prove that they had not engaged in the conduct which led to the automatic loss of their citizenship. The inherent difficulty in proving a negative for a plaintiff may seriously limit that person's right to a fair hearing.

1.119 It may be, however, that a court would approach the question of whether the conduct had occurred as a matter of 'jurisdictional fact'. A jurisdictional fact is one that must exist in order for a decision maker to lawfully exercise a power.[77] In relation to objective jurisdictional facts, a court can receive evidence and decide for itself whether or not the fact exists.[78]

1.120 If a court were to take such an approach, because the conduct resulting in automatic loss of citizenship is to have the same meaning as in the Criminal Code, the court would essentially be required to determine whether a particular crime has been committed. However, while it is usually the respondent who must prove the existence of a 'jurisdictional fact', because the proposed provision is self-executing (meaning there is no decision as such), it may be unlikely that a court would approach the question of whether the conduct had occurred as one of 'jurisdictional fact'.

1.121 The proceedings under discussion are civil rather than criminal in nature under Australian domestic law. It is important to note therefore that the civil standard of proof is on the balance of probabilities, rather than to the criminal standard of beyond reasonable doubt.[79] As discussed below, the application of civil burdens and standards of proof without the usual protections afforded in a criminal proceeding also adversely affects the compatibility of the measure with the right to a fair trial.

1.122 Further, the effect of the operation of sections 33AA and 35(1) is that a person is considered to have lost their citizenship through conduct. However, the

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76 It should be noted that declaratory orders by courts are discretionary rather than as of right, which in theory would increase the uncertainty of the availability of judicial review through the seeking of a declaration by a court. However, given the circumstances in which a person would be seeking such a declaration, it might be assumed that a court would not lightly refuse to exercise its discretion to provide declaratory relief.

77 Judith Bannister, Gabrielle Appleby & Anna Olijnyk, *Government Accountability: Australian Administrative Law* (2015) 524.

78 See *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, 63.

79 See *Evidence Act 1995* (Cth) section 140.

evidence in relation to that alleged conduct may be in fact contested, which means that an individual may be treated as a non-citizen before having the opportunity to challenge or respond to allegations of specified conduct.[80]

1.123 Given the potential difficulties in bringing a claim for effective review of the automatic stripping of citizenship, noted above, the right to a fair hearing is engaged and limited in relation to the proposed measure.

1.124 In light of the serious consequences that may result from loss of citizenship, it is critical that there is clarity and certainty around the process for challenging any loss of citizenship. In this regard, it is noted that the onus is on the legislation proponent to ensure that proposed processes are compatible with the right to a fair hearing, including that there is procedural fairness and equality in proceedings.

1.125 However, the statement of compatibility for the bill does not provide any information on how judicial review would operate in respect of proposed sections 33AA and 35(1), including which party will bear the applicable burden of proof or standard of proof, or address other uncertainties with respect to the operation of sections 33AA and 35(1).

1.126 Such information is necessary to determine whether the measure is compatible with the right to a fair hearing.

1.127 Indeed, noting the serious consequences of the loss of citizenship, it may be appropriate for there to be specific guidance in the legislation in relation to applicable burdens and standards of proof in respect of challenging the loss of citizenship.

1.128 **The committee therefore considers that the automatic loss of citizenship through conduct engages and limits the right to a fair hearing under article 14 of the International Covenant on Civil and Political Rights. The statement of compatibility provides insufficient information to allow a full assessment of this potential limitation, particularly given the unusual construction of proposed sections 33AA and 35(1).**

1.129 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the availability of judicial review and the potential for declaratory relief is sufficient for compatibility with the right to a fair hearing in light of the particular construction of sections 33AA and 35(1) (including with reference to where the burden of proof falls and the standard of proof applicable to such proceedings).**

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80 For example, an individual may be denied consular assistance at an Australian embassy on the basis that they are no longer a citizen because they have travelled to Mosul which is a declared area.

Right to a fair trial

1.130 The right to a fair trial is protected by article 14 of the ICCPR. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.131 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)), the right not to be punished twice for the same conduct (article 14(7)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial

1.132 The statement of compatibility argues that the right to a fair trial is not limited as individuals will have access to judicial review.

1.133 However, there are a range of specific guarantees in relation to the right to a fair trial in the determination of a criminal charge which would not be available in a civil action such as judicial review or an application for declaratory relief as described above. These specific guarantees include the presumption of innocence and the right not to incriminate oneself.

1.134 As noted above at paragraphs [1.115] to [1.120], the courts may be able to declare that the alleged conduct leading to the automatic loss of citizenship has not occurred, with the result that an individual's citizenship was never lost. However, in considering whether to grant such declaratory relief, a court would effectively need to determine whether or not a particular crime (specified as leading to the automatic loss of citizenship) has been committed, in accordance with the definitions set out in the Criminal Code.

1.135 Given that the court would therefore effectively be determining a criminal charge, the criminal process rights contained in article 14 of the ICCPR appear to be engaged. The concept of a 'criminal charge' extends to acts that are criminal in nature with sanctions that must be regarded as penal.[81]

1.136 The proposal for automatic loss of citizenship on the basis of conduct as defined by reference to the Criminal Code, may constitute punitive action against the individual. That is, it may be considered to be a form of banishment.[82] Banishment

81 See UN Human Rights Committee, General Comment 32 [15].

82 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,

has historically been regarded as one of the most serious forms of punishment.[83] The statement of compatibility acknowledges that the ultimate outcome of cessation of citizenship will most likely be removal from Australia for the individual concerned.[84]

1.137 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.

1.138 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 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 of the ICCPR, such as the right to be presumed innocent.

1.139 The first consideration in determining whether a penalty may be considered 'criminal' under human rights law is whether the penalty is classified as 'criminal' under Australian domestic law—if classified as criminal under Australian domestic law then the penalty will be considered 'criminal' for the purposes of human rights law. In this case it is unclear whether or not the penalty is classified as 'criminal'. However, given the direct references to loss of citizenship resulting from criminal conduct in the proposed provision, it is arguable that under Australian domestic law the penalty is classified as criminal in key respects.

1.140 Even if the penalty of loss of citizenship is not strictly classified as criminal under Australian domestic law, it may still be considered 'criminal' under international human rights law. 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 the nature of the penalty and the severity of the penalty.

1.141 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

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‘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.

83 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.

84 See EM 30 which acknowledges that the measures may ultimately result in the expulsion of the former Australian citizen.

being restricted to people in a specific regulatory or disciplinary context). In this regard, the statement of compatibility notes that the measure may have a significant deterrent effect and could apply to all dual citizens and is not limited to a particular regulatory context.

1.142 Even if both (a) and (b) of the above test are not fully satisfied, a penalty may be considered 'criminal' depending upon its severity. In this regard, the serious consequences that may ultimately flow from the loss of a person's citizenship may also mean that the penalty is considered 'criminal' for the purposes of human rights law, thereby engaging the full range of criminal process rights under articles 14 and 15 of the ICCPR.

1.143 As discussed above, a person who loses their citizenship by the operation of section 33AA may seek declaratory relief from a court. However, this would be a civil matter under Australian domestic law and civil burdens and standards of proof would therefore apply. That is, the matter would be decided on the balance of probabilities. On the application of this lower standard of proof an individual could therefore lose their citizenship despite reasonable doubt as to whether they had engaged in the purported conduct. On this basis, the measure would accordingly limit the right to be presumed innocent.

1.144 Further, the process of seeking a declaration could only occur after citizenship has already purportedly been lost. This means that the Australian government may treat the person as a non-citizen on the basis of conduct alleged but not proven. The measure would accordingly limit the right to be presumed innocent. The presumption of innocence generally requires that the prosecution prove each element of a criminal offence to the criminal standard of beyond reasonable doubt. However, the statement of compatibility provides no justification in relation to this limitation on the right to a fair trial.

1.145 Further, in seeking a declaration of the court an individual who had lost their citizenship would have to bring evidence to the court as to why a declaration should be provided in their favour and would not be able to rely on other criminal process rights such as the protection against self-incrimination.

1.146 **The proposed provisions are likely to be considered 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) would apply, including the right to be presumed innocent and the right not to incriminate oneself. The automatic loss of citizenship through conduct as defined by reference to the Criminal Code engages and limits criminal process rights, which form part of the right to a fair trial under article 14 of the ICCPR. This is because the measure does not contain the protection of any of these criminal process rights.**

1.147 **As set out above, the statement of compatibility does not acknowledge that the right to a fair trial is limited and accordingly does not justify that limitation**

for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Quality of law

1.148 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 measures 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

1.149 As outlined at paragraphs [1.112] to [1.120], there is a high degree of uncertainty as to how the automatic loss of citizenship provisions will work in practice. This includes how an individual may seek declaratory relief if they believe they have not engaged in such conduct that led to the automatic cessation of their citizenship and how the courts will determine the rights and responsibilities of the parties in court proceedings.

1.150 As a matter of international human rights law, it is critical that there is clarity and certainty around the processes for challenging any loss of citizenship. In this regard, it is noted that the onus is on the legislation proponent to ensure that the proposed processes are compatible with the right to a fair hearing and right to a fair trial, including that there is procedural fairness and equality in proceedings. For the purposes of the quality of law test, it is insufficient for the legislation proponent to assert that the courts will manage these uncertainties in accordance with established practice and principles. It should be clear in the legislation how the provisions will operate in practice and how the rights of individuals to due process and the rule of law are protected by the bill.

1.151 **The committee's assessment of the automatic cessation of citizenship powers against the quality of law test raises questions as to whether the provisions providing for automatic loss of citizenship for certain conduct are sufficiently certain.**

1.152 **As set out above, the automatic cessation of citizenship engages the quality of law test. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with the quality of law test.**

Prohibition on double punishment

1.153 The right to a fair trial includes specific procedural guarantees. Article 14, paragraph 7 of the ICCPR, provides that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law.

Compatibility of the measure with the prohibition on double punishment

1.154 As outlined at paragraphs [1.46] to [1.54], the provisions that provide for automatic loss of citizenship on the basis of defined conduct may be considered punitive for the purposes of international human rights law. That is, the loss of citizenship is a punishment for the conduct engaged in, notwithstanding the absence of a court process to determine guilt beyond reasonable doubt. The practical effect of this is that loss of citizenship may occur before or during a criminal trial for specific offences that relate to that conduct. Potentially, citizenship could also be lost in the context of a trial at which a person is ultimately acquitted (because of the differing standards of proof), meaning a person could effectively be tried twice for the same conduct (which is also prohibited by article 14(7) of the ICCPR).

1.155 An individual subjected to both the automatic loss of citizenship and a criminal conviction and punishment for the same conduct will effectively suffer double punishment. The statement of compatibility does not address how these measures are compatible with the prohibition on double punishment.

1.156 **The committee's assessment of the automatic cessation of citizenship powers against article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment) raises questions as to whether depriving a person of citizenship will act as a double punishment.**

1.157 **As set out above, the automatic cessation of citizenship may engage and limit the prohibition on double punishment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7).**

Right to an effective remedy

1.158 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.

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

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

Compatibility of the measure with the right to an effective remedy

1.161 The automatic loss of citizenship by conduct provisions engage and may limit the right to an effective remedy as the provisions operate automatically and may apply in circumstances where the individual concerned contests whether the conduct actually occurred.

1.162 It is noted that the automatic cessation provisions would enable government officials to take action notwithstanding that the minister has not yet issued a notice, including declining consular assistance, and notwithstanding the absence of a criminal conviction.

1.163 A person, who contests that they did not engage in the conduct causing the automatic loss of citizenship, may apply to the federal courts to seek declaratory relief. However, as set out above at paragraphs [1.115] to [1.120] there is significant uncertainty as to how an application for declaratory relief regarding the automatic loss of citizenship would operate in practice. This uncertainty raises concerns about the efficacy of any judicial process to ensure that a person who wrongfully lost their citizenship is able to seek effective review and redress.

1.164 It is also noted that an Australian who loses their citizenship outside of Australia may face significant practical hurdles in seeking access to courts to seek declaratory relief. These include difficulty in obtaining the necessary visas to travel to Australia to appear before the courts and the ability to seek and obtain necessary documentary evidence to present to the courts.

1.165 The statement of compatibility does not assess the effect of the cessation of citizenship on the right to an effective remedy.

1.166 **The committee's assessment of the automatic cessation of citizenship powers against article 2 of the International Covenant on Civil and Political Rights (right to an effective remedy) raises questions as to whether a person who has lost their citizenship will have access to an effective remedy.**

1.167 **As set out above, the automatic cessation of citizenship engages and limits the right to an effective remedy. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether 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.**

Automatic loss of citizenship on conviction

1.168 As noted at paragraph [1.18], under proposed section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of any one of 57 offences. The loss of citizenship following conviction engages the prohibition on double punishment.

1.169 In addition, the provisions will apply to individuals who are convicted following enactment of the bill even if the conduct that is the subject of that conviction occurred prior to the Act's enactment. Accordingly, the provisions engage the prohibition on retrospective criminal laws.

Prohibition on double punishment

1.170 The prohibition on double punishment is outlined at paragraph [1.153] above.

Compatibility of the measure with the prohibition on double punishment

1.171 As outlined at paragraphs [1.132] to [1.142], the act of removing someone's citizenship may be considered punitive for the purposes of international human rights law. Provisions that automatically impose a loss of citizenship following conviction for certain offences may be considered to impose an additional punishment to that imposed by the court in accordance with the Criminal Code. The statement of compatibility does not address how these measures are nevertheless compatible with the prohibition on double punishment.

1.172 **The committee's assessment of the automatic cessation of citizenship powers on conviction for certain offences, against article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment) raises questions as to whether depriving a person of citizenship will act as a double punishment inconsistent with this prohibition.**

1.173 **As set out above, the automatic cessation of citizenship on conviction may engage and limit the prohibition on double punishment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7).**

Prohibition against retrospective criminal laws

1.174 Article 15 of the ICCPR prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

1.175 This is an absolute right and it can never be justifiably limited.

1.176 Article 15 requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed. Laws must not impose greater punishments than those which would have been available at the time the acts were done. Further, if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right, where an offence is decriminalised, to the retrospective decriminalisation (if the person is yet to be penalised).

Compatibility of the measure with the prohibition on retrospective criminal laws

1.177 As set out above, the automatic loss of citizenship on conviction provisions will apply to individuals who are convicted following enactment of the bill, even if the conduct that is the subject of that conviction occurred prior to the enactment.[85] A core aspect of article 15 is that laws must not impose greater punishments than those which would have been available at the time the acts were done. Accordingly, the bill would appear to limit the absolute prohibition on retrospective criminal laws. This is not identified or addressed in the statement of compatibility.

1.178 The committee also notes that the bill was referred to the Parliamentary Joint Committee on Intelligence and Security to inquire into and report. The committee notes that as part of that referral the Attorney-General asked that committee to consider whether proposed section 35A 'should apply retrospectively with respect to convictions prior to the commencement of the Act'.[86] The committee notes that were amendments to be made to the bill to apply the cessation of citizenship provisions to anyone ever convicted of any of the listed offences, this would raise serious concerns about the compatibility of the measures with the prohibition on retrospective criminal laws.

1.179 **The committee's assessment of the automatic cessation of citizenship powers on conviction for certain offences, against article 15 of the International Covenant on Civil and Political Rights (ICCPR) (prohibition on retrospective criminal laws) raises questions as to whether the provisions should apply to conduct that occurs prior to the bill becoming law.**

1.180 **As set out above, the automatic cessation of citizenship on conviction may engage and limit the prohibition on retrospective criminal laws which is an absolute right. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 15(1) of the ICCPR.**

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85 See item 8(4) of the bill.

86 See the terms of references to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Terms_of_Reference.

Part 3—Children

1.181 The final part of the analysis considers how the bill will apply to children, which under international human rights law means all people aged under 18 years.

1.182 Proposed new section 33AA would operate so that a dual Australian citizen will automatically cease to be an Australian citizen if they engage in specified conduct, as defined in the Criminal Code. The Explanatory Memorandum (EM) notes that the offences in the Criminal Code have limited application with respect to minors. Under the Criminal Code, a person under 10 years is not criminally responsible for an offence. Accordingly, the EM explains that section 33A would not apply to persons under 10 years of age. However, it should be noted that there is nothing in the bill itself that would restrict the automatic cessation of citizenship on conduct provisions to those over the age of criminal responsibility. It should also be noted that, despite what the EM says, the statement of compatibility states that there are documented cases of children fighting with extremist organisations and otherwise being involved with terrorism and the 'proposed amendments apply to all Australian (dual) citizens regardless of age'.[87]

1.183 The EM also notes that under the Criminal Code, a child aged between 10 and 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. This reflects that children have different capacities and levels of maturity than adults to make judgements. The EM is silent on how section 33A will apply to persons aged between 10 and 14 and whether the provisions in the bill will apply to a person in that age bracket. Noting the analysis above in relation to the right to a fair hearing and a right to fair trial, there is real uncertainty as to how judicial processes would determine whether the provisions apply to young people under the age of 10 and between 10 and 14 years of age and uncertainty as to how court process would work in practice.

1.184 The bill also amends section 35(1) of the Citizenship Act to provide that a person automatically ceases to be an Australian citizen if they are a dual national and fights for, or is in the services of, a declared terrorist organisation. This provision does not reference the Criminal Code and accordingly the proposed section 35(1) would certainly apply regardless of age. For example, a six year old who fetches drinking water from a well for a village elder who is fighting in a declared terrorist organisation would automatically lose their citizenship. This would occur regardless of the child's criminal culpability, or their understanding of how the fetching of water from the well relates to or contributes to the activities of a terrorist organisation.

1.185 Under proposed section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of one of 57 offences (see paragraph [1.18] above). The offences apply to children over 10 years of age. Children aged 10 to 14

87 EM, Attachment A 32.

would only be convicted, and thus subject to automatic loss of citizenship, if they knew that the conduct was wrong in accordance with the standards and procedures of domestic criminal law.

1.186 As the automatic loss of citizenship provisions apply to children, the preceding analysis of the rights implications of those measures set out in Parts 1 and 2 applies equally to children and the minister's response needs to address the human rights compatibility of those measures with respect to their application to both adults and children. This Part considers specific human rights obligations with respect to children that are engaged by these measures.

1.187 In addition, this Part considers item 6 of the bill which gives the minister a discretionary power to cancel the citizenship of a child following the cancellation of the citizenship of the child's parent in accordance with the provisions in the bill.

Automatic loss of citizenship

1.188 As set out above, the bill would amend the Citizenship Act to expand the basis on which Australian citizenship will cease. The bill includes two broad bases on which the citizenship of dual nationals will cease, automatic cessation on the basis of conduct and automatic cessation on the basis of conviction. Automatic loss of citizenship would apply to children as set out above at paragraphs [1.182] to [1.185].

Obligation to consider the best interests of the child

1.189 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.[88]

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

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

1.191 The statement of compatibility explains that the automatic loss of citizenship for conduct engages the obligation to consider the best interests of the child.

1.192 The statement of compatibility explains that:

> The Government has considered the bests interests of the child in these circumstances where conduct of a minor is serious enough to engage the cessation or renunciation provisions and has assessed that the protection

88 Article 3(1).

> of the Australian community and Australia's nation security outweighs the best interest of the child.[89]

1.193 However, this statement misapprehends the nature of the obligation to consider the best interests of the child. It is not possible to simply assert that this obligation has been taken into account in a global sense and considered to be outweighed by national security. The procedure for automatic loss of citizenship in the bill must, as a matter of international law, provide for a consideration of the best interests of the individual child, which may be subject only to limitations that pursue a legitimate objective, are rationally connected to that objective and otherwise proportionate with that objective. The Committee on the Rights of the Child has said that the CRC:

> seeks to ensure that the right is guaranteed in all decisions and actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration. The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures. [90]

1.194 The Committee on the Rights of Children has further explained that:

> Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.[91]

1.195 The procedure for automatic loss of citizenship set out in the bill does not appear to provide for a consideration of the best interests of the child, as the provision applies automatically to specified conduct. The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the conduct in accordance with normative standards of Australian law. It does not take into account whether the loss of citizenship would be in the best interests of the child given their particular circumstances.

1.196 Instead, proposed section 33A would apply to all children aged 10 years and above (or possibly to all children based on the statement in the statement of compatibility) and proposed section 35(1) would apply to all children regardless of age. In addition, as set out above in Part 1, the conduct for which automatic loss of

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89 EM 33.

90 Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* [40].

91 Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* [40].

citizenship applies extends far beyond that which would appear to genuinely threaten national security, including covering property offences.

1.197 The only way that an individual child's circumstances may be taken into account is if the minister decides to exempt a child from the operation of the provisions. This power is entirely discretionary and not subject to the rules of natural justice. There is no specific obligation on the minister that requires his or her decision to take into account the best interests of the child. As a result, this provision is not a sufficient safeguard for the purposes of international human rights law.

1.198 Accordingly, the statement of compatibility has not demonstrated that the provisions have been drafted consistently with Australia's obligation to ensure that in all actions concerning a child, their best interests are a primary consideration.

1.199 **The committee's assessment of the automatic cessation of citizenship powers against article 3 of the Convention on the Rights of the Child (best interests of the child) raises questions as to whether the draft provisions are compatible with Australia's obligation to consider the best interests of the child in all actions concerning children.**

1.200 **As set out above, the automatic cessation of citizenship engages and limits the obligation to consider the best interests of the child. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

1.201 **The committee also seeks the minister's advice on these questions in relation to the rights contained in articles 7, 8 and 12 of the Convention on the Rights of the Child (right to a nationality and right of the child to be heard), as set out below.**

The right to nationality

1.202 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the ICCPR.[92] Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child

92 Article 24(3) of the ICCPR.

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.

Compatibility of the measure with the right to nationality

1.203 The statement of compatibility acknowledges that the automatic loss of citizenship for conduct provision engages and limits the right of a child to preserve his or her nationality. The statement of compatibility states that the provisions are lawful as a matter of domestic law and that the loss of nationality:

> …would in all the circumstance be reasonable, proportionate and necessary in light of the serious conduct of the child that gives rise of the cessation nor renunciation coming into effect.[93]

1.204 Whether or not the provisions are lawful under Australian domestic law is not determinative of whether the provisions comply with Australia's obligations under international law.

1.205 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,[94] 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'.[95] 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.

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

1.206 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

93 EM, 34.

94 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.

95 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.

matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.207 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.

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

1.208 The statement of compatibility acknowledges that the proposed measures engage the right of the child to be heard. The statement of compatibility focuses on the minister's power to exempt a person from the application of the automatic loss of citizenship provisions but doesn't address the automatic nature of the provisions themselves. As the provisions create an automatic loss of citizenship flowing from certain conduct there is no opportunity for a child to express their views and be heard before losing citizenship, which is inconsistent with article 12.

1.209 In relation to the ministerial exemption power, the statement of compatibility states that:

> The Government considers that this limitation on the right to be heard is necessary and proportionate in the circumstances, given the serious conduct on the part of a child that has given rise to the cessation provisions in the first place. Any impact that cessation may have on the child, and the child's best interests, will be considered by the Minister as part of the public interest component relating to exemption.[96]

1.210 No analysis or evidence is provided to support the statement that the limitation on the right to be heard is necessary and proportionate. As set out above at [1.205], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law. This requires a reasoned and evidence-based explanation of how the measure supports a legitimate objective, how the measure is rationally connected to that objective and how the measure is reasonable and proportionate for the achievement of that objective.

Discretionary power to remove the citizenship of a child whose parent has automatically lost their citizenship

1.211 Item 6 of the bill would amend the Citizenship Act to provide that, where a person ceases to be an Australian citizen at a particular time under sections 33, 33AA, 34, 34A, 35, or 35A and the person is a responsible parent of a child under the age of 18, the minister may revoke the child's citizenship. There are exceptions for where this would leave a child stateless or where the child has an alternative parent.

96 EM 34.

1.212 Very serious consequences flow from loss of Australian citizenship. The enjoyment of many human rights is tied to citizenship under Australian law. No separate analysis is provided of the human rights engaged and limited by this measure. This measure needs to be separately justified and all limitations on human rights need to have a legitimate objective, be rationally connected to that objective and proportionate.

Multiple Rights

1.213 The measure engages and may limit the following human rights and human rights standards:

- right to freedom of movement;[97]
- right to a private life;[98]
- protection of the family;[99]
- right to take part in public affairs;[100]
- right to liberty;[101]
- obligations of non-refoulement;[102]
- right to equality and non-discrimination;[103]
- right to a fair hearing and criminal process rights;[104]
- prohibition against retrospective criminal laws;[105]
- prohibition against double punishment;[106]
- rights of children;[107]
- right to work;[108]

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97 Article 12 of the ICCPR.

98 Article 17 of the ICCPR.

99 Articles 17 and 23 of the ICCPR and article 10 of the ICESCR.

100 Article 25 of the ICCPR.

101 Article 9 of the ICCPR.

102 Articles 6 and 7 of the ICCPR and the CAT.

103 Article 26 of the ICCPR.

104 Article 14 of the ICCPR.

105 Article 15 of the ICCPR.

106 Article 14(7) of the ICCPR.

107 CRC.

108 Articles 6, 7 and 8 of the ICESCR.

- right to social security;[109]
- right to an adequate standard of living;[110]
- right to health;[111] and
- right to education.[112]

Compatibility of the measure with the multiple rights

1.214 The measure engages and limits multiple rights in a similar manner to the other provisions in the bill which provide for the loss of citizenship, as set out in Part 1 and Part 2 above. The statement of compatibility does not provide a separate and detailed analysis of how this measure is nevertheless justified.

1.215 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, as set out above at paragraph [1.205].

1.216 **The committee's assessment of the discretionary ministerial power to revoke the citizenship of a child following a parent's automatic cessation of citizenship under the bill against Australia's obligations under the International Covenant on Civil and Political Rights raises questions as to whether the limitation on rights is justifiable.**

1.217 **As set out above, the discretionary ministerial power to revoke the citizenship of a child engages and limits multiple rights. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective.;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to remove a child's citizenship and whether this is the least rights restrictive approach.**

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109 Article 9 of the ICESCR.

110 Article 11 of the ICESCR.

111 Article 12 of the ICESCR.

112 Article 13 and 14 of the ICESCR and article 28 of the CRC.

1.218 **The committee also seeks the minister's advice on these questions in relation to the specific rights contained in articles 3, 7, 8 and 12 of the Convention on the Rights of the Child (best interests of the child, the right to a nationality and the right of the child to be heard), as set out below.**

Obligation to consider the best interests of the child

1.219 The obligation is discussed at paragraphs [1.189] to [1.190] above.

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

1.220 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child.

1.221 The statement of compatibility explains that:

> Any exercise by the Minister of his discretionary power to revoke the Australian Citizenship of a child in circumstances where the Australian citizenship of the parents has ceased under the new provisions must take into consideration all relevant circumstances, including the best interests of the child.[113]

1.222 However, this statement appears to misapprehend the nature of the obligation to consider the best interests of the child. It is an obligation to consider the best interests of the child as a primary consideration, not just one amongst many considerations of equal weight. Moreover, the ministerial power to cancel a child's citizenship is entirely discretionary and the minister is under no statutory obligation to consider the best interests of the child.

1.223 Accordingly, the measure limits the obligation to consider the best interests of the child. 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, as set out above at paragraph [1.205].

The right to nationality

1.224 This right is described above at paragraph [1.202].

Compatibility of the measure with the right to nationality

1.225 The statement of compatibility does not consider whether the measure engages and limits the right to a nationality, particularly, the right to preserve an existing nationality and identity as specifically provided for by article 8 of the CRC. The measure engages and limits this right as a child may lose their Australian citizenship where their nationality and identity is Australian notwithstanding that

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113 EM 33.

they have dual nationality. For example, they may have spent their entire life in Australia.

1.226 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 as set out above at paragraph [1.205].

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

1.227 The right is described above at paragraph [1.206] to [1.207] above.

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

1.20 The statement of compatibility acknowledges that the proposed measure engages and limits the right of the child to be heard. The statement of compatibility explains:

> When considering whether to revoke a child's citizenship under section 36 in light of the new cessation provisions, the Minister must accord natural justice. Natural justice may involve inviting the child or parent of the child to make representations to the Minister about excusing the person. If the child or parent makes such representations to the Minister, the Minister may, having regard to these representations and any other matters the Minister considers relevant, decide not to revoke the Australian citizenship of the child. These provisions give the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12. The government considers that this strikes the appropriate balance between giving a person a fair opportunity to address any issues raised in the information before the Minister while ensuring the effectiveness of cessation as a measure to protect the public interest.[114]

1.228 Importantly, the statement of compatibility notes that the minister *may* rather than *must* give a child the right to make representations. There is no statutory obligation requiring the minister to specifically allow for a child to be heard prior to a decision to revoke their citizenship. A discretionary, non-compellable ministerial power is an insufficient safeguard to ensure that a limitation on a right is justified.

1.229 In addition, the statement of compatibility outlines a process of seeking to balance the right of the child with the effectiveness of the measure. This misapprehends the nature of Australia's obligations under the CRC. In order for any measure that limits the right of a child to be heard to be compatible with international law, it must pursue a legitimate objective, be rationally connected to that legitimate objective and impose a proportionate limitation.

114 EM 34-35.

1.230 The statement of compatibility needs to provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law as set out above at paragraph [1.205].

Fairer Paid Parental Leave Bill 2015

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

Purpose

1.231 The Fairer Paid Parental Leave Bill 2015 (the bill) seeks to amend the *Paid Parental Leave Act 2010* (PPL Act) to:

- provide that from 1 July 2016 primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme; and
- remove the requirement for employers to provide paid parental leave to eligible employees, unless an employer chooses to manage the payment to employees and the employees agree for the employer to pay them.

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

Background

1.233 The bill reintroduces a measure previously introduced in the Paid Parental Leave Amendment Bill 2014 (PPLA bill), which would remove the requirement for employers to provide paid parental leave to eligible employees. The PPLA bill was introduced into the House of Representatives on 19 March 2014 and is currently before the Senate. The committee considered the PPLA bill in its *Fifth Report of the 44th Parliament*[1] and requested further information from the Minister for Small Business as to the compatibility of the measures with the right to social security, rights at work and the right to equality and non-discrimination. The committee then considered the minister's response in its *Eighth Report of the 44th Parliament*.[2]

Schedule 1 – Adjustment to primary carer pay

1.234 Schedule 1 to the bill would amend the PPL Act to provide that from 1 July 2016 primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided PPL scheme.

1.235 Primary carers who are entitled to receive employer-provided parental leave payments will not be eligible to receive payments under the government's PPL scheme, unless their employer-provided payments are valued at less than the total amount of payments under the government's PPL scheme.

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1 Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 13-16.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 54-57.

1.236 The committee considers the reductions in PPL payments for primary carers who receive employer-funded primary carer leave payments engage and may limit the right to social security, rights at work and the right to equality and non-discrimination.

Right to social security

1.237 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.

1.238 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;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

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

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

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

Compatibility of the measure with the right to social security

1.241 Under the PPL Act, the initial primary carers of children currently have access to up to 18 weeks of parental leave pay at the national minimum wage in order to stay home from work and look after their baby. Some primary carers are also able to receive additional employer-funded payments where offered by their employer under registered agreements, employment contracts and workplace policies.

Individuals who receive employer-funded payments currently do not lose their entitlement to PPL payments.

1.242 The amendments in Schedule 1 to the bill would revise these provisions so that primary carers can receive only one form of parental leave pay (either government or employer-funded). As primary carers who receive employer-funded parental leave pay will have their government-funded entitlements reduced or removed under the bill, the amendments therefore engage and may limit the right to social security.

1.243 As noted above at [1.239], Australia has obligations not to unjustifiably take any backwards steps (retrogressive measures) that might affect the rights to social security.

1.244 The statement of compatibility explains that the right to social security is engaged by the measure. There is no explicit acknowledgement that the right is limited as a result of the reduced payments for some new parents.

1.245 The statement of compatibility identifies the purpose of the amendments as ensuring that the PPL scheme:

> continues to support mothers who would not otherwise have access to generous paid maternity leave provisions, while enabling Government resources to be refocused on other complementary measures to support working parents, including increased childcare support.[3]

1.246 The committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.[4] However, in order to be accepted as a legitimate objective, reasoning and evidence is needed to support the stated objective. In particular, more information is required to explain why it is necessary to reduce the current level of social security available (for example, a brief explanation of the fiscal difficulties facing the government) and where it is intended that the savings will be directed to.

1.247 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,[5] and the Attorney-General's Department's guidance on the

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

4 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 172.

5 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.

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'.[6] 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.

1.248 **The committee's assessment of the reduction to paid parental leave against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the amendments are justifiable.**

1.249 **As set out above, the reduction of access to paid parental leave engages and limits the right to social security. 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 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.**

Right to work and the right to maternity leave

1.250 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.[7]

1.251 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work,

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6 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.

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

including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

1.253 The right to maternity leave is protected by article 10(2) of the ICESCR and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Further provisions are contained within articles 3 and 9 of the ICESCR and articles 4(2) and 5(b) of the CEDAW.

1.254 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[8]

1.255 In addition, the CEDAW requires state parties to implement measures to eliminate discrimination against women in the field of employment. Particular obligations include:

> To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.[9]

1.256 Accordingly, the CEDAW recognises that adequate provisions for maternity leave are a critical component of the right to work.

Compatibility of the measure with the right to work

1.257 The bill reduces the amount of maternity leave pay that many primary carers are currently entitled to under law.

1.258 The statement of compatibility for the bill states that Schedule 1 is likely to engage rights at work, including the right to maternity leave as protected by article 11(2)(b) of the CEDAW and article 10(2) of the ICESCR. However, the statement of compatibility does not address the limitation of this right, or provide any justification for the limitation. Instead, it states that 'eligible mothers may use their entitlements to other types of leave, such as annual leave or long service leave, before, after or at the same time as Parental Leave Pay.'[10] The availability of other leave or payments is not directly relevant to the question as to whether the reduction in primary carer pay for some new parents is justified under international human rights law.

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8 UN Committee on Economic, Social and Cultural Rights, *General Comment 16*, The equal right of men and women to the enjoyment of all economic, social and cultural rights (2005).

9 Article 11(2)(b) of the CEDAW.

10 EM, SoC 3.

1.259 As noted above at [1.247], 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. Additionally, it must be shown that a limitation is rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. The statement of compatibility does not explain whether the measure is proportionate, in particular given the extent of the interference with the obligation on the state to provide for paid maternity leave for a reasonable period of time.

1.260 **The committee's assessment of the reduction of access to paid parental leave against article 11 of the Convention on the Elimination of All Forms of Discrimination against Women and article 10(2) of the International Covenant on Economic, Social and Cultural Rights (rights at work and the right to maternity leave) raises questions as to whether the reduction of maternity leave entitlements is justifiable.**

1.261 **As set out above, the reduction of access to paid parental leave engages and limits rights at work and the right to maternity leave. 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 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.**

Right to equality and non-discrimination

1.262 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).

1.263 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.

1.264 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[11] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[12] 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.[13]

1.265 Articles 2, 3, 4 and 15 of the CEDAW further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

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

1.266 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of the paid parental leave scheme, reductions to this scheme under the bill will disproportionately impact upon this group.

1.267 The statement of compatibility states that the measures may engage the right to equality and non-discrimination, and are likely to promote the right for some groups of working parents.[14] The statement of compatibility does not, however, address the limitation of this right in terms of its potential to indirectly discriminate against women, or provide any justification for the limitation.

1.268 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

1.269 **The committee's assessment of the adjustment to primary carer pay against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the disproportionate impact upon women is justifiable.**

1.270 **As set out above, the adjustment to primary carer pay engages and limits the right to equality and non-discrimination (indirect discrimination). The statement of compatibility does not sufficiently justify that limitation for the**

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11 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.

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

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

14 EM, SoC 5.

purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services 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.**

Schedule 2 – Employer opt-in

1.271 Schedule 2 to the bill would amend the PPL Act to remove the requirement for employers to provide and manage government-funded parental leave pay to eligible employees. These employees would instead be paid directly by the Department of Human Services, unless an employer 'opts in' to provide parental leave pay to its employees and is agreed upon by the relevant employee. This amendment would commence from 1 April 2016.

1.272 The committee considers that the employer 'opt in' engages and limits the rights to social security, the right to just and favourable conditions of work and the right to equality and non-discrimination.

Right to social security

1.273 The right to social security is protected by article 9 of the ICESCR. Australia is required to satisfy certain minimum aspects of this right; see [1.237] to [1.240] above.

Right to an adequate standard of living

1.274 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.

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

Right to work

1.276 The right to work is protected by articles 6(1), 7 and 8(1)(a) of the ICESCR, and article 11 of the CEDAW; see [1.250] to [1.256] above.

Right to equality and non-discrimination

1.277 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR, and articles 2, 3, 4 and 15 of the CEDAW; see [1.262] to [1.265] above.

Compatibility of the measure with the right to social security and an adequate standard of living, the right to work and the right to equality and non-discrimination

1.278 The statement of compatibility for the bill states that no human rights are engaged by the amendments as they are limited to changes in administrative arrangements in the ongoing implementation of the PPL scheme.[15]

1.279 However, the regulation impact statement for the bill states that:

> …there may be an impact on the after tax-income of employees with salary sacrifice arrangements in place. Where their employer is administering PLP payments, salary sacrificing arrangements are able to continue and so the employee's tax liability would continue to be calculated on a lower salary. However, as DHS does not offer salary sacrifice deduction functionality, an employee's tax liability could increase if the mandatory employer role is removed and their employer does not opt back in to be the PPL paymaster... While this impact is not a compliance cost, it may have an impact on the after-tax income a person may receive, dependent on an employee's income and the level of salary sacrificed under the arrangement.[16]

1.280 The committee has previously considered these measures as part of its consideration of the PPLA Bill 2014. In its previous analysis, the committee requested further information from the Minister for Small Business as to the compatibility of the measures with the right to social security, right to an adequate standard of living, right to just and favourable conditions at work, and right to equality and non-discrimination. The committee concluded its consideration of these matters as being compatible with Australia's international human rights obligations on the basis of the further information provided by the minister.[17] None of this further information has been included in the statement of compatibility for this bill.

1.281 **The committee's usual expectation is that where additional information has been provided to establish that a measure is compatible with human rights, this information should be included in future statements of compatibility for measures of a similar type.**

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15 EM, SoC 6.

16 EM, Regulation impact statement 4.

17 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 54-57.

Migration Amendment (Regional Processing Arrangements) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 24 June 2015

Purpose

1.282 The Migration Amendment (Regional Processing Arrangements) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* to empower the Commonwealth to:

- take, or cause to be taken, any action relating to an arrangement in place with a regional processing country and to take action in relation to regional processing functions;
- make, or cause to be made, payments relating to the arrangement or regional processing functions of a regional processing country; and
- do anything else incidental or conducive to the taking of such action or the making of such payments.

1.283 The bill provides that the amendments made by the bill commence retrospectively, namely on 18 August 2012.

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

Background

1.285 The bill was introduced into the House of Representatives on 24 June 2015 and passed the same day. It was introduced the following day into the Senate and passed the Senate that day, finally passing both Houses on 25 June 2015 and achieving Royal Assent on 30 June 2015.

Power to take action in a regional processing country

1.286 The bill empowers the Commonwealth to take broad unfettered action in a regional processing country if that action relates to the 'arrangement' or the 'regional processing functions' of a regional processing country.

1.287 Action is defined as including exercising restraint over the liberty of a person and taking action in a regional processing country or another country – 'action' in these countries is undefined.

1.288 An 'arrangement' is defined as any arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding. A 'regional processing function' includes the implementation of any law or policy or the taking of any action by the regional processing country—thereby empowering the Commonwealth to do anything the regional processing country could do in connection with their role as a processing country.

1.289 The committee considers the bill engages and limits multiple human rights, as set out below.

Multiple human rights

1.290 The committee, in its *Ninth Report of 2013* (previous report), examined the human rights implications of the Migration Regional Processing package of legislation. This legislation re-established offshore processing for asylum seekers who arrived by boat in Australia on or after 13 August 2012.[1]

1.291 In the previous report the committee considered that the regional processing regime engaged and limited a number of rights, including:

- the prohibition against arbitrary detention;[2]
- the right to humane treatment in detention;[3]
- the right to health;[4]
- the rights of the child;[5] and
- the prohibition against degrading treatment.[6]

1.292 In its previous report the committee considered the nature and territorial scope of Australia's human rights obligations.[7] It noted that it is well accepted in international law that the human rights obligations of a state extend to persons who are outside the territory of the state but 'under the effective control' of the authorities of the state.

1.293 After considering the evidence of Australia's involvement in the regional processing of asylum seekers in Nauru or on Manus Island, the committee noted that Australia's involvement in the arrangements relating to the detention, upkeep and provision of services to those transferred to Nauru and Manus Island was significant. The committee concluded that 'the evidence demonstrates that Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru.'[8]

Compatibility of the measures with multiple human rights

1.294 The statement of compatibility for the bill states that the bill does not engage any human rights 'because the Government's position is that the Regional

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1 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013).

2 Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 10 of the ICCPR.

4 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

5 Convention on the Rights of the Child.

6 Article 7 of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

7 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013) 30-43.

8 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013) 43.

Processing Centres are managed and administered by the governments of the countries in which they are located, under the law of those countries.'[9] The statement of compatibility goes on to state that while the government recognises that there may be circumstances in which the rights set out in human rights instruments apply extraterritorially, 'Australia does not exercise the degree of control necessary in regional processing centres to enliven Australia's international obligations'.[10]

1.295 As set out above at paragraphs [1.292] to [1.293], the committee has previously concluded that on all available evidence, Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru. The committee notes that the bill reinforces this finding as it empowers the Commonwealth to take any action, including restraining a person, in relation to regional processing functions. As described above at paragraphs [1.286] to [1.288], this gives extremely broad powers to the Commonwealth in relation to the processing of asylum seekers in external countries. Read in conjunction with the findings of the committee in its previous report, the bill confirms the committee's previous conclusion that Australia, in exercising effective control, owes human rights obligations to those asylum seekers in Nauru and Manus Island.

1.296 **As the bill empowers the Commonwealth to take broad action in regional processing countries, the bill, as with the previous package of legislation relating to regional processing, engages and limits multiple rights. The committee reiterates the concerns set out in its previous report[11] in relation to the regional processing regime, which applies equally to this bill, namely:**

- **that the regional processing regime as currently implemented carries a significant risk of being incompatible with a range of human rights. To the extent that some of those rights may be limited, the committee considers that the reasonableness and proportionality of those limitations have not been clearly demonstrated. Of particular concern is:**
  - **the absence of legally-binding requirements relating to minimum conditions in regional processing facilities. While detention necessarily involves constraints on the full enjoyment of rights by detainees, the government has not demonstrated that the conditions on Nauru or Manus Island are consistent with the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights**

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9 Explanatory Memorandum (EM), Attachment A, 9.

10 EM, Attachment A, 10.

11 See Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013* (June 2013) particularly 81-84.

(ICESCR), the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment; and

- **the cumulative effect of the arrangements, which is likely to have a significant impact on the physical and mental health of asylum seekers, contrary to the right to health in article 12 of the ICESCR and the prohibition against degrading treatment in article 7 of the ICCPR.**

1.297 **Noting that the bill has already passed both Houses of Parliament, the committee has concluded its examination of the bill.**

Social Services Legislation Amendment (Defined Benefit Income Streams) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 23 June 2015

Purpose

1.298 The Social Services Legislation Amendment (Defined Benefit Income Streams) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* to provide that the deductible amount for defined benefit income streams, excluding military defined benefits schemes, is capped at a maximum 10 per cent of the gross payments to an individual for the income year.

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

Alterations to the income test for defined benefit income streams

1.300 Under the bill, individuals who receive defined benefit income from their superannuation fund will have a greater proportion of that income included in the income test for the pension. As a result, a number of individuals who receive defined benefit income from their superannuation fund will either have their pension amount reduced or removed all together.

1.301 Accordingly, the bill engages and limits the right to social security.

Right to social security

1.302 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.

1.303 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).

1.304 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.

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

Compatibility of the measure with the right to social security

1.306 The statement of compatibility states that the right to social security is engaged. However it also states that:

> The Bill has no effect on the right to social security.[1]

1.307 The statement of compatibility also explains that:

> [The bill] gives a fairer assessment of an individual's personal contributions to a defined benefit income streams.[2]

1.308 The bill will reduce the pension entitlement of certain individuals and accordingly limits the right to social security. As the statement of compatibility claims the measure doesn't limit the right to social security, the statement does not provide any information as to the legitimate objective of the measures, how the measures are rationally connected to that objective and how the measures are otherwise proportionate.

1.309 The bill will produce savings of $465.5 million over four years. However, no information is provided in the explanatory memorandum (EM) or statement of compatibility as to how many individuals will be affected by the measure or any information as to the likely impact on those individuals, including their capacity to meet their cost of living following the implementation of the bill. Accordingly, it is not possible to assess the compatibility of the measure with the right to social security.

1.310 The statement of compatibility could have advanced an argument that, while the bill does limit the right to social security, the proposed measures are nevertheless justified as they are reasonable, necessary and proportionate to achieve a legitimate aim.

1.311 The committee notes that budgetary constraints have been recognised as being capable of providing a legitimate objective for the purpose of justifying

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1 EM, SoC 1.

2 EM, SoC 1.

reductions in government support that impact on economic, social and cultural rights.

1.312 Further, in justifying the proposed measures as proportionate to a legitimate aim, the statement of compatibility could have advanced an argument about the capacity of individuals receiving a defined benefit income from their superannuation fund to meet their costs of living notwithstanding their reduced entitlement to social security.

1.313 **The bill will reduce the aged pension entitlement of certain individuals and accordingly limits the right to social security. The statement of compatibility for the bill states that the bill engages but does not limit the right to social security. As a result, the statement of compatibility does not justify the limitation on the right to social security. Noting that the bill has already passed both Houses of Parliament, the committee has concluded its examination of the bill.**

Social Security (Administration) (Income Management—Crediting of Accounts) Rules 2015 [F2015L00781]

Portfolio: Social Services
Authorising legislation: Social Security (Administration) Act 1999
Last day to disallow: 20 August 2015

Purpose

1.314 The Social Security (Administration) (Income Management—Crediting of Accounts) Rules 2015 (the rules) set out the particular circumstances in which the income management record and a person's income management account can be credited with an amount that is ascertained in accordance with the rules. These circumstances all relate to debits that are made from a person's record and account for the purpose of giving a BasicsCard to a person or increasing the monetary value stored on a BasicsCard.

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

Background

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

Income management

1.317 The income management regime engages multiple human rights, in particular the right to a private life, the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living.[2]

1.318 The rules particularly engage the right to privacy, in that it sets out the specific circumstances in which a person can access their social security benefits. For example, a person must apply to the Secretary of the Department of Human Services if they wish to reduce the amount of money stored on their BasicsCard and have the money provided to them directly in order to address a priority need. The affected person needs to make an application to the Secretary and explain the priority need for which they require direct access to their social security benefits, thereby engaging and limiting the person's right to a private life.

1.319 The statement of compatibility does not consider the right to privacy and so provides no justification as to whether the rules are compatible with this right.

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

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

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

Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780]

Portfolio: Attorney-General
Authorising legislation: Federal Court of Australia Act 1977; *Family Law Act 1975*; and *Federal Circuit Court of Australia Act 1999*
Last day to disallow: 20 August 2015

Purpose

1.321 The Federal Courts Legislation Amendment (Fees) Regulation 2015 (the regulation) makes amendments to the Federal Court and Federal Circuit Court Regulation 2012 to:

- exclude 'public authorities' (such as government agencies) from having to pay fees applicable to a 'corporation' when filing all matters in the Federal Court of Australia and the Federal Circuit Court of Australia (the federal courts), other than bankruptcy matters;
- remove the 'publicly listed company' fee category, and instead provide that such companies pay the lower fees applicable to a 'corporation' when filing all matters in the federal courts, other than bankruptcy matters;
- increase all fee categories (as amended above) by 10 per cent for the federal courts, except for those fees not subject to a biennial fee increase; and
- exempt certain procedural international arbitration matters from the general filing fee.

1.322 Schedule 2 of the regulation also sought to amend the Family Law (Fees) Regulation 2012 to:

- increase the fee for certain divorce applications, consent orders and issuing subpoenas by a prescribed amount;
- increase all other existing family law fee categories (by an average of 10 per cent) except for the reduced divorce fee in the Federal Circuit Court and divorce fees in the Family Court of Australia, and
- establish a new fee category for the filing of amended application.

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

Background

1.324 On 25 June 2015, the Senate disallowed Schedule 2 of the regulation. Accordingly, this analysis deals only with Schedule 1 of the regulation which continues in force.[1]

Increased fees for federal court proceedings

1.325 Schedule 1 of the regulation increased the costs in all fee categories by 10 per cent for all proceedings in the federal courts. This includes the costs of commencing an application or appeal and the costs for the hearing of the application or appeal.

1.326 The committee considers that this engages and may limit the right to a fair hearing (access to justice).

Right to a fair hearing

1.327 The right to a 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 and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

1.328 The right also includes the right to have equal access to the courts, regardless of citizenship or other status. This requires that no one is to be barred from accessing courts or tribunals (although there are limited exceptions if these are based on objective and reasonable grounds, for example vexatious litigants). To be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

Compatibility of the measure with the right to a fair hearing

1.329 The statement of compatibility states that the regulation does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

1.330 However, the right to a fair hearing includes a right to access to justice. A substantial increase in the cost of making an application to the federal courts, and in conducting a case before the courts, engages the right to a fair hearing, as this right includes a right to access to justice. The UN Human Rights Committee has said that

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1 Note that on 9 July 2015 a new instrument was made which increased the fees relating to divorce, consent orders and subpoenas and all other existing family law fee categories to an amount similar to that contained in the regulation; see Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138].

the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.[2]

1.331 Whether the right is limited will depend on whether the increase in fees to access the federal courts would indiscriminately prevent access to justice. No information is provided in the statement of compatibility as to whether there is any ability for an applicant to seek to have the fees waived if the fees would effectively prevent them from accessing the federal courts.

1.332 **The committee's assessment of the 10 per cent increase for all federal court fees against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing) raises questions as to whether the increase in court fees is a limitation on the right to access to justice.**

1.333 **As set out above, the increase in fees engages and may limit the right to a fair hearing. The statement of compatibility does not explore whether the measure limits the right to a fair hearing and does not justify any limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Attorney-General as to whether the measure is likely to limit the right to a fair hearing, and if so:**

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

2 See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007). See also *Lindon v Australia*, Communication No. 646/1995 (25 November 1998), para. 6.4.

Chapter 2

Concluded matters

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

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

Copyright Amendment (Online Infringement) Bill 2015

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

Purpose

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

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

Background

2.5 The committee previously considered the bill in its *Twenty-second Report of the 44th Parliament* (previous report) and requested further information from the Attorney-General as to whether a number of measures in the bill were compatible with human rights.[1]

2.6 The bill passed both Houses of Parliament on 22 June 2015 and achieved Royal Assent on 26 June 2015.

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

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

2.8 The committee considers that the bill engages and limits the right to freedom of opinion and expression and the right to a fair hearing.

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1 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 31-34.

Right to freedom of opinion and expression

2.9 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

2.10 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*)[2], or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.[3]

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

2.11 The statement of compatibility states that the bill promotes the right to freedom of opinion and expression. However, preventing users who are legally sharing or distributing files from websites, and preventing the general public from accessing such lawful material, limits their enjoyment of the right to freedom of opinion and expression and their right to receive information. Such a limitation may be justifiable.

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

2.13 However, the information provided in the statement of compatibility does not establish that the measure is proportionate to this objective (that is, there is no less rights restrictive alternative to achieve this result). Other potential mechanisms could include, for example, issuing infringement notices to individual copyright infringers and/or the provision of damages.

2.14 The committee therefore sought the advice of the Attorney-General as to whether the bill imposed a proportionate limitation on the right to freedom of opinion and expression.

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2 'The expression 'public order (*ordre public*)'…may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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

Attorney-General's response

The Committee has considered that the Bill engages and limits the right to freedom of opinion and expression and has sought advice on whether this limitation is proportionate.

The injunction power contained in the Bill is intended to target sources that supply significant amounts of infringing copyright content to Australian consumers. The Bill asks the Federal Court to balance a variety of interests in making an order and I expect the Court will be very circumspect in using this process.

Mechanisms that aim to change the behaviour of individual consumers through an educational approach, such as the Copyright Notice Scheme contained in the industry code submitted to the Australian Media and Communications Authority on 8 April 2015, would effectively complement but not replace a measure that disrupts the supply of infringing content. International experience has shown that disrupting the supply of infringing content will steer consumers towards legitimate avenues. Direct proceedings against individual infringers is not an effective means of addressing online copyright infringement due to the large number of infringers and the small quantum of damages that could be recovered from each infringer.

The Bill does not seek to limit the ability of persons to access or communicate information or ideas, other than where doing so would infringe another person's copyright. Where an online location provides a mixture of legitimate and infringing material, it is open to the Court to issue an injunction with regard to only specific pages, directories or indexes provided this is technically feasible. Moreover, the primary purpose test, combined with the factors in subsection 115A(5) make it clear that only online locations that are deliberately and flagrantly infringing copyright will be captured. The injunction power is not intended to capture incidental infringement.

Furthermore, there are a number of reasons that make it impractical for copyright owners to take direct proceedings against infringing foreign-based online locations. The territorial nature of copyright means that copyright owners often face complex issues of private international law when enforcing their rights in the online environment.

This was discussed in a 2011 article published in the European Intellectual Property Review and authored by Ms Fiona Rotstein of the University of Melbourne, which stated:

> It is often difficult to know which nation's courts have jurisdiction over intellectual property disputes involving a foreign element and which conditions need to be met for decisions of foreign courts to be recognised and enforced within a country. It is also not easy to

> determine which nation's laws are to be applied to govern the substance of legal relationships involving a foreign element.[4]

> The article also noted that it is unknown whether the copyright owner can bring an action in one forum in respect of multiple infringements in different countries.
>
> The legal complexities and the possibility that copyright owners will need to attend foreign courts to enforce their rights means that any direct proceeding against a foreign online location are likely to be prohibitively costly, particularly for individual or lesser known copyright owners. In contrast, the process of seeking an injunction against a Carriage Service Provider would be a much simpler and more accessible process.[5]

Committee response

2.15 **The committee thanks the Attorney-General for his response on the proportionality of the measure. The committee considers the Attorney-General's response has demonstrated that the measure is likely to be compatible with the right to freedom of opinion and expression. In particular, the committee notes that:**

- **the Federal Court will weigh up a number of factors before granting an injunction requiring a CSP to block access to an online location operated outside Australia that has the primary purpose of infringing copyright or facilitating the infringement of copyright;**
- **where an online location provides a mixture of legitimate and infringing material, the Federal Court could issue an injunction with regard to only specific pages, directories or indexes; and**
- **direct proceedings against a foreign online location are likely to be prohibitively costly.**

Right to a fair hearing

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

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4 Rotstein, Fiona, 'Is there an international intellectual property system? Is there an agreement between states as to what the objectives of intellectual property laws should be?' European Intellectual Property Review, Vol 33, Iss 1, 2011.

5 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 14 July 2015) 1-2.

Compatibility of the measure with the right to a fair hearing

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

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

2.19 However, for the reasons listed above, the committee was concerned that granting copyright owners the power to seek from the court an injunction against CSPs to block particular overseas websites may not be the least rights restrictive method of achieving the stated objective, as set out at [2.13].

2.20 The committee therefore sought the advice of the Attorney-General as to whether the bill imposes a proportionate limitation on the right to a fair hearing.

Attorney-General's response

> The Committee has also found that the Bill engages and limits the right to a fair hearing and has sought further advice on whether this limitation is proportionate.
>
> The Committee has raised the concern that the opportunity for the operator of the online location to apply to be joined as a party is dependent on notification by the copyright owner and there may be circumstances in which the operator cannot be contacted despite reasonable efforts. However, in circumstances where the identity or address of the operator cannot be ascertained, the possibility of initiating direct proceedings against the operator would also be precluded. Therefore, if the requirement for notification was absolute, the copyright owner would be left with no remedy in these cases. An important objective of the Bill is to enable copyright owners to overcome the practical difficulties they face in taking action against foreign online locations. This objective would not be achieved if the operator of the online location could avoid any action by hiding their identity and location.

6 EM 5-6.

The rights of users will only be affected to a limited extent by an order. Where the user has a contractual relationship with the operator of the online location, this relationship will govern the consequences for the user of an injunction order which results in the blocking of the online location and any recourse that the user may have against the operator. To the extent that the user is denied access to legitimate information, this impact will only be significant if the information cannot be accessed from legitimate sources. Furthermore, the operator of the online location is not prevented from providing a modified, legitimate source of information at a new online location.

Therefore in my opinion, the Bill limits the right to freedom of opinion and expression and the right to a fair hearing to an extent that is proportionate to achieving its objective of reducing online copyright infringement.[7]

Committee response

2.21 **The committee thanks the Attorney-General for his response on the proportionality of the measure. The committee considers that the Attorney-General's response has demonstrated that the measure is likely to be compatible with the right to a fair hearing. In particular, the committee notes that:**

- **both CSPs and the operators of affected online locations will be parties to the proceedings and the court can grant the operator of a website access as a party to the proceedings;**
- **if the identity or address of the operator of a website cannot be ascertained, they may not be notified of the proceedings, however if the requirement for notification was absolute the copyright owner would be left with no remedy in such cases; and**
- **where the user has a contractual relationship with the operator of the online location, this relationship will govern the consequences for the user of an injunction order.**

7 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 14 July 2015) 2-3.

Freedom of Information Amendment (New Arrangements) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 2 October 2014

Purpose

2.22 The Freedom of Information Amendment (New Arrangements) Bill 2014 (the bill) repeals the *Australian Information Commissioner Act 2010* and amends the *Freedom of Information Act 1982* (the FOI Act), the *Privacy Act 1988* (the Privacy Act) and the *Ombudsman Act 1976* (the Ombudsman Act) and other Acts.

2.23 The bill would abolish the Office of the Australian Information Commissioner (OAIC) and amend the FOI Act and Ombudsman Act to provide for:

- the removal of specific external review of FOI decisions by the OAIC, providing instead for the Administrative Appeals Tribunal (the AAT) to have sole jurisdiction for external merits review of FOI decisions;
- compulsory internal review of FOI decisions (where available) before a matter can proceed to the AAT;
- the Attorney-General to take over responsibility from the OIAC for FOI guidelines, collection of FOI statistics and the annual report on the operation of the FOI Act; and
- the Ombudsman to have sole responsibility for the investigation of FOI complaints.[1]

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

Background

2.25 The committee previously considered the bill in its *Eighteenth Report of the 44th Parliament* (previous report) and requested further information from the Attorney-General as to whether a number of measures in the bill were compatible with human rights.[2]

Removal of review by the OAIC

2.26 As set out above, the bill would abolish the OAIC leaving the AAT as the sole forum for external review of FOI decisions.

2.27 Currently, review of FOI decisions by the OAIC may commence before an internal review process has been completed. If an applicant does not agree with

1 Revised Explanatory Memorandum (REM) 2.

2 Parliamentary Joint Committee on Human Rights, Eighteenth Report of the 44th Parliament (10 February 2015) 40-42.

the OAIC's review, they may then seek review of the decision with the AAT.

2.28 In addition, individuals who are denied a FOI request may seek external review from the OAIC. The OAIC does not charge any fee to conduct its reviews. In contrast, there are generally fees payable for access to AAT review.

2.29 The abolition of the OAIC may engage the right to an effective remedy as individuals would only be able to have a FOI decision reviewed if they can afford the AAT fees.

Right to an effective remedy

2.30 Article 2 of the International Covenant on Civil and Political Rights (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.

2.31 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.

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

Compatibility of the measure with the right to an effective remedy

2.33 The statement of compatibility identifies the right to an effective remedy as being engaged by the measure, and concludes that the measure is compatible with the right.[3]

2.34 However, the committee noted in its previous report that currently individuals may access both the OAIC and the AAT for merits review of FOI decisions. That is, individuals are able to access two forums of merits review before needing to access the courts. The bill would therefore reduce access to review by removing one forum of review.

2.35 Further, there is generally an $861 fee to access AAT review (which can be reduced to $100 in certain circumstances). By abolishing the OAIC and leaving the AAT as the sole avenue for external merits review of FOI decisions, the bill would remove access to free external merits review of most FOI decisions.

3 REM 4.

2.36 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes.

2.37 The committee considered in its previous report that the proposed removal of specific external review of FOI decisions by the OAIC may limit the right to an effective remedy. The statement of compatibility does not sufficiently justify that potential limitation for the purposes of international human rights law. The committee therefore sought the advice of the Attorney-General as to whether the removal of access to free external merits review of FOI decisions is compatible with the right to an effective remedy, and particularly, whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Attorney-General's response

> The purpose of the Bill is to abolish the Office of the Australian Information Commissioner (OAIC), as part of the Government's commitment to reduce the size of government, streamline the delivery of government services and reduce duplication. The Bill does not affect the legally enforceable right of every person to request access to documents of an agency or official documents of a Minister. It does not make any changes to the objects of the *Freedom of Information Act 1982* (FOI Act) or the matters that agencies and ministers are required to consider in making decisions on FOI requests. It simply removes an anomalous and unnecessary layer of external merits review of FOI decisions.
>
> The dual layers of merits review was examined in the 2013 report on the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Hawke FOI Review). The report noted that a number of submissions to the review, including that of the OAIC, questioned whether having access to three levels of merits review was the most efficient model for reviews of FOI decisions. A multiple review process where applicants can access a range of dispute resolution mechanisms can be confusing and creates complexity which adds to the resource burden for both applicants and FOI decision makers.
>
> The establishment of the OAIC created an unnecessarily complex, multi-levelled system resulting in duplication of complaint handling and significant processing delays. These issues have existed from conception and are inherent in the design of the system, as opposed to practice or procedure of the OAIC. No amount of time to consolidate practices or refine procedures would redress the underlying issues with the system.
>
> Prior to the establishment of the OAIC, there was compulsory internal review of FOI decisions before an applicant could apply for merits review at the Administrative Appeals Tribunal (AAT). Since the commencement of

the OAIC, internal review has been available, but not compulsory, prior to seeking review in the OAIC.

Under the new arrangements, the AAT will have sole responsibility for external merits review of FOI decisions as it did for thirty years from commencement of the FOI Act in 1982 until the establishment of the OAIC in 2010. If an FOI applicant is not satisfied with an agency decision, they can apply for an internal review of the decision. There is no application fee for an internal review.

Compulsory internal review will ensure access to low-cost and timely review for applicants. It also provides an opportunity for agencies to reconsider the merits of the initial decision and give agencies primary responsibility for overseeing original FOI decisions. Following the abolition of the OAIC, agencies will again have sole responsibility for the initial review of agency decisions. If an applicant is not satisfied with an internal review decision, they may then apply to the AAT for an external review of the decision.

No changes are proposed for the AAT application fee under the new arrangements for FOI reviews. While there is a reduced fee of $100 that applies in cases of hardship, there are also circumstances where no application fee is payable. This includes where the FOI review relates to a decision about Commonwealth workers' compensation, family assistance and social security payments and veteran's entitlements. Further information is provided in the enclosed extract from the AAT website [see Appendix 1]. Consistent with other AAT matters, a successful applicant before the AAT will receive a refund of all but $100 of the application fee.

It is appropriate that the existing fee regime applies to FOI applicants in the same way as it applies to other government decisions being reviewed by the AAT. Requiring the payment of a fee for an AAT application may also lead to consideration by applicants of whether or not seeking review is appropriate in the circumstances, rather than simply an automatic response to an agency decision that is not favorable to the applicant.

The Bill corrects the fundamental problems in the current system by streamlining FOI regulation to remove a layer of unnecessary external merits review. By doing so, the Bill brings the process into line with review arrangements for other government decisions. This will mean that FOI applicants will no longer need to navigate a complex multi-level system nor be subject to significant processing delays.

As noted above, under the new arrangements those applicants who wish to seek review of the initial FOI decision will be able to seek internal review of the decision. Where a party is not satisfied with the internal review decision, there is a further right of review to the AAT. There is a further right of appeal to the Federal Court of Australia on a question of law from a decision of the AAT and the AAT is also able to refer a question of law to the Federal Court during a review.

Those applicants who wish to make a complaint about agency processing under the FOI Act will be able to make their complaint directly to the Ombudsman, who will take over the OAIC's role of investigating FOI complaints.

In my view the removal of a layer of external merits review does not impinge on the right to an effective remedy for FOI applicants. The continued availability of internal review, external merits review, access to judicial review and a right of complaint to the Ombudsman ensures comprehensive access to an effective remedy.

The new arrangements were to commence on 1 January 2015. However, as the Bill is still before the Parliament, the OAIC remains responsible for privacy and FOI regulation and continues to exercise its functions under both the *Privacy Act 1988* and the *Freedom of Information Act 1982* (FOI Act).

Resources are being reappropriated to the OAIC for the remainder of 2014-15 to allow it to continue the exercise of privacy and FOI functions, and the OAIC will also receive an appropriation in 2015-16 for these functions.

The OAIC has implemented a streamlined approach for applications for merits review of FOI decisions. Straightforward matters are being finalised by the OAIC, and where appropriate more complex or voluminous matters are being referred to the AAT if the Information Commissioner decides that it is desirable in the interests of the administration of the FOI Act that the matter be reviewed instead by the AAT. In such an event, an applicant may apply to the AAT in accordance with regular AAT procedures. All new FOI complaints are being referred to the Ombudsman.

The appointment of the Information Commissioner ends at the end of October 2015. If the Bill has not passed by then, the Government will ensure that arrangements are in place for the continued exercise of all of the Information Commissioner functions. The former Freedom of Information Commissioner, Dr James Popple, was appointed as a full-time Senior Member of the AAT on 1 January 2015. Dr Popple has been appointed until 31 December 2017.[4]

Committee response

2.38 **The committee thanks the Attorney-General for his response. The committee considers that the response demonstrates that the measures are likely to be compatible with the right to an effective remedy. In particular, the committee notes that the bill would:**

4 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 June 2015) 1-3.

- **not affect the legally enforceable right to request access to documents of a government agency or official documents of a minister;**
- **not make any changes to the objects of the FOI Act or the matters that agencies and ministers are required to consider in making decisions on FOI requests; and**
- **maintain merits review of decisions to refuse a FOI request through the AAT.**

2.39 **The committee also notes the Attorney-General's advice that there are a number of circumstances where no application fee is payable to the AAT, including where an FOI decisions relates to a decision about Commonwealth workers' compensation, family assistance and social security payments and veteran's entitlements.**

2.40 **The committee has concluded its examination of the bill.**

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

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

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

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

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

Background

2.43 The committee previously considered the bill in its *Twenty-Second 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]

1 Parliamentary Joint Committee on Human Rights, *Twenty-Second Report of the 44th Parliament* (13 May 2015) 57-65.

Broad discretionary power to collect biometric data

2.44 The powers to collect biometric data or personal identifiers from an individual is currently authorised under eight separate sections of the Migration Act depending on the particular circumstances. The bill would replace these powers with a broad discretionary power to collect personal identifiers in proposed section 257A of the Migration Act.[2] Personal identifiers include fingerprints, handprints, measurements of height and weight, photographs or images of a person's face and shoulders, an audio or visual recording of a person, an iris scan, a person's signature or other identifiers specified by regulation.[3] The power would provide that the minister or an officer may require a person to provide one or more personal identifiers for the purposes of the Migration Act or Migration Regulations.[4]

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

Right to privacy

2.46 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes:

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

2.47 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

1.7 The committee considered in its previous report that as the proposed power expands the circumstances in which biometric data or personal identifiers may be collected the power engages and limits the right to privacy. The statement of

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

3 Migration Act, section 5A(1).

4 Explanatory Memorandum (EM) 10.

compatibility acknowledges that the measure engages and limits the right to privacy but argues that this limitation is justifiable.[5]

2.48 The committee agreed that 'ensuring the integrity of Australia's borders and visa system' may be regarded as a legitimate objective for the purposes of international human rights law. However, it considered that while the proposed power appears to be rationally connected to the stated objective it may not be a proportionate means to achieve this stated objective.

2.49 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.

Minister's response

> The approach in the Bill is proportionate as personal identifiers can only be collected for a purpose set out in the *Migration Act 1958* or *Migration Regulations 1994*. These legislated purposes ensure the collection of personal identifiers is not done arbitrarily, and are necessary to the Department's functions and activities. As stated in the Explanatory Memorandum to the Bill, the Department collected an additional personal identifier (i.e., fingerprints) from less than two percent of people granted a visa in 2013/14. This very small number evidences that the current purpose for the collection of personal identifiers is appropriate and limited to legitimate needs to not only verify identity, but also to conduct necessary immigration, security and law enforcement checks to protect the Australian community.
>
> The Bill expands the circumstances in which personal identifiers may be collected beyond those currently set out in the Migration Act:
>
> - visa decision-making (sections 40 and 46) - non-citizens only;
> - at Australia's border, on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175)- citizens and non-citizens;
> - evidencing that a non-citizen holds a lawful visa (section 188) and when a non-citizen is being detained on the basis that they hold a visa that is subject to cancellation on certain grounds (section 192) - non-citizens only; and
> - immigration detention decision-making (section 261AA)- non-citizens only.
>
> The Bill does not:
>
> - add new types of personal identifiers that the Department is authorised to collect

5 EM 40.

- expand the circumstances where Australian citizens can be required to provide personal identifiers to locations other than the border
- amend the existing legislative rules and public scrutiny that the Department's handling of personal identifiers is subject to.

Developments in biometric technologies are at the forefront of the reforms in the Bill. Technological innovation now allows the Department to collect personal identifiers quickly, using non-intrusive scanners and other devices. Yet, the Department cannot utilise this new technology effectively because of limitations in current legislation. The Bill authorises the use of verification checks that take advantage of advances in biometric technology collection.

A verification check is a non-invasive, quick scan of a person's fingers using a hand-held mobile scanner. A verification check is able to be completed in approximately 30 seconds.

The Department currently collects personal identifiers, namely a facial image and fingerprints, by a time-consuming identification test. It is impractical to use identification test procedures at Australia's border because it is:

- time consuming - the current process that involves collecting both facial-image and 10 fingerprints may take 30-60 minutes to complete; and
- ineffective as the Department does not have resources to conduct more than a few identification tests per flight.

The safeguards that apply to an identification test are not necessary for a verification check, noting that unlike an identification test a person's biometric information is not retained after the completion of a verification check. The Department has been conducting verification checks in public at two international airports since 2012. More than 12,000 checks have been conducted on a consent basis, without incident, indicating the broad acceptance of the check among travellers. Conducting verification checks in public is consistent with other technology-enabled checks currently conducted in public at airports, such as the explosives trace detection test that is accepted by the travelling public as a necessary part of the overall security apparatus at airports.

Collecting personal identifiers by a means of a verification check provides the Department with flexibility to meet the increasing challenges at Australia's borders to identify persons of concern and conduct appropriate security checks accurately and quickly, and in a way that does not burden legitimate travellers. A verification check is efficient and quick. Only those individuals identified as being of higher risk would be subject to a verification check.

Officers conducting verification checks must act in accordance with the Australian Public Service Code of Conduct and the Department's

professional integrity framework. Administrative and criminal penalties may apply for breaches.[6]

Committee's response

2.50 **The committee thanks the minister for his response.** The committee notes the minister's statement that the bill is proportionate as personal identifiers can only be collected for a purpose set out in the Migration Act or Migration Regulations 1994. In its initial analysis, the committee noted that the powers in the bill were not constrained by a requirement that the collection of the identifier be considered necessary in the circumstances or that an officer must be reasonably satisfied that the collection would assist in the identification of an individual. These specific concerns are not addressed in the minister's response.

2.51 The committee agreed that the measures have a legitimate objective and that the measures were rationally connected to that objective. The committee notes that the developments in biometric technologies are a key driver of these reforms. The committee agrees that our customs and immigration authorities should have access to the latest technology in order that appropriate and necessary identification checks are able to be undertaken in the most efficient and least intrusive manner.

2.52 However, under international human rights law, in order to use technology in a manner that limits a person's right to privacy, there must be appropriate safeguards and the approach taken must be the least rights restrictive method to achieve appropriate identity checks.

2.53 The bill does not limit the use of identification checks to circumstances where the collection of the identifier is considered necessary in the circumstances or that an officer is reasonably satisfied that the collection would assist in the identification of an individual. Accordingly, the legislation permits a broader use of identification checks than is necessary in all the circumstances and therefore does not impose a proportionate limitation on the right to privacy.

2.54 In its initial analysis, the committee also noted that the measures in the bill, in addition to allowing the collection of personal identifier by an authorised identification test, would allow personal identifiers to be collected in a manner 'specified by the minister or officer'. If personal information is collected in this way, particular safeguards provided for under the Act, such as that the identification test be 'must be carried out in circumstances affording reasonable privacy to the person' would not apply.[7]

2.55 The minister's response notes that this power will be used to undertake verification checks of fingerprints which are currently done with an individual's

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6 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 25 June 2015) 2-3.

7 Section 258E of the Migration Act.

consent at two airports. The minister states that the safeguards that apply to identification checks are not required for verification checks because:

- the biometric information is not retained; and
- conducting the tests in public is consistent with other checks done in public such as the explosives trace detection test.

2.56 While the stated intended use of the power in the bill to conduct fingerprint checks may appear reasonable and appropriately circumscribed, the actual powers available under the bill are not so limited. The bill would permit the collection of any of the personal identifiers provided for under the Migration Act or by regulation and in any manner specified by the minister without any of the safeguards that apply to identification tests. The minister's response states that the current verification check is a non-invasive, quick scan of a person's fingers using a hand-held mobile scanner. No reasons have been given as to why the bill has not been drafted in a way to restrict the power to the circumstances stated by the minister. The committee considers that the minister's response has not demonstrated that this broad power imposes a necessary or proportionate limitation on the right to privacy.

2.57 **Some committee members consider that the broad discretionary power to collect personal identifiers engages and limits the right to privacy. As noted above, the minister's response has not sufficiently justified this limitation for the purposes of international human rights law. These committee members therefore consider that the broad discretionary power to collect personal identifies may be incompatible with the right to privacy.**

2.58 **However, some committee members noted the minister's advice that personal identifiers can only be collected for a purpose set out in the *Migration Act 1958* or Migration Regulations 1994, and consider that the measure is justified.**

Right to equality and non-discrimination

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

2.60 These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.61 The ICCPR defines ‘discrimination’ as a distinction based on a personal attribute (for example, race, sex or religion),[8] which has either the purpose (called

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

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[9] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[10]

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

2.62 The statement of compatibility acknowledges that the measures may engage the right to equality and non-discrimination. As set out at paragraph [2.48] above, the committee agrees that the measure may pursue a legitimate objective for the purposes of international human rights law.

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

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

2.65 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.

Minister's response

> It is the Government's view that the Bill is not discriminatory in its purpose or its impact. Individuals are not currently targeted for additional scrutiny at Australia's borders because of any single characteristic, such as religion or nationality, and the Bill provides no change to the current approach.
>
> The Department has developed a range of sophisticated and innovative tools and capabilities to analyse risk when making visa application decisions and when people are crossing Australia's border. These mathematical, statistical and intelligence techniques produce evidence-based data that can be used to detect persons of higher risk. Examples where these tools are used include where a person:

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

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

- 'fails' automated immigration clearance through Smartgate or a manual face-to-passport check, because their facial image does not 'match' the passport photo or the passport is listed as 'stolen';
- an alert is triggered against the Department's Central Movement Alert List; and
- matches a profile (e.g., a person might match a profile for identity fraud, which may include combinations or patterns of a range of variables, such as age or where and how a ticket was purchased).

These same tools and capabilities will continue to be used to detect persons of risk. Under the Bill, the Department will be able to respond to such risks more effectively by using biometrics to resolve identity and security concerns, rather than relying on paper-based documents.[11]

Committee's response

2.66 **The committee thanks the minister for his response.** The committee notes that the minister's response does not address the specific concern raised by the committee in its initial analysis that 'risk-based and intelligence-based targeting' may have a disproportionate or unintended negative impact on particular groups based on race or religion and therefore be potentially indirectly discriminatory.

2.67 The response states that mathematical, statistical and intelligence techniques produce evidence-based data that can be used to detect persons of higher risk. The response does not explain whether such tools result in more persons of a particular nationality or religious belief being identified as higher risk. Where a measure impacts on particular groups disproportionality, it establishes prima facie that there may be indirect discrimination.

2.68 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

2.69 **The committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality and non-discrimination particularly in relation to profiling and targeting of individuals for scrutiny. However, the committee notes the minister's assurance that such powers are used by the department only on the basis of objective evidence using highly sophisticated operational tools. Accordingly, the committee considers that the powers may be compatible with the right to equality and non-discrimination.**

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11 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 25 June 2015) 3-4.

Right to equality before the law

2.70 The right to equality before the law is protected by article 26(1) of the ICCPR.[12] It is an important aspect of the right to equality and non-discrimination.

2.71 The right to equality before the law provides that law must not be applied by law enforcement authorities or the judiciary in an arbitrary or discriminatory manner.[13]

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

2.72 The committee previously considered that the measure engages and may limit the right to equality before the law. This is because, unless there are sufficient safeguards, the collection of personal identifiers has the potential, in practice, to be applied in a manner which may target, for example, persons with certain physical characteristics or particular national or ethnic origins.[14]

2.73 Where this kind of targeting occurs, without objective or reasonable justification, it will be incompatible with the right to equality before the law. That is, it may result in the law being applied in ways that are arbitrary or discriminatory. This form of targeting is often referred to as racial profiling.[15]

2.74 As set out at paragraph [2.48] above, the committee agrees that the measure may pursue a legitimate objective for the purposes of international human rights law. However, the committee considered that information as to how the risk-based and intelligence based-targeting will be undertaken in practice will be critical to assessing whether such practices impose a proportionate limitation on the right to equality before the law.

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

Minister's response

> As stated above, the same tools and capabilities that are currently used to detect persons of risk will continue to be used and the Bill makes no

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

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

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

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

> changes to the methods used to identify persons who may be requested to provide their personal identifiers to resolve concerns about a person's identity or their immigration, security or criminal histories. The Bill will authorise the use of new technology to conduct a more accurate, faster and higher-integrity check using a fingerprint scan in less than one minute.
>
> The recent case of the convicted terrorist Khaled Sharrouf, who in December 2013 used his brother's passport to leave Australia to participate in terrorist-related activities, illustrates the need to expand the use of fingerprint-based checks to resolve concerns at the border. Under the Bill, the Department will be able to respond to such risks more effectively and quickly by using a verification check to resolve identity and security concerns.[16]

Committee's response

2.76 **The committee thanks the minister for his response.** The committee notes that the minister's response refers to the information provided in relation to the right to equality and non-discrimination. The committee considers that similar issues arise from the response in relation to the right to equality to those set out above.

2.77 **The committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality before the law, particularly in relation to profiling and targeting of individuals for scrutiny. However, the committee notes the minister's assurance that such powers are used by the department only on the basis of objective evidence using highly sophisticated operational tools. Accordingly, the committee considers that the powers may be compatible with the right to equality before the law.**

Removal of restrictions on the collection of personal identifiers from minors

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

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

Rights of the child

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

- the right to develop to the fullest;

16 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 25 June 2015) 4.

- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

2.81 States parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:

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

Compatibility of the measure with the rights of the child

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

2.83 The committee previously agreed with the statement of compatibility that the amendments have the dual legitimate objective of maintaining effective immigration controls and the protection of vulnerable minors, and that the measures are rationally connected to the legitimate objective.

2.84 However, the committee considered that the statement of compatibility has not sufficiently explained why it is necessary to provide broad discretionary powers with few statutory safeguards. The committee therefore considered that the measure had not been justified as proportionate.

2.85 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.

Minister's response

> The Bill aims to amend existing consent and presence requirements for minors to protect vulnerable children from trafficking and exploitation, and detect radicalised individuals who may seek to harm the Australian community.
>
> The Department is currently prohibited by law from collecting certain types of personal identifiers from minors under the age of 15 years. In

locations away from Australia's border, the Migration Act currently requires that a parent, guardian or independent person must consent to, and be present for, the collection of personal identifiers from minors. This means that a parent, guardian or independent person can prevent the Department from collecting personal identifiers from a minor by refusing consent or refusing to be present with a minor during collection of personal identifiers.

Allowing the current consent and presence requirements to remain unaltered reduces the effectiveness of using personal identifiers to combat identity fraud, including trafficking, and to detect undisclosed adverse security, law enforcement and/or immigration information of minors. The reasons for the amendments relating to minors are already outlined in the Explanatory Memorandum and Statement of Compatibility with Human Rights for the Bill. These include:

- improved integrity of identity data to more accurately identify that the right person is subject to action, and not another person who is misidentified;
- greater consistency with partner countries where fingerprints are collected based on operational policy
- enabling the case-by-case collection of personal identifiers from individual minors identified as of concern
- more protection for children who have been, or who are at risk of being trafficked
- effectively addressing the current problem of a person claiming to be a minor under 15 years of age to avoid identity, security, law enforcement and immigration checks that would otherwise apply
- detecting radicalised minors who are returning after participating in conflicts in the Middle East and elsewhere, where an increasing number of cases are evident, including some now reported in the media and are involved in violent extremism.

It is anticipated that the Bill will impact on only a small number of minors in specific circumstances, including:

- offshore to protect minors from people smugglers and traffickers;
- on entry and departure at Australia's border in certain circumstances where a minor is identified as at risk or as of concern; and
- applicants from the Refugee and Humanitarian caseload, who are a particularly vulnerable group.

Existing safeguards in the Migration Act relating to access, disclosure and retention of biometrics will continue to provide robust protections for all people affected by amendments in the Bill, including minors. The Department will implement additional policy guidelines that provide

> guidance to officers on how the new power to collect personal identifiers is to be exercised. The policy guidance will cover how personal identifiers are to be collected from minors and it will ensure that this is done in a respectful way. The policy guidance will be publicly available.[17]

Committee's response

2.86 **The committee thanks the minister for his response.** The committee noted in its initial analysis that the statement of compatibility had not sufficiently explained why it is necessary to provide broad discretionary powers with few statutory safeguards if the intention is that minors would usually be fingerprinted with the consent and/or presence of the minor's parents or guardians. It would, for example, be possible to have an exceptions based provision that would permit fingerprinting in more limited circumstances. The minister's response has not specifically addressed this concern.

2.87 The proposed provisions do not require a guardian or independent observer to be present during the collection of personal identifiers thus creating a situation where an unaccompanied child is required to look after their own interests in a system they are unfamiliar with. There is also no specific legislative requirement that the personal identifiers be collected in the least intrusive manner possible nor a requirement that younger children are not unnecessarily separated from their parent or guardian.

2.88 The committee notes that the minister's response explains that the department will implement additional policy guidelines to guide officers on how the new power to collect personal identifiers is to be exercised. The committee welcomes such guidance. However, international human rights law generally requires that appropriate safeguards be included in legislation. The committee remains concerned that the bill gives a broad discretionary power to collect personal identifiers from minors with few statutory safeguards.

2.89 **The committee considers that removing the current restrictions on the collection of personal identifiers on minors engages and limits the obligation to consider the best interests of the child as a primary consideration. As noted above, the minister's response has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore considers that the power to collect personal identifiers from minors without the presence of their parent or guardian may be incompatible with the obligation to consider the best interests of the child.**

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17 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 25 June 2015) 4-5.

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

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

Purpose

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

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

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

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

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

Background

2.94 The committee previously considered the bill in its *Twenty-second Report of the 44th Parliament* (previous report), and requested further information from the Minister for Employment as to whether the bill was compatible with Australia's international human rights obligations.[1]

Redefining work related injuries (Schedule 1)

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

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

Right to social security

2.97 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.

2.98 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).

2.99 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;

1 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 72-104.

- 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.

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

Right to health and a healthy environment

2.101 The right to health is guaranteed by article 12(1) of ICESCR, and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information). As set out above in relation to the right to social security, under article 2(1) of ICESCR, Australia has certain minimum obligations in relation to the right to health (see paragraph [2.99]).

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

2.102 The statement of compatibility states that the measure engages and limits the right to social security and the right to health.[2] The statement of compatibility for the bill does not provide sufficient information to establish that the measure pursues a legitimate objective for human rights purposes (that is, addresses a pressing or substantial concern). The committee therefore sought the advice of the Minister for Employment as to whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> ***Redefining work related injuries (Schedule 1)***
>
> Right to social security
>
> Right to health and a healthy environment
>
> At paragraph 1.304, the Committee requested further information to show that 'redefining work related injuries ... pursues a legitimate objective'.

2 Statement of Compatibility (SOC) 17.

Schedule 1 to the Bill contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**) which tighten the criteria which must be satisfied before particular injuries, such as heart attacks, strokes or spinal disc injuries, are compensable as work-related injuries.

Article 9 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) provides for the right to social security, including the right to social insurance. General Comment 19 elaborates on the right of social insurance in the context of workers' compensation: 'States parties should also ensure the protection of workers who are injured in the course of employment or other productive work.'[3] The legitimate objective of these amendments is to more clearly define when an injury occurs 'in the course of employment or other productive work' for the purposes of eligibility for workers' compensation. This is to ensure that an employer's liability will not extend to diseases or injuries that are manifestations of underlying medical conditions which have no significant basis in employment.

The Committee requested further information on the sustainability of the Comcare scheme and the ability of insured employers to meet premium increases.

The Comcare scheme has come under increasing financial pressure. A $687 million deficit (based on the asset to liability ratio) in 2011-2012 was identified following a change in actuarial model in 2011-2012. It was driven by reductions in market interest rates and increases in average claims costs. There have been sharp increases in the premiums charged to Commonwealth entities and authorities. In February 2015, the ACT government announced its intention to leave the scheme due to the high premium costs resulting from a 180 per cent increase in nine years to $97 million for 2014-2015.

Successive governments have applied an efficiency dividend to the resourcing of government agencies. For the past decade, this has averaged 1.88 per cent. In essence this means that, after allowing for changes in responsibilities, agencies' administrative funding has declined in real terms each year. At the same time, Comcare premiums have risen by 50 per cent over the four year period from 2010-11to2013-14. This has put significant pressure on agencies.

Rational connection between measure and objective

The rational connection between the legitimate objective and these amendments is to distinguish between heart attacks, strokes and spinal disc injuries which are connected to employment only because they happened to occur at the workplace, and those which are significantly contributed to by a person's employment.

3 Committee on Economic, Social and Cultural Rights, General Comment No. 19 para 17.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable because they seek to clarify the injuries which are attributable to employment. The amendments are proportionate because they maintain coverage under the Comcare workers' compensation scheme for injuries which have a sufficient nexus to employment. Historically, heart attacks, strokes and some spinal disc injuries were considered to be the culmination of a disease and therefore the 'significant contribution test' was applied to determine liability for compensation. In *Health Insurance Commission v Van Reesch* [1996] FCA 1118, the Full Federal Court applied the High Court decision in *Zickar v MGH Plastic Industries Pty Limited* [1996] HCA 31 to the 1971 Act (the predecessor to the SRC Act) and, by implication of its relevant terms, to the SRC Act. The High Court in *Zickar* held that the sudden rupture of blood vessels was an 'injury'. In applying *Zickar*, the Full Court noted that a spinal disc prolapse, which was not an inevitable consequence of a pre-existing back condition, could also properly be identified as an 'injury'. As a result the range of compensable injuries has considerably expanded.

The Committee requested further information on other support available to individuals who are injured or unwell and who would no longer be eligible for workers' compensation.

The purpose of workers' compensation is to give greater protection and security to workers against injury, illness and death occurring in the course of employment. It is not a substitute for a social security/welfare system. For people who are not eligible for workers' compensation for injuries, because their injury was not caused by their employment, social security/welfare payments will continue to be available. The Commonwealth's disability support and discrimination, superannuation, social security and health care legislation all maintain a person's right to health and social security support.

Social Security

Australia's social security system provides payments for those unable to work, either partially or wholly, because of injury/illness, including access to:

- the Disability Support Pension, which provides financial support where there is a physical, intellectual or psychiatric condition that prevents a person from working, or if a person is permanently blind
- the Sickness Allowance, which is a short-term payment to a person who is employed or self-employed, but who temporarily cannot work or study because of a medical condition
- the Mobility Allowance, which helps a person participate in approved activities where a person has a disability, illness or injury – the allowance helps with transport costs if a person uses public transport

without substantial assistance, either permanently or for an extended period

Australia's social security system also provides for a carer's allowance and payment. If a person's medical condition is such that they require care in the home, their relatives/partner may receive a carer's allowance through the Australian Government social security system. The carer payment is an income support payment for people who personally provide constant care in the home of someone with a severe disability or illness.

Australian Government services that are available nationally to persons with a disability or injured as a result of a non-work related injury include Job Access and employment services such as Disability Employment Services (**DES**), jobactive and the Remote Jobs and Communities Program (**RJCP**). JobAccess is a free information and advice service about the employment of people with disability. JobAccess helps people with disability, employers, service providers and the community to access information about services, financial assistance and workplace solutions.

Disability Employment Services, jobactive and Remote Jobs and Communities Program

The services that are available to persons injured as a result of a non-work related injury include DES to help all eligible job seekers with disability, injury or health condition to prepare for, find and keep a job. DES providers develop return-to-work plans and work with the person and their employer (if the person is employed) to ensure all the supports are in place the keep them in employment. If the person is not employed they develop a return-to-work plan to assist the person to secure appropriate new employment. Examples of the types of on-the-job supports provided include on-the-job training, co-worker and employer support, access to incentives for the employer, free workplace modifications and adjustments to cater to the employees' restrictions. Alternatively, many people with a disability are supported by jobactive providers to find employment.

jobactive

On 1 July 2015, the Australian Government is introducing new employment services called jobactive to better meet the needs of job seekers and employers and improve job outcomes.

Job seekers will have access to tailored help from a jobactive organisation, based on their assessed needs. This could include:

- help looking for work, writing a resume and preparing for interviews
- referrals to jobs in their local area
- training that is suited to the skills that local employers need
- case management so that job seekers are ready to take up and keep a job

- support to complete Work for the Dole or other eligible activities to provide them with work-like experiences, to help them learn new skills and improve their chances of finding a job.

RJCP

The RJCP provides a jobs, participation and community-development service in 60 remote regions across Australia. The programme supports people to build their skills and get a job or to participate to their capacity in activities that contribute to the strength and sustainability of communities. It also helps remote-area employers to meet their workforce needs and supports communities in remote Australia to plan and build a better future.

Key features of RJCP are:

- Employment and participation activities, including personalised support for job seekers;
- The Remote Youth Leadership and Development Corps (Youth Corps) to help young people move successfully from school to work;
- Providers and communities working together through the development of Community Action Plans to identify the strategies and resources needed to overcome barriers to employment and participation; and
- The Community Development Fund to help communities build strong social and economic foundations

National Disability Insurance Scheme

For people who suffer a disability as a result of heart attacks, strokes or spinal injury, the National Disability Insurance Scheme provides support including access to community services, funded personal plans and supports over a person's lifetime.

Medicare

The health needs of injured people whose injuries are not covered under workers' compensation, are covered by the Australian Government's Medicare system. Medicare provides access to medical and hospital services for all Australian residents and certain visitors to Australia. Medicare covers free and subsidised treatment by health professionals such as doctors, specialists, optometrists and, in certain circumstances, dentists and other allied health practitioners. Medicare also provides free treatment and accommodation in a public hospital.

PBS Scheme

The *Pharmaceutical Benefits Scheme* (**PBS**) provides highly discounted medications to the Australian public and an additional discount for those on a low income who hold a Health Care Card (concession card). The payment for all PBS listed medications for those with a concession card is $6.10 (1 January 2015) while those without a concession card pay up to

$37.70 (1 January 2015). The Australian Government pays the remaining cost.

Disability discrimination legislation

The Commonwealth's *Disability Discrimination Act 1992* (**DD Act**) covers direct and indirect discrimination, and places positive obligations on employers in relation to employees with a disabling health condition, injury or illness. An employer's main obligations under the DD Act are:

- not to discriminate directly by less favourable treatment
- not to discriminate indirectly by treatment which is less favourable in its impact
- to make reasonable adjustments (e.g. performance requirements, equipment and facilities provided) where required
- to avoid and prevent harassment.

Superannuation and related insurances

The Australian Government has legislated that all Australian employers must provide superannuation coverage to all employees. The new 'My Super' legislation, commencing in 2013 with full compliance required by 2017, requires that all superannuation funds must provide default opt-out death and total and permanent disability insurance coverage. A majority of superannuation schemes also currently provide opt-in income protection insurance at lower than market rates.[4]

Committee response

2.103 **The committee thanks the Minister for Employment for his response in relation to the compatibility of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the right to social security and the right to health. In particular, the committee notes that the minister's response explains that the legitimate objective of the measure is to more clearly define when an injury occurs 'in the course of employment or other productive work' for the purposes of eligibility for workers' compensation.**

Introduction of 'Compensation Standards' (Schedule 1)

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

4 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 3-7.

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

Right to social security and the right to health

2.106 These rights are described above at paragraphs [2.97] to [2.101].

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

2.107 The committee considered that the statement of compatibility has not explained why Compensation Standards are necessary. Moreover, in the absence of safeguards, Comcare will have the power, through Compensation Standards, to limit access to workers' compensation in circumstances that may be inconsistent with medical evidence.

2.108 The committee therefore considered that the measure granting Comcare the power to establish 'Compensation Standards' engages and limits the right to health and the right to social security. The statement of compatibility for the bill does not provide sufficient information to establish that the bill may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore sought the advice of the Minister for Employment as to whether the measure imposes a proportionate limitation on the right to health and the right to social security.

Minister's response

> ***Introduction of 'Compensation Standards' (Schedule 1)***
>
> *Right to social security*
>
> *Right to health and a healthy environment*
>
> Schedule 1 to the Bill inserts a new section 7A which empowers Comcare to determine a Compensation Standard that relates to a specified ailment and sets out the factors that must, as a minimum, exist before it can be said that an employee is suffering from the ailment. A Compensation Standard can also set out matters that must be taken into account in determining whether an ailment or the aggravation of an ailment was contributed to, to a significant degree, by an employee's employment.
>
> The Committee agreed that ensuring that an employer's liability does not extend to diseases or injuries which have no significant basis in employment could be a legitimate objective. The Committee also agreed that the measure is rationally connected to this objective. This is because the amendments will enable Comcare to establish criteria for particular ailments which will determine whether an employee is eligible for workers' compensation.
>
> The Committee stated at paragraph 1.312 that it required further information to show that the amendments were proportionate to the stated objective.

Measure is a reasonable and proportionate means of achieving the objective

This amendment is reasonable and proportionate to the stated objective because Compensation Standards will provide greater transparency and consistency in relation to the matters that are taken into account in determining whether a person suffers from a compensable injury or disease. Compensation Standards will be subject to the *Legislative Instruments Act 2003* (**LI Act**) and will contribute to ensuring the integrity of the scheme while having the benefit of parliamentary scrutiny.

The Department of Veterans' Affairs currently uses similar decision support tools to determine liability for claims made by Australian Defence Force (**ADF**) members under the *Military Rehabilitation and Compensation 2004* (**MRC Act**) and *the Veterans' Entitlements act 1986*. The Statements of Principles (**SoPs**) used under those Acts are determined by the Repatriation Medical Authority. The SoPs include a set of diagnostic criteria based on sound medical-scientific evidence that are used to establish a connection between a medical condition and service in the ADF. The SoPs also identify the factors which must exist, as a minimum, to cause a particular kind of disease, injury or death. The SoPs were created to provide a more equitable, efficient, consistent and non-adversarial system of dealing with claims for liability. It is anticipated that Comcare will develop the Compensation Standards along similar lines to the SoPs. However, unlike the SoPs, which are specific to defence-related service, the Compensation Standards will be specific to employment-related injury and disease and will enable a more equitable and consistent approach to determining liability for workers' compensation claims.

Under the SRC Act, an employee who believes that an injury or disease was significantly contributed to by his or her work can lodge a claim for workers' compensation based on a diagnosis from a medical practitioner linking the claimed condition to employment. However, given that medical practitioners do not have access to the employee's workplace, and are unlikely to have specific knowledge of relevant workplace events, it is questionable whether workplace causality can be based on medical diagnosis alone. This is particularly the case for psychological or psychiatric injury claims. Where a medical practitioner does not have full knowledge of relevant workplace events, a Compensation Standard can be used to support the practitioner's assessment of causation. A causality-based diagnostic model will:

- inform medical practitioners about what constitutes a compensable injury and
- provide greater scheme-wide consistency and transparency in the initial liability decision-making process.

In cases of physical injury, it is relatively easy to establish workplace causality. However, for psychological or psychiatric injuries, this can be difficult because a person's mental health is compromised. Currently, when

claims are rejected, an injured employee may be subjected to a lengthy dispute resolution process involving reconsideration of a claim and possible referral to the Administrative Appeals Tribunal (**AAT**). This is not an ideal outcome, particularly for someone who has compromised health.

Compensation Standards will establish clear, transparent criteria for determining workplace causality for a limited range of conditions, such as adjustment disorder, to support better decision making and reduced disputation. Liability for most conditions will be determined without a Compensation Standard, making the development of a Compensation Standard the least restrictive measure for determining liability for conditions where diagnoses are currently inconsistent across the scheme. Clearer rules, as outlined in a Compensation Standard, may further reduce the need for an injured employee to engage in lengthy disputation. In particular, Compensation Standards will assist where workplace causality is disputed or harder to establish and will make it simpler for employees, especially those with mental injuries, to negotiate the claims process.

The Committee expressed concern that there appears to be no requirement for the Compensation Standards to be based on objective evidence. The Committee also expressed concern at the broad discretion available to Comcare in establishing the Compensation Standards and regarding whether appropriate consultation would be carried out.

Comcare will be establishing a working group to develop Compensation Standards with membership to include representatives from relevant expert groups including employers, employee advocates and medical experts. This working group will be tasked with ensuring that any Compensation Standards developed are based on objective evidence.

Further, a Compensation Standard will be a legislative instrument and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken. Furthermore, a Compensation Standard will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).[5]

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5 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 7-9.

Committee response

2.109 **The committee thanks the Minister for Employment for his response on the proportionality of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the right to social security and the right to health. In particular, the committee notes:**

- **the establishment of a working group to develop Compensation Standards, with membership to include representatives from relevant expert groups;**
- **Compensation Standards will be disallowable instruments;**
- **similar decision support tools are currently used by the Department of Veterans' Affairs to determine liability for claims made by Australian Defence Force members; and**
- **the amendments will enable a more equitable approach to determining liability for workers' compensation claims.**

Workplace rehabilitation plans (Schedule 2)

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

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

Rights of persons with disabilities to rehabilitation

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

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6 SOC 21.

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

8 SOC 21.

9 Proposed section 36A.

and rehabilitation services and programs, particularly in the areas of health, employment, education and social services. These services and programs need to:

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

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

2.113 The committee noted that the statement of compatibility sets out a range of reasons as to why this objective is important and addresses a pressing concern.[11] Based on the information provided the committee considers that the measures pursue a legitimate objective for the purpose of justifying a limitation on human rights.

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

2.115 However, the committee previously considered that the statement of compatibility does not explain how specifically the measures will support the stated legitimate objective and whether less rights restrictive measures would achieve the same result.

2.116 The committee therefore sought the advice of the Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly whether a less rights restrictive alternative would achieve the same result.

Right to health and a healthy environment

2.117 The right to health is set out above at [2.101].

Compatibility of the measure with the right to health

2.118 The statement of compatibility states that, to the extent that the measures could be viewed as narrowing the scope of medical rehabilitation, the measures may also limit the right to health.[12]

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10 CRPD, article 26.

11 SOC 22.

12 SOC 22.

2.119 The committee therefore sought the advice of the Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly, whether a less rights restrictive alternative would achieve the same result.

Minister's response

Workplace rehabilitation plans (Schedule 2)

Rights of persons with disabilities to rehabilitation

Right to health and a healthy environment

Schedule 2 to the Bill contains amendments which emphasise the vocational (rather than medical) nature of rehabilitation services.

The Committee agrees that the measure pursues a legitimate objective to pursue a core purpose of the Comcare scheme to, as far as possible, provide for early intervention and rehabilitation support for injured employees to stay in or return to suitable employment. The Committee seeks advice as to:

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

Rational connection between measure and objective

The amendments distinguish medical and vocational rehabilitation, thereby clarifying the roles and responsibilities of participants in the system (i.e. to provide medical treatments or vocational treatments). This clarification will enable the Comcare scheme to better provide for early intervention and rehabilitation support for injured employees to enable them to stay in or return to suitable employment. This is the rational connection between the amendments and the legitimate objective.

Medical rehabilitation is the process of enhancing and restoring functional ability and quality of life to those with physical or mental impairments or disabilities.

Vocational rehabilitation is aimed at maintaining injured or ill employees in, or returning them to, suitable employment.

Providers of vocational rehabilitation are engaged to provide specialised expertise in addition to that generally available within the employer's and insurer's operations. Providers are engaged for those injured employees where return to work is not straight forward. Service provision is largely delivered at the workplace by:

- facilitating an early return to work of the employee;
- identifying and designing suitable duties for the injured employee and assisting employers to manage the employee in these duties;

- identifying and coordinating rehabilitation strategies that ensure employees are able to safely perform their duties;
- providing the link between the claims manager, the employer and treatment providers to ensure a focus on safe and sustainable return to work; and
- arranging appropriate retraining and placement in alternative employment when an employee is unable to return to pre-injury duties.

The vocational rehabilitation model has been refined and developed over the last 25 years and the SRC Act has not kept up to date with those developments. The current definition of rehabilitation program in the Act, in that it includes provision for medical services, is out of step with the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers (**National Rehabilitation Framework**). The National Rehabilitation Framework was developed by the Heads of Workers' Compensation Authorities, a group comprising the Chief Executives (or their representatives) of the peak bodies responsible for the regulation of workers' compensation in Australia and New Zealand.

The National Rehabilitation Framework which has been in place since 1 July 2010 specifically limits the work of approved rehabilitation program providers to vocational tasks, so as to minimise the perceived conflict of interest for the delivery of treatment services together with vocational programs.

Comcare's operational standards, to be met by all persons who are approved as rehabilitation program providers require, that:

> *A provider must ensure that no conflict of interest arises when providing rehabilitation services. Specifically, treatment and occupational rehabilitation services must not be provided to the same individual.*

The removal of the provision of medical treatment from the definition of a workplace rehabilitation plan in the Bill is consistent with contemporary thinking in relation to vocational rehabilitation.

Measure is a reasonable and proportionate means of achieving the objective

These amendments are reasonable and proportionate to the stated objective. This is because access to medical rehabilitation and the right to health are not restricted by removing the references to medical treatment in the workplace rehabilitation plan. The Bill positively engages the right to health by providing for access to rehabilitation from injury notification rather than as currently provided for, on acceptance of a claim. The Bill also positively engages the right to health by providing access to provisional medical expense payments before a claim is determined.

Further, safeguards have been put in place to ensure that an injured employee is medically fit to participate in workplace rehabilitation. For example, an employer is

obliged to consult with the employee and any treating medical practitioner when developing a workplace rehabilitation plan.[13]

Committee response

2.120 **The committee thanks the Minister for Employment for his response on the compatibility of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the rights of persons with disabilities to rehabilitation and the right to health. In particular, the committee notes that:**

- **the amendments distinguish between medical and vocational rehabilitation;**
- **access to medical rehabilitation and the right to health are not restricted by removing the references to medical treatment in the workplace rehabilitation plan; and**
- **current definitions of 'rehabilitation program' in the Act, which includes provision for medical services, is inconsistent with the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers.**

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

2.121 Schedule 2 of the bill would also provide that an injured employee's responsibilities and the obligations of a liable employer under a workplace rehabilitation plan are not reviewable.[14] Currently section 38 out the Act sets out when decisions by Comcare are reviewable.[15] The committee accordingly considers that the measure engages and limits the right to a fair hearing.

Right to a fair hearing

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

Compatibility of the measure with the right to a fair hearing

2.123 The committee previously considered that the measure limits the right to a fair hearing as it renders obligations under a workplace rehabilitation plan non-

13 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 9-10.

14 SOC 21.

15 Section 38 of the Act.

reviewable. The committee also considered that the statement of compatibility has not demonstrated that the measure is rationally connected to and a proportionate means of achieving the stated objective. Limited information has been provided as to the content or adequacy of relevant safeguards, and as such, it is difficult to make a full assessment of the human rights compatibility of the proposed measure.

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

Minister's response

> ***Obligations under a workplace rehabilitation plan not subject to review (Schedule 2)***
>
> <u>Right to a fair hearing</u>
>
> Schedule 2 to the Bill contains amendments to the formulation of workplace rehabilitation plans. Not every part of a workplace rehabilitation plan will be subject to review. The employee's responsibilities and the obligations of the liable employer contained in the workplace rehabilitation plan, will not be reviewable.
>
> The Committee, at paragraph 1.331, has requested further information as to why the measure is needed in pursuit of the objective, which is to promote compliance with rehabilitation plans, rather than arguments regarding particular employee responsibilities and obligations of the liable employer. The Committee has also requested further information as to whether there is a rational connection between the objective and the amendments, and whether the amendments are reasonable and proportionate.
>
> *Rational connection between measure and objective*
>
> By ensuring that the details of the plans are not reviewable, the amendments will provide for greater flexibility in the plans to accommodate changes in the employee and employer's circumstances. The plans will therefore more accurately reflect each party's circumstances. This is the rational connection between the objective and these amendments.
>
> A workplace rehabilitation plan outlines the rehabilitation objectives or goals and related services, supports and activities that will assist an employee with their rehabilitation and return to work. A workplace rehabilitation plan will include an employee's responsibilities and an employer's obligations in relation to the employee's rehabilitation. Where a rehabilitation provider is engaged, the plan will also include the rehabilitation provider's services and estimated costs.

Typical employee responsibilities include undertaking medical treatment and counselling with an expected outcome of continuing to recover and commencing graduated return-to-work according to an agreed schedule and within medical restrictions. The expected outcome is that the employee will have a safe and durable return to work.

A typical employer obligation for a supervisor is to support and monitor the employee's performance while in the workplace and to ensure that suitable work, within the employee's current medical restrictions, is available. This responsibility will support rehabilitation and graduated return to work programs.

Typical responsibilities of a workplace rehabilitation provider include liaising with the employee to ensure the employee is supported through the rehabilitation process and liaising with the employee's treating GP to discuss medical restrictions and the recovery process.

Under the proposed amendments, the goals of a workplace rehabilitation plan will be reviewable. An engaged rehabilitation provider's services and estimated costs will also be reviewable.

The most important component of a workplace rehabilitation plan is the stated objectives or goals. A workplace rehabilitation plan's goals will be reviewable when the plan is first developed and whenever any change is made to those goals.

The more detailed elements of a workplace rehabilitation plan tend to be responsibilities allocated to the rehabilitation provider.

The Bill introduces a new section (s36E) which allows an employee who has sustained a workplace injury to request that the liable employer formulate a workplace rehabilitation plan for the injury. Under existing legislation, an employee does not have the power to request a rehabilitation plan be developed in relation to the injury to assist their return-to-work. The section places an obligation on the employer to consider the request and if the employer decides not to formulate a workplace rehabilitation plan, that decision is reviewable.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable and proportionate because:

- the content of rehabilitation plans are developed in consultation with the employee, their medical practitioners and their employer;
- the goal or objective which informs an employee's responsibilities and employer obligations in the plan is reviewable; and
- the amendments promote compliance with the goals and objectives of a rehabilitation plan rather than more administrative arrangements regarding particular employee responsibilities and obligations of a liable employer.

> While some areas of a workplace rehabilitation plan are not subject to merits review by the AAT, procedural fairness in the decision-making process is preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make decisions in a fair and reasonable manner.[16]

Committee response

2.125 **The committee thanks the Minister for Employment for his response on the compatibility of the measure. The committee considers that the minister's response has demonstrated that the measure may be compatible with the right to a fair hearing. In particular, the committee notes that:**

- **the goals of a workplace rehabilitation plan will be reviewable and an engaged rehabilitation provider's services and estimated costs will also be reviewable; and**
- **the content of rehabilitation plans are developed in consultation with the employee, their medical practitioners and their employer.**

Expanded definition of 'suitable employment' (Schedule 2)

2.126 Under section 40 of the Act employers currently have a duty to provide 'suitable employment' to injured employees who have undertaken or are undertaking a rehabilitation program. Schedule 2 of the bill would broaden the definition of 'suitable employment'. Employment with any employer who is not the Commonwealth or a licensee (including self-employment) may now be considered 'suitable employment'. Failure by an employee to accept or engage in such 'suitable employment' would be subject to the sanctions regime in proposed Schedule 15 of the bill. New section 34K requires a liable employer to take all reasonably practicable steps to provide an injured employee with suitable employment or assist the employee to find such employment.[17]

2.127 The expanded definition of 'suitable employment' engages and may limit multiple rights.

Multiple rights

2.128 The committee previously considered that the measure engages and may limit the following rights:

- the right to work;

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16 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 10-12.

17 SOC 25.

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

2.129 The committee noted in particular that these rights include the ability to freely choose work.

Compatibility of the measure with multiple rights

2.130 The statement of compatibility states that the measure engages and may limit the right to work and the right to persons with disabilities to work.[18]

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

> to strengthen the obligations of employers to provide greater opportunities for injured employees to engage in suitable employment and thereby improve health and return to work outcomes for injured employees.[19]

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

2.133 The statement of compatibility further argues that the measure is a proportionate approach to achieving this objective.[20] However, the committee considered that further information regarding the specifics of the safeguards is needed for the committee to fully assess the human rights compatibility of the expanded definition of suitable employment.

2.134 The committee also noted that no information has been provided as to whether less rights restrictive measures would have achieved the same result. Specifically no information has been provided as to whether a regime where employees were encouraged rather than mandated to accept or engage in an expanded definition of 'suitable employment' has been provided.

2.135 The committee therefore sought the advice of the Minister for Employment as to whether the limitation is a proportionate measure for the achievement of that objective (that is, particularly, whether there is a less rights restrictive approach and whether there are sufficient safeguards).

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18 SOC 25.

19 SOC 25.

20 SOC 25.

Minister's response

Expanded definition of suitable employment (Schedule 2)

Right to work

Right to just and favourable conditions at work

Right of persons with disabilities to work

Right to rehabilitation

Schedule 2 to the Bill includes an amendment which broadens the definition of 'suitable employment' to include any employment which is suitable employment. Currently, suitable employment as defined in section 4 of the SRC Act does not allow for employment by a different employer to be 'suitable employment', even if that employment would otherwise be suitable for the employee. For an injured employee who continues to be employed by the Commonwealth or a licensee, 'suitable employment' must be employment within the Commonwealth or the relevant licensee.

The Committee, at paragraph 1.340, has requested further information on how the new definition of 'suitable employment' is proportionate for the achievement of the legitimate objective to strengthen the obligations of employers to provide greater opportunities for injured employees to engage in suitable employment and thereby improve health and return to work outcomes for injured employees.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable and proportionate in that there are substantial safeguards in place to ensure that suitable employment is appropriate to the individual circumstances of an employee. What constitutes suitable employment is specific to an individual and must take into account the employee's age, experience, training, language and other skills, and the employee's suitability for rehabilitation or vocational training and any other relevant matter.

The capacity of an employee to remain or engage in suitable employment must be assessed in consultation with the employee and their medical practitioner to ensure that the employment reflects the capacity and abilities of an employee.

The restriction in the definition of 'suitable employment' under the SRC Act is unique to the Commonwealth legislation and is at odds with the nationally recognized return-to-work hierarchies as outlined in the National Rehabilitation Framework.

The rehabilitation process outlined in the National Rehabilitation Framework is aimed at encouraging and returning an injured employee to 'suitable employment'/suitable duties as soon as it is safe to do so, and incorporates:

- assessment of need:

- early, accurate identification of risks and needs ensures the most appropriate intervention is applied to achieve a safe return to work
- assessment of need continues throughout the course of service delivery as new information is received

• return to work planning-return to work planning is required when all necessary assessments have been completed and an employee needs assistance to:

- return to work with the pre-injury employer;
- undertake physical upgrading or transitional duties with a host employer prior to return to work with the pre-injury employer; or
- find a new job.

Return to work planning will:

• specify strategies that address the identified risks, needs, strengths and capacities having regard to the 'employee's medical status, functional capacity, vocational status, psychosocial concerns, employer requirements, workplace issues and any other return to work barriers

• take place in consultation with the employee, the treating doctor, the employer (if the employee is still employed) and the union (if involved), to align expectations of key parties

• be consistent with the insurer's Injury/Case/Claim Management Plan

• consider personnel management and industrial issues in the workplace and adopt strategies to address these issues if they are barriers to the employee's return to work

• take account of the preferred hierarchy for placement but not at the expense of the employee's needs or the employer's capacity, namely:

- same job/same employer
- different job/same employer
- similar job/different employer
- different job/different employer.

The process also requires active implementation and review of the employee's return to work and providing support to the employee and the employer to ensure the return to work is durable.

As can be seen from the process outlined above, the return-to-work process is highly consultative and sensitive to the needs of the employee in ensuring that their rehabilitation back to the workplace is managed taking into account their specific needs. The majority of employees are encouraged and supported to return to work, there are only a very small percentage of employees for whom mandating a return to work is

> required. For those employees who do not cooperate with the return to work process, the SRC Act currently requires that an employee's rights to compensation under the Act are suspended until the employee begins to co-operate.
>
> The changes to the definition of 'suitable employment' therefore enable access to greater opportunities in returning injured employees to work and bring the Commonwealth legislation into line with the National Rehabilitation Framework and with state and territory workers' compensation schemes.[21]

Committee response

2.136 **The committee thanks the Minister for Employment for his response on the proportionality of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with multiple rights. In particular, the committee notes that:**

- **the bill requires a liable employer to take all reasonably practicable steps to provide an injured employee with suitable employment or assist the employee to find such employment;**
- **the current restriction in the definition of 'suitable employment' is unique to the Commonwealth legislation and is inconsistent with the return-to-work hierarchies outlined in the National Rehabilitation Framework; and**
- **there are only a very small percentage of employees for whom mandating a return to work is required.**

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

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

2.138 These measures will limit the existing discretion afforded to Comcare and licensees to provide compensation for the cost of medical treatment and as a result this may reduce the extent to which an employee is fully compensated for medical expenses incurred as a result of a workplace injury. The measures may also limit patient choice with respect to medical practitioners where the medical practitioner is

21 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 12-14.

unwilling to charge for services at the rate prescribed under regulations established by provisions in these measures.

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

Right to social security and the right to health

2.140 These rights are described above at paragraphs [2.97] to [2.101].

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

2.141 The statement of compatibility explains that the measures may limit the right to social security and the right to health. The statement of compatibility also explains that the measures are intended to improve the sustainability of the scheme by focussing limited resources on medical treatment that is reasonable, and contain medical costs under scheme.

2.142 The statement of compatibility explains the measures as proportionate on the basis as they 'promote greater transparency and consistency in Comcare's decision-making'.[22]

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

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

2.145 The committee therefore sought the advice of the Minister for Employment as to whether the measures impose a proportionate limitation on the right to health and the right to social security.

Minister's response

> ***Amendments to the amount and type of medical expenses covered (Schedule 5)***
>
> *Right to social security*
>
> *Right to health and a healthy environment*

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22 SOC 36.

Schedule 5 contains amendments which allow for Comcare to set a schedule of fees (the 'medical services table') for the reimbursement of costs for medical treatment obtained by an employee. The medical services table will not limit the types of medical treatment, but will limit the amount payable by the relevant authority for specified treatments. Schedule 5 also contains amendments which allow for Comcare to prescribe Clinical Framework Principles, which must be taken into account when determining whether medical treatment was reasonably obtained.

The Committee, at paragraph 1.349, requested further information as to how these measures are proportionate to the legitimate objectives of improving the sustainability of the scheme by focussing limited resources on medical treatment that is reasonable, and containing medical costs under the scheme.

Medical services table

A key objective of the Bill, in addition to improving the sustainability of the scheme, is to improve the health, recovery and return-to-work outcomes of injured employees. This will be achieved by ensuring that medical treatment is evidence-based, outcomes-focussed and provided by registered and accredited health practitioners. In addition, new measures will ensure early reimbursement of medical expenses, even before a claim for compensation is lodged.

Fee schedules are currently used in other Australian workers' compensation jurisdictions and thorough investigation of their effectiveness has been undertaken. There is evidence that fee schedules prevent overcharging for the same service.

The Committee expressed concern at the broad discretion available to Comcare in setting scheduled fees in the medical services table for specific medical treatments, and the lack of requirement to consult with, or have regard to figures set by, the Australian Medical Association. The medical services table will be a legislative instrument, and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken.

Furthermore, the medical services table will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Whether treatment was reasonably obtained

In determining whether treatment was reasonably obtained, the amendments require that regard must be had to the Clinical Framework Principles and any other matter Comcare considers relevant.

This provision has a two-fold purpose in that it establishes key medical principles (as outlined in the Clinical Framework) and maintains the discretionary element that is a feature of current scheme practice by taking other factors, including non-medical factors, into consideration when making a determination as to the compensability of the treatment. For example, an injured employee living in a remote area may not be able to access treatment that fully satisfies Clinical Framework Principles. In this case, the remoteness of the location would be a relevant factor that Comcare would be able to take into account in order to determine that a treatment was reasonably obtained. It is reasonable that relevant non-medical factors are taken into regard when determining whether treatment was reasonably obtained, so that the treatment can be examined in the context of the employee's circumstances.

The Clinical Framework Principles will also be a legislative instrument, and the requirements of the LI Act apply (see above).

Measure is a reasonable and proportionate means of achieving the objective

The amendments to establish the medical services table and the Clinical Framework Principles, which together will assist in determining whether medical treatment was reasonably obtained, and the amount which will be reimbursed in respect of this medical treatment, are reasonable and proportionate. The establishment of a fee schedule will specify the maximum compensable amount payable for a number of medical treatments. However, this measure also contains flexibility in that treatments that are not specified in the fee schedule will be assessed and paid as charged, providing they meet the standards outlined in the Clinical Framework. This ensures the sustainability of the scheme - by limiting some amounts payable, but retaining enough flexibility to ensure that items that fall outside the schedule are able to compensated.[23]

Committee response

2.146 **The committee thanks the Minister for Employment for his response on the proportionality of the measure.** The committee notes that the minister's response relies on the consultation requirements under the *Legislative Instruments Act 2003* (LI Act) as evidence that there will be effective consultation in the development of the medical services table. However, the committee notes that section 17 of the LI Act does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he

23 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 14-15.

or she thinks is appropriate, is undertaken. There is no requirement that the rule-maker be reasonably satisfied, only that they are satisfied.

2.147 In the event that a rule-maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the LI Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[24]

2.148 Accordingly, the committee considers that the minister's response has not addressed its original concern that there is no requirement to have regard to rates endorsed by the Australian Medical Association or even to consult the Australian Medical Association. Accordingly, it may be possible that scheduled fees may be set at such a low level that the most appropriately trained and qualified medical practitioners are unwilling to provide services at that rate.

2.149 In relation to the test for whether treatment was reasonably obtained, the amendments allow Comcare not only to consider the Clinic Framework Principles (which will be developed under regulations) when determining whether a medical treatment is reasonable but any other matter that Comcare considers relevant. As a result, matters that are not strictly medical in nature may be considered. The minister's response gives a good example of where it may be appropriate to consider non-medical matters – that the patient lives in a remote area with limited services.

2.150 However, the response does explain why it is necessary to grant Comcare a broad discretion to consider any other matter when determining whether treatment was reasonably obtained. Such a broad discretion would make it very difficult for a claimant to challenge a decision of Comcare.

2.151 **The committee therefore considers that the measures in Schedule 5 of the bill amending the amount and type of medical expenses covered under the Comcare scheme engage and limit the right to health and the right to social security as contained in articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights.**

2.152 **For the reasons set out above, the minister's response does not sufficiently justify that these measures may be regarded as proportionate to its stated objective. Accordingly, the committee considers that the measures in Schedule 5 of the bill may be incompatible with the right to health and the right to social security.**

2.153 **The committee recommends that the bill be amended so that Comcare must consult the Australian Medical Association and other relevant professional bodies prior to establishing the medical services fee schedule and to require**

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24 LI Act, sections 18 and 19.

Comcare to ensure that the fee schedule does not unduly restrict access to medical treatment.

2.154 **If the bill is passed, and regulations made to establish the fee schedule the committee will review the regulation for compatibility with the right to health and the right to social security.**

Compensable household and attendant care services (Schedule 6)

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

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

Right to social security and the right to health

2.157 The right to social security and the right to health are described above at paragraphs [2.97] to [2.101].

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

2.158 The statement of compatibility notes that the measure engages the social security and the right to health.[25] In terms of proportionality, the statement of compatibility notes that the measures are directed towards ensuring that employees are provided with appropriate and professional care and that they are proportionate as they do not 'prevent family members from providing care and support to an injured worker… However, for this care to be compensated, the person providing the services must be suitably qualified.[26]

2.159 The committee noted that as attendant care services can be highly personally intrusive, it may be entirely reasonable in certain circumstances for an injured worker to prefer that such services be provided by a family member. Qualification and registration processes may take some time and in the interim this would either have to be done without compensation by a family member or, instead, by a registered provider. There may also be circumstances where a family member is providing sufficient and appropriate care but is unable to meet the qualifications or registration requirements.

2.160 The committee considered that a less rights restrictive approach could be to include statutory exemptions for family members to provide attendant care services without registration at the discretion of Comcare. Accordingly, the statement of

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compatibility has not demonstrated that the measures are a proportionate means of achieving the legitimate objective.

2.161 The committee therefore sought the advice of the Minister for Employment as to whether the measures impose a proportionate limitation on the right to health and the right to social security.

Minister's response

> ***Compensable household and attendant care services (Schedule 6)***
>
> *Right to social security*
>
> *Right to health and a healthy environment*
>
> Schedule 6 to the Bill contains amendments which provide that attendant care services will only be compensable if they are provided by a qualified provider of attendant care services.
>
> The Committee agreed that ensuring that individuals providing attendant care services are appropriately trained and qualified is a legitimate objective, and that the measures are rationally connected to that objective. However, the Committee noted the difficulty that the qualification and registration process could present to family members who wanted to provide attendant care services, particularly in circumstances where a family member is providing sufficient and appropriate care but is unable to meet the qualifications or registration requirements. The Committee (at paragraph 1.358) considered that it could be possible to include statutory exemptions for family members to provide attendant care services without registration at the discretion of Comcare. Subsequently, the Committee requested further information to demonstrate that the amendments were proportionate to the legitimate objective.
>
> Items 11 and 16 of Schedule 6 to the Bill provide that compensable attendant care services can be provided by accredited, registered or approved providers of attendant care services. These items also contain a provision that compensable attendant care services may be provided by an individual authorised by the relevant authority in relation to the employee, with the requirement that the relevant authority may only authorise such an individual if there are special circumstances. These provisions are designed to, and will allow, a family member in special circumstances to be able to provide compensable attendant care services without obtaining qualifications or undergoing the registration process. These provisions ensure that the amendments are reasonable and proportionate to a legitimate objective.[27]

Committee response

2.162 **The committee thanks the Minister for Employment for his response on the proportionality of the measure. The committee considers that the minister's**

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27 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 15-16.

response has demonstrated that the measure is likely to be compatible with the right to health and social security. In particular, the committee notes that the provisions are designed to allow a family member in special circumstances to be able to provide compensable attendant care services without obtaining qualifications or undergoing the registration process.

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

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

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

Right to social security

2.165 The right to social security is described above at paragraphs [2.97] to [2.100].

Right to an adequate standard of living

2.166 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.

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

2.167 The statement of compatibility agrees that the measure limits the right to social security.[28]

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

2.169 The statement of compatibility explains that the objective is to:

> correct an anomaly under which an employee who would not have earned anything if free from incapacity is able to receive an income because of his or her incapacity.[29]

2.170 The committee considered that, as expressed, this is not a legitimate objective for the purposes of international human rights law as the objective does not appear to meet a pressing or substantial concern.

2.171 The committee therefore sought the advice of the Minister for Employment as to whether this measure is compatible with the right to social security and the

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28 SOC 41.

29 SOC 41.

right to an adequate standard of living, and particularly, whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

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

Right to social security

Right to an adequate standard of living

Schedule 9 contains an amendment which corrects a significant undermining of disciplinary processes which currently allows an employee who would not otherwise receive an income due to being suspended from work to continue to receive weekly incapacity payments for workers' compensation during that period of compensation.

The Committee, at paragraph 1.368, has requested more information as to how the measure is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is reasonable and proportionate.

Addresses a pressing concern

This situation arose as a result of the Federal Court decision in *Comcare v Burgess* [2007] FCA 1663 which ruled that paragraph 8(10)(a) of the SRC Act-which is expressed to apply to an injured employee who continues to be employed during his or her incapacity - does not contemplate the situation where an employee continues to be employed but is suspended from that employment without pay, and therefore does not apply in this situation. The result of this decision is that an employee who would not have earned anything if free from incapacity (because he or she is suspended without pay) is able to receive an income because of his or her incapacity.

Rational connection between measure and objective

The employment relationship contains certain rights and obligations under law. Where an employee has been suspended for misconduct, they have acted in a manner which breaches the terms of this relationship. To allow a suspended employee to continue to receive income replacement for workers' compensation under these circumstances fails to respect the employment relationship and associated entitlement systems; in this case, the workers' compensation safety net.

Measure is a reasonable and proportionate means of achieving the objective

This measure is reasonable in that it recognises and supports the rights of employers to suspend an employee, and their entitlements, for actions endangering the safety of other employees or the workplace. It ensures the

integrity of the suspension process where periods of suspension and compensation occur simultaneously.

This measure is reasonable and proportionate in that, while suspended, an employee continues to receive other workers' compensation entitlements. These include payment of medical expenses, permanent impairment lump sum compensation, household and attendant care services and any other benefit for which the employee is eligible. This measure only reduces the income replacement benefit amount to zero to reflect the amount that the employee would be earning while suspended from employment. Payment of incapacity benefits will recommence when the period of suspension ends.[30]

Committee response

2.172 **The committee thanks the Minister for Employment for his response on the compatibility of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the right to social security and the right to an adequate standard of living. In particular, the committee notes the minister's advice that, while suspended, an employee continues to receive other workers' compensation entitlements (including payment of medical expenses, permanent impairment lump sum compensation and household and attendant care services).**

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

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

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

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

Right to social security

2.176 The right to is social security is described above at paragraphs [2.97] to [2.100].

30 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 16-17.

Compatibility of the measures with the right to social security

2.177 The statement of compatibility agrees that the measure limits the right to social security, but explains that the objectives are to:

- align the Comcare scheme with state and territory workers' compensation scheme
- address a concern identified by the [Safety, Rehabilitation and Compensation Act] Review that a single step down point after 45 weeks creates a disincentive for early return to work by injured employees.[31]

2.178 The committee previously agreed that the objective set out in the second bullet point may be considered a legitimate objective for the purposes of international human rights law. The committee also considered that the measures may be rationally connected to the legitimate objective.

2.179 The statement of compatibility also states that the measures are reasonable, necessary and proportionate.[32] It explains that at all step-down stages targeted return-to-work measures will be introduced to facilitate return to work.

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

2.181 The committee therefore sought the advice of the Minister for Employment as to whether the measures impose a proportionate limitation on the right to social security.

Minister's response

> ***Calculation of compensation - introduction of structured reductions (Schedule 9)***
>
> Right to social security
>
> Schedule 9 to the Bill contains amendments which provide for earlier structured reductions ('step downs') to weekly incapacity payments.
>
> At paragraph 1.378, the Committee requested further information as to how these amendments were proportionate to the legitimate objective of addressing a

31 SOC 42.

32 SOC 43.

concern identified by the Review that a single step down point after 45 weeks creates a disincentive for early return to work by injured employees.

Measure is a reasonable and proportionate means of achieving the objective

In most schemes across Australia, there is more than one step-down of incapacity payments, with the first step-down occurring reasonably early in the life of a claim. Victoria and South Australia have their first step-downs after 13 weeks. The majority of States and Territories have at least one step-down by 26 weeks. In contrast, the first (and only) step- down in the Comcare scheme occurs much later, at 45 weeks.

The Review of the *Safety, Rehabilitation and Compensation Act 1988* considered three models of compensation step-down and recommended a three level system of step-down that had earlier step down points than the current scheme but ultimately resulted in employees receiving 80 per cent of their normal weekly earnings, a higher level than the 75 per cent currently received.

The step-down model subsequently chosen for the SRC Act reduces the final income to 70 per cent of the employee's pre-injury average remuneration, which is lower than the final step-downs available in Queensland and New South Wales, where injured employees receive 85 per cent or 90 per cent respectively of their pre-injury earnings. However, both Queensland and New South Wales significantly cap the total amount of income replacement that can be paid to employees. It is worth noting that the Commonwealth workers' compensation schemes (the SRC Act, the MRC Act and the *Seafarers Rehabilitation and Compensation Act 1992*) as well as the Australian Capital Territory workers' compensation scheme are the only 'long tail' schemes left in Australia, which means that income replacement under the SRC Act is paid for the duration of an employee's incapacity until age 65. The Bill will extend eligibility for incapacity payments to the age of eligibility for the age pension.

The majority of long term claimants will not be impacted by the reduction of the final stepdown from 75 per cent to 70 per cent of pre-injury average weekly remuneration. This is because the SRC Act currently requires that for those employees who are in receipt of superannuation payments, incapacity payments are reduced by a further 5 per cent to 70 per cent (this requirement is being removed by the Bill). It is anticipated that approximately 26 per cent of long term claimants[33] will be impacted by the reduction to 70 per cent, however, these claimants may benefit from the increased support available in the Bill for those with serious injuries.

The Bill also significantly increases (by over $100,000) the lump sum payable for permanent impairment and introduces an algorithmic formula to ensure that those with more serious impairments receive a greater proportion of the lump sum than is currently the case.

33 Based on data obtained from Comcare, as at 1 May 2015.

The current weekly cap on household and attendant care services is also being removed for those employees who have suffered catastrophic injuries.

The final step-down will be reduced to 70 per cent of the employee's average remuneration, while at the same time:

- removing the 5 per cent reduction for those in receipt of superannuation;
- extending the payment of incapacity benefits in line with the increases in the age of eligibility for the age pension;
- significantly increasing the lump sum permanent impairment payments for the severely injured and; and
- removing the cap on payments for household and attendant care support for the catastrophically injured.

This balances the reduction in the step-downs in incapacity benefits to 70 per cent and is therefore a proportionate limitation on the right to social security. [34]

Committee response

2.182 **The committee thanks the Minister for Employment for his response on the proportionality of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the right to social security. In particular, the committee notes that at the final step-down the amendments will also:**

- **extend the payment of incapacity benefits in line with the increases in the age of eligibility for the age pension;**
- **increase lump sum permanent impairment payments for the severely injured; and**
- **remove the cap on payments for household and attendant care support for the catastrophically injured.**

Capping of legal costs (Schedule 11)

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

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

34 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 17-18.

Right to a fair hearing (equal access)

2.185 The right to a fair hearing is described above at paragraph [2.122]. All people are to have equal access to the courts, regardless of citizenship or other status. To be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.[35]

Compatibility of the measure with the right to a fair hearing

2.186 The statement of compatibility recognises that the measure limits the right to a fair hearing as it 'may discourage some claimants from bringing proceedings and affect their representation choices'. However, it states that the legitimate objective is to 'remove any incentives for employees to participate in drawn out proceedings'.[36]

2.187 The statement of compatibility states that the amendment is proportionate to that objective as the amendment will not prevent employees from incurring legal costs that exceed the specified amounts in the schedule of legal costs, and the amendment will bring the Comcare scheme in line with some state schemes.

2.188 The Regulatory Impact Statement (RIS) provides additional reasons for introducing a schedule of legal costs, including that it would limit the potential for over-charging and over-servicing and may reduce the incentive for individuals and their lawyers to litigate weak and unlikely claims.[37]

2.189 Ensuring that legal proceedings do not become unnecessarily drawn out and are resolved in a timely manner is a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. However, the committee previously noted its concerns that the measure may not be proportionate.

2.190 In particular, if the cap on the amount of legal fees that may be awarded is set too low, a claimant may end up having to bear the majority of his or her legal fees and may prevent that person from accessing his or her AAT review rights, despite having a meritorious claim. The committee previously noted that many law firms take on workplace injury cases on a 'no win no pay' arrangement, and if the schedule of legal costs is set too low, law firms may not provide representation for clients without the means to pay, regardless of the merits of the claim.

2.191 The availability or absence of legal assistance often determines whether or not a person can access judicial forums and participate in them in a meaningful way. The right to a fair hearing encompasses a right of equal access to the courts and

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

36 SOC 46.

37 Regulatory impact statement 47.

tribunals, and the affordability of legal assistance can affect the right of equal access to the courts and tribunals.

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

Minister's response

Capping of legal costs (Schedule 11)

Right to a fair hearing (equal access)

Schedule 11 to the Bill contains amendments which allow for Comcare to prescribe a schedule of legal costs, which will cap the amount that the AAT will be able to award to a successful claimant.

The Committee, at paragraph 1.388, stated that it was unable to complete its assessment of whether this measure is proportionate to the legitimate objective of removing incentives for employees to participate in drawn out proceedings until it has reviewed the schedule of legal costs.

The schedule of legal costs will be a legislative instrument, and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken.

Furthermore, the schedule of legal costs will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

In the period from 2011-12 to 2013-14, legal costs in the Comcare scheme increased by more than 34 per cent. In 2013-14, this equated to an amount of $122,243,305(Table 1). This was driven partly by:

- the length of time it takes to resolve disputes; for example, in 2012-13, nationally, 88.6 per cent of workers' compensation disputes were resolved within nine months but only 47.7 per cent of disputes within the Comcare scheme were resolved during this time. In comparison,

Queensland and Western Australia resolved more than 90 per cent of their workers' compensation disputes within 9 months;

- a dispute system that offers little incentive to resolve scheme disputes before they breach hearing stage at the AAT-legal costs are currently not reimbursed at the reconsideration stage, meaning there is little incentive to resolve a dispute before proceeding to the AAT; and
- limited ability for an employer or Comcare to recover legal costs for a claim that is either vexatious or dismissed by the AAT.

If dispute times are not reduced and spending on legal costs continues to increase at this rate, the scheme will not be sustainable in the long-term.

In addition to a schedule of legal costs, the Bill is introducing several measures to address the spending on legal costs and improve dispute resolution timeframes. These include:

- statutory timeframes for initial claim determination liability and all reconsiderations (there are currently no timeframes);
- in eligible cases, the scheme will reimburse costs at the reconsideration stage providing the dispute does not progress to the AAT. If the claimant wishes to proceed to the AAT, the claimant will be required to repay reconsideration legal costs before being able to make an application, but will retain current eligibility for reimbursement of certain costs at the AAT stage; and
- once the case has proceeded to the AAT, a party to the proceeding (such as Comcare, or an employer) can apply for costs to be awarded against the claimant if the application is dismissed by the AAT (for example, because the application is frivolous or vexatious).

These steps will encourage claimants to engage legal representation at the reconsideration stage and avoid the lengthy dispute resolution process associated with a disputed claim progressing to an AAT hearing. Currently, it is the AAT's practice to award a successful applicant legal costs, including counsel's fees, at a rate equal to 75 per cent of the Federal Court scale. This is regardless of the length of time it takes to resolve an application and offers little incentive for parties to resolve applications as soon as possible. The schedule of legal costs, which will be developed by Comcare, in consultation with relevant stakeholders, will be designed to create an incentive to reduce the time taken to resolve claims and reduce the overall cost of applications.

Table 1. Legal costs in the Comcare scheme 2009-2014

2009-10		2010-11		2011-12		2012-13		2013-14	
No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost
2493	$88,260,691	2023	$92,665,754	1746	$104,452,097	1985	$114,136,794	2237	$122,245,305

Source: Comcare

> The Committee expressed concern that, in the schedule of legal costs, the cap on the amount of legal fees that may be awarded would be set so low that law firms may not provide representation for clients without the means to pay. As noted above, the schedule of legal costs will be a legislative instrument, and therefore subject to the requirements under the LI Act. It is expected that Comcare will undergo extensive consultations in accordance with section 17 of the LI Act with the legal community to ensure that the schedule of legal costs both discourages proceedings being unnecessarily drawn out and represents a fair rate to enable employees to be able to afford legal representation. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken. Furthermore, the schedule of legal costs will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).[38]

Committee response

2.193 **The committee thanks the Minister for Employment for his response.** The committee welcomes the minister's commitment that the schedule of legal costs will represent a fair rate to enable employees to be able to afford legal representation.

2.194 The committee notes that there is no right to legal representation under international human rights law in civil matters. However, there is a right to a fair trial and access to justice, and this may include access to legal representation.

2.195 However, the minister's response has not addressed the central aspect of the committee's concern, that the schedule of fees may be set too low to provide access to justice and that in absence of reviewing the schedule it is unable to conclude that the measure is compatible with the right to a fair hearing right.

2.196 The minister notes in detail the consultation requirements under the LI Act as providing a safeguard against inappropriately low fees being set in the fee schedule. However as outlined above at paragraphs [2.146] to [2.147], the LI Act provides limited protection. Accordingly, it may be possible that scheduled fees may be set at such a low level that the most appropriately trained and qualified legal practitioners are unwilling to provide services at that rate.

2.197 **The committee therefore considers that the cap on the amount of legal costs payable limits the right to a fair hearing as set out in article 14 of the International Covenant on Civil and Political Rights. Whether the cap on legal costs is proportionate to meet the stated objective will depend on whether the amount**

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38 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 18-20.

specified in the schedule of legal costs, to be set out in a legislative instrument, is sufficient to meet the claimant's reasonable costs to litigate their claim. As the schedule has not yet been developed the committee is unable to conclude that Schedule 11 of the bill is compatible with the right to a fair hearing.

2.198 **The committee recommends that the bill be amended so that Comcare must consult the Law Council of Australia and other relevant professional bodies prior to establishing the cap on legal costs and to require Comcare to ensure that the fee schedule does not unduly restrict access to the courts.**

2.199 **If the bill is passed, and regulations made to establish the fee schedule the committee will review the regulation for compatibility with the right to a fair hearing.**

Changes to payments for permanent impairment (Schedule 12)

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

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

Right to social security

2.202 The right to social security is described above at paragraphs [2.97] to [2.100].

Compatibility of the measure with the right to social security

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

> …improv[ing] scheme equity by better targeting support. The level of compensation payable for permanent impairment should reflect the severity of an employee's injury and the impact that it has on their life.[39]

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

2.205 In terms of the proportionality of the measures the statement of compatibility explains that it is 'necessary to prioritise resources in the Comcare scheme so that the amendments will achieve fairer outcomes that recognise the needs of severely impaired employees'.[40]

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39 SOC 47.

40 SOC 48.

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

2.207 The committee therefore sought the advice of the Minister for Employment as to whether the measures impose a proportionate limitation on the right to social security.

Minister's response

> ***Changes to payments/or permanent impairment (Schedule 12)***
>
> Right to social security
>
> At 1.395, the Committee has requested evidence to show that the changes to calculations of permanent impairment are the most effective in responding to degrees of impairment and that any individual's loss of compensation under the amendments is both necessary as a result of resource constraints and proportionate in the operation of the whole scheme.
>
> The approach to the calculation and assessment of permanent impairment compensation in Australian workers' compensation jurisdictions is generally informed by both policy and the need to protect the financial viability of the scheme. The diversity in approach to assessment means that benefits can vary significantly from one scheme to another, and that there is little capacity for scheme administrators to learn from shared experience. Medical assessors also have difficulty in developing assessment skills that can be used across the schemes. This is particularly important for the Comcare scheme given its national operation.
>
> The Hanks Review of the scheme, undertaken in 2013, also identified deficiencies in the way the scheme compensated the most severely impaired employees and the Government sought a cost neutral solution that directed compensation to those who needed it most without increasing employer costs.
>
> At present, compensation for permanent impairment is comprised of 2 elements - a payment to reflect the degree of permanent impairment and a payment to reflect the loss of quality of life. Non-economic loss is assessed both quantitatively, in reference to the percentage of permanent impairment, and qualitatively, using questionnaires. This process has been open to criticism on the basis that the effect on quality of life is unpredictable and, consequently, unquantifiable. Where measurement of a component of non-economic loss is qualitative, it is inconsistent and highly subjective. Also, the process of calculating the permanent impairment value already includes an assessment on the impact on activities of daily living.

Additionally, it has been argued that assessing the degree of permanent impairment in a linear fashion is an overly simplistic and fails to take into account the variances between and within impairment levels.

The Department reviewed the methods of calculating permanent impairment lump sum compensation in other jurisdictions and considered both linear and algorithmic models. Australian schemes use both linear and algorithmic models to calculate the amount of compensation payable but, because of the variability of approaches, there is no evidence to indicate that one is better or more effective than the other. However, it was found that the algorithmic model used in NSW more closely aligned with the policy intent to increase compensation for the most seriously injured.

Consequently, the changes proposed by the Bill will:

- achieve a degree of consistency with practices in other schemes;
- address criticisms of the current methods of assessment and calculation of permanent impairment;
- provide maximum support to those with higher levels of impairment; and·
- achieve a higher degree of scheme sustainability.

Under the changes, permanent impairment and non-economic loss payments will be combined. The current combined total of these payments is $243,000 but the maximum payable will be increased to $350,000. There will still be assessment of the effect on quality of life but this will be part of the overall assessment of the percentage of permanent impairment, which will then be calculated as a percentage of overall permanent impairment.

The scheme will adopt a national permanent impairment assessment guide that is currently being developed by Safe Work Australia. This will allow for some jurisdictional variation but will establish nationally consistent methods of assessment. The planned guide will be based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended by the NSW Scheme, and currently in use by the NSW scheme.

Based on an analysis of models used in state schemes and informed by the recommendations of the Hanks' Review, an algorithmic compensation calculation model was developed that allows an increase in the maximum compensation available to target employees with the most serious injuries while maintaining cost neutrality in respect of all permanent impairment compensation claims. Adoption of the NSW compensation calculation model also provides greater alignment with Safe Work Australia's proposed national guide for the assessment of permanent impairment,

which will be based on the permanent impairment guidelines currently used by the NSW scheme.[41]

Committee response

2.208 **The committee thanks the Minister for Employment for his response on the proportionality of the measure. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the right to social security. In particular, the committee notes the minister's advice that the current provisions are inadequate to ensure compensation is sufficiently directed to employees with severe impairments, and that the changes will address these inadequacies.**

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

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

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

Right to social security

2.211 The right to social security is described above at paragraphs [2.97] to [2.100].

Compatibility of the measures with the right to social security

2.212 The statement of compatibility explains that the measure limits the right to social security for certain injured workers, as detailed at [2.203].[42]

2.213 The committee previously agreed that the measure sought a legitimate objective for the purposes of international human rights law and that the measures are rationally connected to that objective.

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

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41 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 20-22.

42 SOC 48.

2.215 The committee therefore sought the advice of the Minister for Employment as to whether the measures impose a proportionate limitation on the right to social security.

Right to equality and non-discrimination

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

2.217 These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.218 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[43] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[44] 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.[45]

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

2.220 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.

2.221 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 measures with the right to equality and non-discrimination

2.222 As set out above at paragraph [2.213], the committee agrees that the measure has a legitimate objective and is rationally connected to that objective for the purposes of international human rights law.

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43 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.

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

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

2.223 However, the committee previously considered that the statement of compatibility has simply asserted that the amendments are a proportionate limitation on the right to equality and non-discrimination. No evidence has been provided in the statement of compatibility in support of this assertion.

2.224 The committee therefore sought the advice of the Minister for Employment as to whether the measures impose a proportionate limitation on the right to equality and non-discrimination.

Minister's response

Removal of compensation/or psychological or psychiatric injuries and ailments that are secondary injuries (Schedule 12)

Right to social security

Right to equality and non-discrimination

Schedule 12 to the Bill contains amendments which remove compensation for permanent impairment for psychological injuries and ailments which are secondary injuries.

The Committee, at paragraph 1.401, agreed that improving scheme equity by better targeting support [so that] the level of compensation payable for permanent impairment should reflect the severity of an employee's injury and the impact it has on their life. The Committee further agreed that it is necessary to prioritise resources in the Comcare scheme and ensure that severely impaired employees are properly compensated.

However, the Committee requested information and evidence to explain the economic cost to Comcare of compensating secondary psychological or psychiatric injuries and ailments to show that the amendments are a proportionate limitation on the right to social security.

In the last five years, claims for psychological conditions in the Comcare scheme have consistently increased in both number and cost (Table 2). This has resulted in an increase in the number and cost of claims for permanent impairment due to psychological injury, not just for primary psychological injuries, but also for secondary psychological injuries.

Table 2. Psychological injury/disease claims in the Comcare scheme 2009-2014

2009-10		2010-11		2011-12		2012-13		2013-14	
No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost
3187	$70,098,884	3209	$78,330,633	3218	$81,521,166	3558	$95,908,948	3749	$103,800,066

Source: Comcare

Lump sum permanent impairment payments for psychological injury constitute the largest single category of permanent impairment liabilities for Comcare and are a significant liability for all employers covered by the SRC Act. For example, in 2009-2010, approximately 20 per cent of the total cost of all permanent impairment claims was attributed to claims for

psychological injury. Based on available data, it is difficult to quantify the proportion that relates to secondary psychological injuries, however it is estimated that this proportion is significant.

Measure is a reasonable and proportionate means of achieving the objective

The removal of lump sum compensation for secondary psychological or psychiatric permanent impairment is a proportionate means to achieving the stated objective. This is because the removal of the entitlement will allow for a wide range of benefits to continue to be available to injured employees, including those with a secondary psychological condition. These ongoing benefits are described in Table 3 and, it should be noted, include eligibility for lump sum permanent impairment compensation (of up to $350,000) for the primary injury.

The Government's approach to achieving the stated objective was informed by an examination of permanent impairment lump sum compensation practices in Australian state workers' compensation schemes. Permanent impairment lump sum compensation is payable for primary psychological conditions in New South Wales, Tasmania, Victoria and Western Australia, but is not paid for secondary psychological conditions. South Australia and the ACT do not pay any permanent impairment lump sum compensation for psychological injuries, regardless of whether they are primary or secondary injuries.

After considering alternative state compensation models, the Government adopted the measure it considered the least restrictive, yet allowed it to achieve its objective of long-term sustainability and the provision of support to the most severely injured employees in the scheme. The scheme will continue to pay permanent impairment lump sum compensation for all primary injuries, including psychiatric and psychological injuries, yet also increase the maximum amount payable by over $100,000. This will ensure that adequate support is provided for the catastrophically injured in terms of lump sum compensation. At the same time, in order to improve long-term scheme viability, the scheme will remove permanent impairment lump sum compensation for secondary psychological injuries, while ensuring psychological injury claimants retain access to all other scheme benefits. As referred to in Table 3, this includes, but is not limited to, access to income support, medical treatment and compensation for dependents in the event of an employee's death. [46]

46 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 22-24.

Table 3. Summary of workers' compensation benefits for eligible employees with primary and secondary (psychological) conditions

Benefit	Primary condition covered?	Secondary psychological or psychiatric condition covered?	Conditions
Permanent impairment lump sum compensation (whether for physical or psychological injury)	Yes	No	Up to $350,000 (increased from previous maximum of up to $243,000)
Combine multiple permanent impairments	Yes	Yes	Increases eligibility for permanent impairment lump sum compensation
Income support	Yes	Yes	Until pension age
Payment of medical expenses	Yes	Yes	Lifetime, if required
Household services	Yes	Yes	Limits based on severity of injury: Non-catastrophic: $442.40 weekly for 3 years Catastrophic: no limits (previously capped at $442.40 weekly)
Attendant care services	Yes	Yes	Limits based on severity of injury: Non-catastrophic: $442.40 weekly for 3 years Catastrophic: no limits (previously capped at $442.40 weekly)
Post-surgery services	Yes	Yes	Up to 6 months after surgery
Aids, appliances & modifications to home, car, equipment	Yes	Yes	As required
Death payments – dependent lump sum	Yes	Yes	Up to $504,419.16
Death payments – dependent weekly	Yes	Yes	$138.72 weekly per dependent child (up to 16 years of age, or 25 years of age if studying full-time)
Death payments – funeral expenses	Yes	Yes	Up to $11,267

Committee response

2.225 **The committee thanks the Minister for Employment for his response. The committee considers that the minister's response has demonstrated that the measure is likely to be compatible with the right to social security. In particular, the committee notes the further information provided by the minister regarding the compensation benefits available for employees with primary and secondary psychological conditions; and the consideration of the least restrictive method in comparison with alternative state compensation models. Accordingly, the committee considers that the measure is likely to be compatible with the right to social security.**

2.226 However, the committee notes that the right to equality and non-discrimination has not been addressed in the minister's response. The amendments engage and limit the right to equality and non-discrimination, and the committee previously considered that the statement of compatibility had simply asserted that the amendments are a proportionate limitation on that right.

2.227 The statement of compatibility for the bill acknowledged that the amendments will disproportionately affect employees suffering from psychological or psychiatric ailments and injuries, and there is no evidence to suggest that such a disproportionate impact is nevertheless justified. Individuals who suffer psychological or psychiatric ailments are particularly vulnerable and there is no

reasoning provided as to why such individuals should not be protected from the disproportionate impact of the measures.

2.228 **The committee considers that the provision may be incompatible with the right to equality and non-discrimination.**

Schedule 15

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

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

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

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

Obligations of mutuality (Schedule 15)

2.231 The bill establishes that a number of the obligations imposed on an injured worker by the Act are 'obligations of mutuality.' An example of one such obligation, is an obligation on an injured worker to follow a reasonable medical treatment advice. As the consequence of failing to meet obligations of mutuality might include the suspension and cancellation of workers compensation (including on a permanent and ongoing basis), the regime engages and limits the right to health, the right to rehabilitation and the right to social security.[47]

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

2.232 The right to social security and the right to health are described above at [2.97] to [2.101]. The right to rehabilitation is described above at [2.112].

47 See proposed sections 29Y – 29ZA.

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

2.233 The statement of compatibility states that the obligations of mutuality engage the right to social security and the rights of persons with disabilities.[48] It explains that the legitimate objective of Schedule 15 is 'to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to improve the integrity of the scheme'.[49] The statement of compatibility states that the existing mechanisms allowing for the suspension of payments in more limited circumstances (but not for permanent cancellation of payments) are not effective 'due to the lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature'.[50]

2.234 The committee previously agreed that the measure seeks a legitimate objective for the purposes of international human rights law, and that the measures are rationally connected to that objective. However, the committee found it unclear as to whether the measures are proportionate to achieve that objective. Some of the obligations of mutuality may be drafted so broadly that the sanctions regime that flows from breach of these obligations may not be proportionate to the objective sought to be achieved.

2.235 On this basis the committee considered that the measure risks being more rights restrictive than is strictly necessary to achieve the stated objective (that is, disproportionate). Further the committee noted that the statement of compatibility does explain why less rights restrictive measures would have been ineffective or unworkable.

2.236 The committee therefore sought the advice of the Minister for Employment as to whether the limitation is a proportionate means to achieve the stated objective.

Minister's response

> ***Obligations of mutuality (Schedule 15)***
>
> *Right to social security*
>
> *Right to health and a healthy environment*
>
> *Right to rehabilitation*
>
> The Act currently provides for a number of employee obligations which result in the suspension of all compensation entitlements in cases of non-compliance. However, due to a lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature,

48 SOC 9, 11.

49 SOC 52.

50 SOC 52.

they do not provide effective support for the achievement of rehabilitation and return-to-work outcomes.

Schedule 15 to the Bill contains new provisions, which share similarities with some state and territory workers' compensation schemes and which amend the Act to streamline and enhance the existing regime of sanctions. In particular, these amendments:

- identify specified activities that an injured employee must comply with as 'obligations of mutuality'. These are fair and reasonable activities to expect people receiving workers' compensation payments to undertake to improve their health and their ability to work; and
- provide for the mandatory application of a 3-stage sanctions regime that results in the suspension of compensation rights, and finally the cancellation of compensation, including medical treatment, rehabilitation and most appeal rights, where obligations of mutuality have been repeatedly breached without reasonable excuse.

The Committee has requested clarification of the following items and that the Minister demonstrate that they are proportionate to achieving the outcomes sought. At paragraph 1.420, the Committee requires the Minister to show that the obligations of mutuality are proportionate to achieving improvement of health and rehabilitation outcomes and the integrity of the Coin care scheme.

Measure is a reasonable and proportionate means of achieving the objective

The obligations are proportionate as they have been drafted in such a way as to ensure they are suitably prescriptive to ensure clarity, but broad enough to respect the limitations or scope of the objects they prescribe. For example, an employee is required to follow reasonable treatment advice, but the obligations do not interfere with the practitioner/patient relationship. Also, rehabilitation and work readiness plans are highly dependent on a number of very specific factors, not the least of which relate to the type of injury, the patient's general health and the requirements of a job. It is not possible to prescribe these items other than broadly without severely limiting an employee's right to make decisions about their health, recovery and rehabilitation.

As mentioned earlier, the Bill takes a broad, yet suitably prescriptive approach to ensure obligations are clarified. At paragraph 1.422 the Committee believes that the obligation to seek suitable employment is more restrictive than is strictly necessary to achieve the objective (i.e. disproportionate) as the bill does not specify how it will be determined that an employee has 'failed to seek' suitable employment. The Minister believes that this requirement is proportionate, as there is currently a requirement in the SRC Act for an employee to undertake job seeking, with prescribed sanctions for not meeting these obligations (s19(4)(e)).

Therefore there are already a suite of measures which are currently used to demonstrate that job seeking obligations are being met, and which will continue to demonstrate whether an employee is seeking suitable employment. These measures include, but are not limited to providing copies of employees' job seeking diaries, job applications and employer responses to job applications where available.

The Committee is concerned (paragraph 1.423) that that a person's right to compensation 'must be permanently removed if the person has failed to follow medical treatment advice'. The Bill does not require a person to follow all medical treatment advice provided in order to avoid being subject to the sanctions or cancellation regime. The obligation upon an employee is to follow medical treatment advice from a legally qualified medical practitioner or legally qualified dentist (health practitioners, such as physiotherapists or chiropractors, are not included in this category). An employee is also able to defer following advice in order to seek a second opinion, and where the employee has advice from two or more medical practitioners or dentists, the employee is free to choose which advice to follow. In addition, an employee is free to refuse to follow medical treatment advice to undergo surgery or take or use a medicine without breaching the obligation of mutuality. This ensures an employee's right to alternative treatment or a treatment they prefer over another and, so doing, preserves an employee's right to make decisions about their own recovery. The obligation merely requires employees to actively participate in their own treatment, whatever that may be.

The Committee was concerned in paragraph 1.424 that the nature of a 'workplace rehabilitation plan' means that there may be a high degree of specificity in relation to an injured employee's responsibilities under the plan. Workplace rehabilitation plans outline the responsibilities of an employee, their supervisor, their claims manager and/or their rehabilitation provider. The plan is developed in consultation with an employee so that there is mutual agreement about the ability to carry out and comply with the content and objectives of the plan. The plan contains a greater degree of specificity for rehabilitation providers as to how they will assist an employee achieve the stated objectives. The responsibilities in the workplace rehabilitation plan are generally at a high enough level that suspension of an employee for specific activities would be appropriate.

The Committee was concerned at paragraph 1.425 as to whether the limitation on the right to social security and the right to health was proportionate. The sanctions regime has been developed in an escalating framework to ensure that the consequences for non-compliance are transparent and that the system provides an effective deterrent. The Bill provides three levels of sanctions, making it easy for employees to understand how their entitlements will be reduced if they breach their obligations. The determination that an employee has breached an obligation and is subject to level I or 2 of the sanctions regime must also be accompanied by a statement that sets out (if the breach has not already

stopped), what actions the employee should take to stop the breach. Compensation and rehabilitation will only be cancelled when an employee has refused, without reasonable excuse, to comply with their obligations under the Act on three qualifying occasions. An employee, then, will not lose their right to compensation, except where they have made a conscious choice to breach their obligations on three qualifying occasions.

Similarly, the scheme will not restrict an employee's right to health, except where the employee has made a conscious choice to not participate in activities to manage their recovery. Such activities fall well within the boundaries of reasonableness and include attending medical assessments, following reasonable medical treatment advice and complying with rehabilitation obligations. The scheme cannot provide the impetus to engage in the recovery process, but it does provide an employee with every assistance and encouragement to do so. The sanctions recognize that most people are willing and eager participants in the injury management and rehabilitation process but, where it is clear that a person receiving workers' compensation payments does not intend to engage in any, or all, of the activities designed to facilitate their recovery and improve return-to-work outcomes, the sanctions provisions will be engaged.[51]

Committee response

2.237 **The committee thanks the Minister for Employment for his response on the proportionality of the measure. The committee considers that the minister's response has demonstrated that the obligations of mutuality are likely to be compatible with the right to social security, right to health and a healthy environment and the right to rehabilitation. In particular, the committee notes that:**

- **an employee is able to defer following medical advice in order to seek a second opinion, and where the employee has advice from two or more medical practitioners, the employee is free to choose which advice to follow; and**
- **the responsibilities of employee specified in the workplace rehabilitation plan will be at a sufficiently high level that suspension of an employee for specific activities would be appropriate.**

Suspension and cancellation of compensation for breaches of mutual obligations (Schedule 15)

2.238 Employees who breach an obligation of mutuality in relation to the same injury or an associated injury will be subject to a 3-stage sanctions regime. At the third stage, an employee's rights to compensation and to institute or continue any

51 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 24-26.

proceedings in relation to compensation in respect of all current and future associated injuries are permanently cancelled. This will also have the effect of permanently cancelling the employee's right to rehabilitation.

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

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

2.240 The right to social security and the right to health are described above at [2.97] to [2.101]. The right to rehabilitation is described above at [2.112].

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

2.241 The statement of compatibility states that the obligations of mutuality and the sanction provisions engage the right to social security and the rights of persons with disabilities.[52] It explains that the legitimate objective of Schedule 15 is 'to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to improve the integrity of the scheme'.[53] The statement of compatibility says the existing mechanisms allowing for the suspension of payments in more limited circumstances (but not for cancellation of payments) is not effective 'due to the lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature'.[54]

2.242 The committee previously accepted that the objective is legitimate for the purposes of international human rights law, and that the measures are rationally connected to that objective. However, it remained unclear as to whether the measures are proportionate to achieve that objective.

2.243 The statement of compatibility states that there are safeguards in the bill that make the measures proportionate to the objective sought to be achieved.[55]

2.244 However, suspending and cancelling an employee's right to compensation may not be proportionate to achieve the stated objective. In particular, permanently cancelling an employee's right to compensation, including their right to medical treatment, may have adverse impacts on the health and rehabilitation of the employee.

2.245 The committee therefore considered that the power to suspend and cancel compensation payments limits the right to social security, the right to health and the

52 SOC 9, 11.

53 SOC 52.

54 SOC 52.

55 SOC 52-53.

rights of persons with disabilities. The statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore sought the advice of the Minister for Employment as to whether the limitation is a proportionate means to achieve the stated objective, in particular, whether the bill is drafted in the least rights restrictive way.

Minister's response

> ***Cancellation of compensation for breaches of mutual obligations (Schedule 15)***
>
> *Right to social security*
>
> *Right to health and a healthy environment*
>
> *Right to rehabilitation*
>
> Schedule 15 to the Bill contains amendments to the effect that employees who breach (without reasonable excuse) an obligation of mutuality in relation to an injury or an associated injury will be subject to a 3-stage sanctions regime. At the final stage, an employee's right to compensation, rehabilitation and the right to continue to institute or continue proceedings (other than in relation to the sanctions or cancellation regime) are cancelled for that injury and any current or future associated injuries.
>
> At paragraph 1.430, the Committee accepted that the stated objective of seeking to improve health and rehabilitation outcomes (by ensuring that employees actively participate in their rehabilitation) and improving the integrity of the Comcare scheme is a legitimate objective. The Committee also accepted that the measures are rationally connected to that objective. However, the Committee required further information as to the proportionality of the amendments.
>
> *Measure is a reasonable and proportionate means of achieving the objective*
>
> An employee's compensation rights will only be cancelled after three breaches of an obligation of mutuality without reasonable excuse. As discussed in the Statement of Compatibility with Human Rights, and by reference to the High Court's judgment in *Corporate Affairs Commission v Yuill* [1991] HCA 28, 'reasonable excuse' refers to physical or practical difficulties in complying with a requirement. In order to strongly encourage compliance with the obligations of mutuality, which are rationally connected to the stated legitimate objective, a rigorous deterrent is needed against refusal to comply with the obligations of mutuality, where such refusal occurs without reasonable excuse and not because of physical or practical difficulties in complying. It is therefore proportionate that employees who continually refuse to comply with obligations to actively participate in their rehabilitation and return-to-work cease to be supported by the Comcare scheme, after those repeated breaches of the obligations of mutuality without reasonable excuse.

Paragraph 24 to the General Comment 19 to ICESCR provides that the withdrawal, reduction or suspension of benefits (being social security benefits) should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law. The Committee on Economic, Social and Cultural Rights noted that, under ILO Convention No. 168 (1988) on Employment Promotion and Protection against Unemployment, such action can only be taken in certain circumstances. One permissible circumstance is when the person has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work. This circumstance is directly applicable to suspension or cancellation of compensation rights after failures to meet the obligations of mutuality in relation to suitable employment. It is also analogous to the suspension or cancellation of compensation rights where an employee fails to meet the other obligations of mutuality. That is, in General Comment 19, and in the ILO Convention No. 168, there exists a concept that the right to social security may also be balanced with a concept of requiring the recipient of social security benefits to fulfil certain obligations to work towards reemployment. A similar concept is borne out by the suspension and cancellation regime provisions.

Although there is no express requirement in the Bill that requires a relevant authority to contact an employee and undertake appropriate inquiries before determining that an employee has breached an obligation of mutuality, procedural fairness is preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make decisions in a fair and reasonable manner.

An employee's right to compensation for medical treatment will not be suspended at any stage; cancellation will occur after three breaches, without reasonable excuse, of the obligations of mutuality. Cancellation of an employee's right to compensation for medical treatment will not cancel an employee's right to medical treatment. An employee whose right to compensation for medical treatment has been cancelled will continue to have access to medical treatment, although compensation will no longer cover the cost. In that situation, the employee, supported by schemes such as Medicare and the Pharmaceutical Benefits Scheme, would need to cover the cost of the necessary or desired medical treatment as though the treatment sought was in relation to a non-work related injury suffered outside the workers' compensation scheme.

A determination that a breach of an obligation of mutuality has occurred cannot be made unless the relevant authority is 'satisfied' that the employee breached an obligation of mutuality. There is no intention in the legislation that requiring a relevant authority to be 'satisfied', rather than 'reasonably satisfied', will lessen the test that the relevant authority is to

> apply. Throughout the SRC Act, each requirement that a body be satisfied of a particular condition is a reference that the body must be 'satisfied', rather than 'reasonably satisfied'. Even if the requirement in the Bill were for the relevant authority to be 'reasonably satisfied', the degree of satisfaction of the relevant authority will be immaterial if the relevant factual pre-condition is not met on the balance of probabilities.
>
> The Bill does not allow a relevant authority the discretion to decide not to apply the sanctions or cancellation regimes, or to reinstate compensation rights once they have been cancelled. This policy decision is proportionate to the objective of strongly encouraging compliance with the obligations of mutuality, with the deterrent that suspension or cancellation will occur if the obligations of mutuality are breached. It also ensures a transparent and equal process so that each employee is treated the same under the SRC Act. An employee will not have breached an obligation of mutuality if the employee had a reasonable excuse for complying with the requirement.
>
> A suspension or cancellation in respect of an injury will also apply in respect of associated injuries. Associated injuries are injuries which arise out of, or in the course of, the same incident or state of affairs, or which result from another injury. Associated injuries are also diseases which are contributed to, to a significant degree, by the same incident or state of affairs, or which result from another disease. As associated injuries are closely related to each other, they are often not distinguishable for the purposes for workers' compensation. An employee who suffers a leg injury and a back injury in an accident and whose compensation rights were suspended as a result of a failure to follow reasonable medical treatment in respect of the back injury would not continue to be eligible for compensation (such as weekly incapacity payments) in respect of the leg injury. A piece-meal approach to compensation and rehabilitation would undermine the legitimate objective of improving health and rehabilitation outcomes by ensuring employees actively participate in their rehabilitation.[56]

Committee response

2.246 **The committee thanks the Minister for Employment for his response.** The committee remains concerned that permanently cancelling an employee's right to compensation, including their right to medical treatment, may have adverse impacts on the health and rehabilitation of the employee. As the committee has previously noted, while employees would continue to have access to the social security system, this could provide a much lower level of support, and at this stage the National Disability Insurance Scheme is in a trial phase and the majority of persons with a disability are not able to access support through this scheme. As such, the permanent cancellation of a person's right to compensation limits their right to

56 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 26-28.

health, right to rehabilitation and right to social security. While the minister's response has provided some justification for the temporary suspension of a person's right to compensation (at which time the person will continue to receive medical treatment), the minister's response has not adequately justified the limitation on these rights caused by the cancellation of a person's compensation for four reasons: the measure appears to not be the least rights-restrictive way to achieve the stated aim; the measure lacks safeguards to ensure that the relevant authority will undertake appropriate inquiries and hear from the affected person before taking action to suspend, or permanently cancel, their right to compensation; the measure lacks sufficient flexibility to treat different cases differently; and there is no discretion for the relevant authority or the Administrative Appeals Tribunal to decide not to permanently cancel or to reinstate compensation based on the affected employee's circumstances.

2.247 The committee remains concerned that the sanctions regime requires a relevant authority (such as Comcare) to suspend compensation if it is 'satisfied' that an employee has breached an obligation of mutuality. There is no requirement that the authority must be 'reasonably' satisfied. The committee notes the minister's advice that there is 'no intention' that requiring a relevant authority to be 'satisfied', rather than 'reasonably satisfied', will lessen the test that the relevant authority is to apply. However, it is a common principle of statutory interpretation that a requirement that a decision-maker be 'satisfied' of something provides a less objective test than that the decision-maker be 'reasonably satisfied'. The committee notes the minister's advice that even were the requirement to be one of 'reasonably satisfied', the degree of satisfaction of the relevant authority 'will be immaterial if the relevant factual pre-condition is not met on the balance of probabilities'.[57] However, while some decisions to suspend will be based on equivocal facts (such as, whether the person attended a treatment interview), others may involve an assessment as to whether the person has acted appropriately, for example, did they fully follow all medical treatment advice. Therefore, the committee remains concerned that enabling a relevant authority to suspend compensation (which can lead to cancellation of compensation) on the basis of being 'satisfied' of a breach of an obligation, rather than 'reasonably satisfied', may not provide the least restrictive way to achieve the stated aim.

2.248 The committee also remains concerned that there is no express requirement in the bill requiring a relevant authority to contact an employee and undertake appropriate inquiries before determining that an employee has breached an obligation of mutuality. The minister advised that this is appropriate as a person would still have access to judicial review of the decision to impose sanctions. However, rather than relying on the affected person having to take expensive judicial

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57 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 28.

review proceedings to seek to enforce their right to procedural fairness, it would be more appropriate if safeguards were included in the bill to ensure that the relevant authority should undertake appropriate inquiries and hear from the affected person before taking action to suspend, or permanently cancel, their right to compensation.

2.249 The bill also does not give the relevant authority the discretion to decide whether, in all the circumstances, compensation payments should be suspended or cancelled. The minister advises that this is consistent with the objective of encouraging compliance and with ensuring a transparent and equal process. However, there may be personal circumstances that mean a person is less able to comply or where suspension, and particularly cancellation, may impact more heavily on that person (that do not satisfy the requirement of a 'reasonable excuse'). Under international human rights law, in considering the proportionality of a measure it is relevant to consider whether a measure provides sufficient flexibility to treat different cases differently.

2.250 Finally, the committee remains concerned that an employee's right to compensation can be permanently cancelled in relation to the primary injury as well as to any associated injuries that may later arise.[58] This is regardless of the level of the employee's injury and the level of treatment they may require as a result of that injury. If the relevant breaches of the obligation of mutuality are established to have occurred, there is no discretion for the relevant authority or the Administrative Appeals Tribunal to decide not to permanently cancel or reinstate compensation based on the affected employee's circumstances.

2.251 **The committee therefore considers that the measures in Schedule 15 of the bill to suspend and cancel workers compensation for breaches of mutual obligation engage and limit the right to health, the right to social security and the right to rehabilitation as contained in articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights and article 26 of the Convention on the Rights of Persons with Disabilities.**

2.252 **For the reasons set out above, the minister's response does not justify that limitation.**

2.253 **The committee recommends that, to avoid unjustifiably limiting the right to health, the right to social security and the right to rehabilitation, amendments to the bill should be made setting out the process to be followed before compensation is suspended or cancelled, and to provide the relevant authority with the discretion to decide whether to suspend or cancel compensation in all circumstances, having regard to the personal circumstances of the employee and the severity of their injury or disease.**

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58 See proposed section 29Z.

Removal of review rights in certain circumstances (Schedule 15)

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

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

Right to a fair hearing

2.256 The right to a fair hearing is described above at paragraph [2.122].

Compatibility of the measure with the right to a fair hearing

2.257 The statement of compatibility states that as the measure provides for the suspension and cancellation of an injured employee's right to institute or continue any proceedings (both merits review and judicial review) under the Act in relation to compensation for any current or future associated injury, the measure engages the right to a fair hearing.[59]

2.258 The statement of compatibility states that the objective of the amendments is to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to ensure the integrity of the scheme. The committee previously agreed that this may be considered a legitimate objective for the purposes of international human rights law.

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

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

2.261 Second, the committee noted that the statement of compatibility has not shown that removal of review rights is the least rights restrictive alternative to achieve the stated objective.

2.262 The committee therefore sought the advice of the Minister for Employment as to whether there is a rational connection between the limitation and the stated

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59 SOC 16.

objective of the measure to improve health and rehabilitation outcomes by ensuring that employees actively participate in their rehabilitation and to ensure the integrity of the scheme, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

Removal of review rights in certain circumstances (Schedule 15)

Right to a fair hearing

The current suspension mechanisms in the SRC Act discussed above in the context of mutual obligations are:

- not fair in that they operate automatically to suspend compensation and can result in overpayments spanning long periods;
- not consistent (for example, the sanction relating to the suitable employment obligations differs to the sanction relating to rehabilitation obligations); and
- not effective in supporting the existing compliance framework.

To address these issues, Schedule 15 to the Bill provides for the suspension of an employee's rights to institute or continue proceedings in relation to compensation (other than proceedings in the AAT in relation to the sanctions regime). However this will only occur while the employee:

- is subject to either the level 1 or 2 sanctions regime because of a breach of mutuality (other than an obligation relating to suitable employment) and
- remains in breach of the obligation.

If an employee becomes subject to the cancellation regime, the employee's rights to institute or continue any proceedings in relation to compensation and rehabilitation (other than proceedings in the AA T in relation to the sanctions regime) are cancelled. These amendments only apply in so far as the rights relate to that injury (or an associated injury).

At paragraph 1.441, the Committee agreed that the stated objective of improving health and rehabilitation outcomes (by ensuring employees actively participate in their rehabilitation) and to ensure the integrity of the scheme is a legitimate objective. However, the Committee required further information as to the rational connection to the objective and proportionality of the amendments.

In particular, the Committee has requested information to explain how the removal of review rights would be effective or capable of achieving this stated objective or that this is the least restrictive rights alternative.

The rational connection between the objective and these amendments is to support active engagement in the rehabilitation process by employees through a mix of encouragement and sanctions in the form of a graduated

response to employees who are not actively engaged in their recovery and rehabilitation.

Effective rehabilitation requires active participation. It is detrimental to the health outcomes of an injured employee for that employee to remain the passive recipient of compensation where the employee has some capacity or potential to be in suitable employment. An employee's return to work will clearly be impeded if that employee chooses not to engage in the process.

Early recovery from injury brings with it a range of benefits, for both injured employees and their employers. For employees, there is the obvious benefit of recovering from injury more quickly, and returning to work and life. For employers, early rehabilitation means that the investment in existing employees is not lost, productivity and workplace morale are improved and premiums (for premium payers) compensation costs (for licensees) are lowered.

As discussed above, in the context of the definition of suitable employment, the majority of employees are actively engaged in their rehabilitation and return to work. There is only a small percentage of employees for whom mandating a return to work is required. To provide for such employees to institute or pursue proceedings in relation to compensation while they are subject to the sanctions regime would defeat the purpose of the regime and contribute to unnecessary costs and delay being incurred by parties to the proceedings.

As discussed above, before determining that an employee has breached an obligation of mutuality resulting in the suspension, requirements to procedural fairness are preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make fair and reasonable decisions.

The amendments are reasonable and proportionate because they do not affect an employee's rights of review and to pursue proceedings in the AAT in relation to the sanctions regime. They provide for an effective means of graduated enforcement response to ensure that injured employees are actively engaged in their recovery and rehabilitation. They are proportionate in that they are complemented by other more supportive amendments proposed including early access to medical treatment and rehabilitation and access to a greater range of suitable employment options that must be responsive to the recovery and personal circumstances of an injured employee.[60]

60 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 3-7.

Committee response

2.263 **The committee thanks the Minister for Employment for his response.** The committee previously considered that the statement of compatibility had not shown that removal of review rights is rationally connected to the objective or that it is the least rights restrictive alternative to achieve the stated objective.

2.264 In light of the Minister's response, the committee continues to consider that there does not appear to be a rational connection between the objective of improving health and rehabilitation outcomes and removing rights of review. The minister's response states that the removal of review rights will 'support active engagement in the rehabilitation process' and '[e]ffective rehabilitation requires active participation'. The minister goes on to say that it is detrimental to the health outcomes of an injured employee 'for that employee to remain the passive recipient of compensation'. However, the minister's response does not explain how actively seeking review of a decision that the injured employee considers has been wrongly engaged would affect that person's health outcomes.

2.265 In terms of proportionality, much of the response is focused on general information about the importance of an employee's engagement with their own rehabilitation and that only a small proportion of employees are not appropriately engaged. While this information may be relevant to the application of the broader mutual obligation arrangements, the specific issue is whether or not barring an employee from instituting or continuing any proceedings in relation to compensation under Act for the injury or associated injury while they are subject to the suspension and cancellation regime (whether at stage 1, 2 or 3), is a proportionate limitation on fair hearing rights.

2.266 The response states that allowing employees to institute or pursue proceedings in relation to compensation while they are subject to the sanctions regime would defeat the purpose of the regime and contribute to unnecessary costs and delay being incurred by parties to the proceedings. However, the response does not address that for an employee the pursuit of compensation (and delays in resolving a claim) and the mutual obligation regime may be closely linked and frustration with the process of a compensation claim may legitimately affect their willingness and ability to meet requirements of mutual obligation. Moreover, the response does not explain why it is necessary and proportionate to impose the bar on compensation proceedings where the employee is only subject to a stage 1 or 2 breach. Accordingly, it has not been demonstrated that this is a proportionate limitation on the right to a fair hearing.

2.267 **The committee considers that the power to suspend and cancel the right to institute or continue proceedings limits the right to a fair hearing as provided for by article 14 of the International Covenant on Civil and Political Rights.**

2.268 **For the reasons set out above, the minister's response does not justify this limitation the purpose of international human rights law. Accordingly, the**

committee considers that the measures may be incompatible with the right to a fair hearing.

2.269 **The committee has concluded its examination of the bill.**

Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015

Portfolio: Employment
Introduced: House of Representatives, 2 October 2014

Purpose

2.270 The Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the bill) amends the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act) to clarify coverage of those Acts.

2.271 The Seafarers Act provides workers compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The OHS(MI) Act regulates work, health and safety for a defined part of the maritime industry. Together, these Acts are referred to as the 'Seacare scheme'.

2.272 The amendments:

- repeal provisions that apply the Seacare scheme to any employees employed by a trading, financial or foreign corporation;
- provide that the Seacare scheme applies to the employment of employees on a prescribed ship that is 'directly and substantially' engaged in interstate or international trade or commerce; and
- make technical amendments to ensure that, where an employee's employment is not covered by the Seacare scheme, their employer will not be liable for a levy in respect of that employee.

2.273 Amendments were made to the bill during its passage to ensure that the bill only applied to incidents occurring between 24 June 1993 and 26 May 2015 (the date of Royal Assent), and not prospective incidents. Instruments were made to deal with any prospective claims.[1] Amendments were also made to ensure that claims under the Seacare scheme that had been finalised or had been made before the bill received Royal Assent, would not be affected.

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

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1 See Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-state Trade) Declaration 2015 [F2015L00336]; Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit—Intra-state Trade) Declaration 2015 [F2015L00335]; Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 (No. 2) [F2015L00858] and Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 (No. 2) [F2015L00863].

Background

2.275 The committee previously considered the bill in its *Twentieth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Employment as to whether a number of measures in the bill were compatible with human rights.[2]

2.276 The bill passed both Houses of Parliament on 14 May 2015 and achieved Royal Assent on 26 May 2015.

Alteration of coverage of persons eligible for workers compensation

2.277 The bill initially amended the existing legislation to ensure that workers on ships engaged in intra-state voyages were not covered by the Seacare scheme, both historically and prospectively. This would result in such workers no longer having an entitlement to compensation under the Seafarers Act, as from 1993. Instead, such workers would be covered by the relevant workers' compensation and work health and safety legislation of the state in which they work.

2.278 The amendments to the bill mean that workers injured on ships engaged in intra-state voyages between 1993 and May 2015 will not be covered by the Seacare scheme (though if any claims had already been made or finalised these will not be affected). For those injured on such ships after 26 May 2015 the bill will not apply to them (although instruments made in March[3] provide that the Seacare scheme will not apply to any prospective injuries).

2.279 The committee considered in its previous report that amending the Seacare scheme to remove an entitlement to compensation engages and may limit the right to social security.

Right to social security

2.280 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.

2.281 Specific situations and statuses which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support. It also includes the protection of workers injured in the course of employment.

2 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 36-38.

3 See footnote 1.

Compatibility of the measure with the right to social security

2.282 The statement of compatibility states that the bill is intended to align the coverage of the Seafarers Act with the understanding of the scheme prior to the Full Court of the Federal Court's decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (the *Aucote* decision), and that as a consequence some workers will no longer have an entitlement to compensation under the Seafarers Act. While this is acknowledged to be a potential limitation of the right to social security, the statement of compatibility assesses the measure as compatible with the right.

2.283 The committee noted previously that, to the extent that the state schemes are less generous than the Seacare scheme, the measure may be regarded as a retrogressive measure. Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to social security.

2.284 While ensuring the long-term viability of maritime industry employers and sustainability of the Seacare scheme is likely to be a legitimate objective for the purposes of international human rights law, the committee considered that it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

2.285 The committee therefore sought the advice of the Minister for Employment as to the extent of differences in levels of coverage and compensation between the Seacare scheme and state and territory workers' compensation schemes.

Minister's response

> The Committee has raised concerns regarding the potential impact of the Bill on a purported right to social security. This Bill simply sought to address a Federal Court decision which fundamentally changed the historic application of the Act and would have left thousands of formerly injured workers in a state of limbo.
>
> But for the Government's swift action, the Federal Court decision meant there was the potential for workers who had been compensated under the Seacare scheme to repay all monies paid and to have those claims reassessed under the relevant state scheme that applied at the time of injury in the state where the injury occurred. It is disappointing that the Committee's report failed to reflect this fact.
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> Following the introduction of the Government amendments, the Bill was passed in the Senate on 13 May 2015 with the support of Government, Opposition and Greens Senators. The Bill was passed in the House on 14 May 2015.
>
> The Government amendments to the Bill adequately address the concerns of the Committee that the Bill may limit access to compensation under the Seafarer Act for some seafarers who have historically been considered to

> be covered by the Act. To any extent that the Bill limits the rights of seafarers who have been injured and received compensation under state workers' compensation legislation to claim additional compensation under the Seafarers Act, this is proportionate and appropriate since the Bill also protects the sustainability of the Seacare scheme, limits the exposure of maritime industry employers to compensation claims for which they are not likely to be insured and will assist with protecting the validity of compensation payments already paid to seafarers under state workers' compensation legislation.[4]

Committee response

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

2.287 The committee notes that it had requested specific advice from the Minister for Employment as to the extent of differences in levels of coverage and compensation between the Seacare scheme and state and territory workers' compensation schemes. The minister's response did not address this specific question. This makes it difficult for the committee to assess whether workers will be adversely affected by these changes and the extent of any limitation on the right to social security.

2.288 The committee notes the minister's comments that the government amendments made to the bill 'adequately address the concerns of the Committee that the Bill may limit access to compensation under the Seafarer Act for some seafarers who have historically been considered to be covered by the Act'. However, the minister's response fails to explain the nature of the amendments made and how these have addressed the committee's concerns.

2.289 The amendments made to the bill are highly technical (and interact with instruments that have also been made) and it would have been helpful if the minister's response had explained the effect of these amendments. The committee understands that the effect of the amendments are that the bill has no prospective coverage, but it does remove the entitlement to the federal Seacare scheme for workers injured on intra-state ships between 1993 and May 2015.

2.290 As such, the right to social security (which includes a right to workers' compensation) for these workers appears to still be limited (if indeed the federal Seacare scheme provides greater coverage than the state schemes).

2.291 The minister's response provides some analysis of whether any such limitation is proportionate, stating that to the extent that the bill limits the rights of workers to claim additional compensation under the Seacare scheme, this is proportionate for three reasons:

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4 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 29 June 2015) 1.

- it protects the sustainability of the Seacare scheme;
- it limits the exposure of maritime industry employers to compensation claims for which they are not likely to be insured; and
- it will assist with protecting the validity of compensation payments already paid to seafarers under state workers' compensation legislation.

2.292 The committee notes that these reasons would seem to more appropriately go towards establishing the legitimate objective of the bill, rather than whether the limitation on the right to social security is proportionate to the objective being sought.

2.293 The committee has previously accepted that ensuring the long-term viability for maritime industry employers and the sustainability of the Seacare scheme is likely to be a legitimate objective for the purposes of international human rights law.

2.294 No information is given to the committee to understand whether any compensation payments already paid under state legislation would be affected (as it is not clear to the committee that being entitled to additional compensation would render any compensation already paid null and void). Therefore, the committee is unable to assess the impact of these measures.

2.295 No reasoning is provided to explain whether any limitation on the workers' right to compensation is proportionate to the objective being sought, in that no analysis is provided as to the impact of the changes on affected workers and whether there were any less restrictive ways to achieve the same aim.

2.296 **As the minister's response did not answer the committee's question as to the extent of differences in levels of coverage and compensation between the Seacare scheme and state and territory schemes, the committee is unable to assess the extent of the limitation on the right to social security for workers affected between 1993 and 2015. The minister's response also failed to explain whether any limitation on this right was proportionate to the objective being sought. As such, the committee is unable to conclude that the amendments to restrict the application of the Seacare scheme to injuries that occurred between 1993 and May 2015 is compatible with the right to social security. The committee has concluded its examination of the bill.**

Social Services Legislation Amendment Bill 2015

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

Purpose

2.297 The Social Services Legislation Amendment Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* to cease social security payments to certain people who are in psychiatric confinement. This will apply to new and existing psychiatric patients, including:

- those unfit to plead;
- those on limiting terms (which is a cap on the period that a person can be confined, applied to certain psychiatric patients);
- those found 'not guilty' by reason of mental illness.

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

Background

2.299 The committee previously considered the bill in its *Twenty-second Report of the 44th Parliament* (previous report), and requested further information from the Minister for Social Services as to whether the bill was compatible with Australia's international human rights obligations.[1]

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

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

Right to social security

2.301 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.

2.302 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:

1 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 105-107.

- 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).

2.303 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.

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

Compatibility of the bill with the right to social security

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

2.306 The committee considered in its previous report that the amendments, which would result in certain individuals who are in psychiatric confinement because they have been charged with a serious offence losing existing entitlements to social security, engages and limits the right to social security. The committee considered that the statement of compatibility has not explained the legitimate objective for the measure. The committee therefore sought 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.

Minister's response

The Committee seeks advice whether the proposed changes are aimed at achieving a legitimate objective.

This policy is intended to ensure the integrity and sustainability of the income support system. The purpose of social security payments such as the Disability Support Pension is to provide a safety net for those most in need to help meet their daily living needs in the community. It is the responsibility of states and territories to provide for a person who is in prison or psychiatric confinement in accordance with a state or territory law. Part of this responsibility is to provide for a person's basic needs such as sustenance, health care and shelter. The Australian Government considers that a person who is undergoing psychiatric confinement because they have been charged with a serious offence will have their basic needs met by the state or territory, in the same way as a person who is on remand or convicted and held in prisons. It is therefore a legitimate objective to provide that a person is not eligible to receive a social security payment while they are undergoing that confinement.

The Committee seeks advice whether there is a rational connection between the limitation and that objective.

The amendments made by the Bill will ensure the same social security treatment for people charged with a serious offence in the criminal justice system, whether they are confined in a psychiatric institution or prison. The amendment will support the original intent of section 1158 of the *Social Security Act 1991* (the Act), that income support payments are not payable to a person who is in gaol or a person who is undergoing psychiatric confinement because the person has been charged with an offence.

The Act currently provides that a person is not taken to be undergoing psychiatric confinement while the person is undertaking a course of rehabilitation. In *Franks v Secretary, Department of Family & Community Services [2002]* FCAFC 436, the Federal Court considered that 'a course of rehabilitation' should be interpreted broadly. The effect of this decision is that the vast majority of people who are undergoing psychiatric confinement will be taken to be undertaking a course of rehabilitation. This means that a social security payment will be payable to almost everyone who is undergoing psychiatric confinement because the person has been charged with an offence.

This broad interpretation of when a person is undertaking a course of rehabilitation is not however consistent with the original policy intent that most people who are undergoing psychiatric confinement as a result of being charged with an offence are not eligible to receive social security payments.

Providing that a social security payment is not payable to a person who is undergoing psychiatric confinement because the person has been charged

with a serious offence, seeks to support the original policy intent and will assist albeit in a small way, in ensuring the sustainability of the social security system by ensuring that payments are appropriately targeted to those in need.

The Committee seeks advice whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This policy is proportionate and will not have an unreasonable impact on persons in psychiatric confinement because they are already receiving in-kind benefits in the form of accommodation and other services in the relevant institution where they are confined.

This policy does not have a punitive intent, rather it is a recognition that people in these circumstances, like those in gaols, have a reduced need for social security payments as their basic needs are met by the states and territories that confine them.

This measure will not apply to a person who is undergoing psychiatric confinement because they have been charged with an offence that is not a serious offence, or for reasons unrelated to the commission of an offence. The Government recognises that people can be caught up in criminal proceedings, and then psychiatric confinement, by being charged with minor offences that in some cases would not result in them being confined if they did not have a disability.

With regards to the impact of this measure on the families of patients, the current arrangements for social security payments make provisions for the partners of people in psychiatric confinement. While a social security payment recipient's partner is imprisoned or undergoing psychiatric confinement because the partner has been charged with an offence, the recipient can be paid a higher partnered rate of their social security payment which is equal to the single rate of the payment. Where a social security recipient was a carer for a child (or other person) prior to undergoing psychiatric confinement, and that caring responsibility has passed to another person, that other person is able to claim social security payments in respect of the child (or person), subject to all standard eligibility criteria. This may include Parenting Payment, Family Tax Benefit, Carer Payment and Carer Allowance.

The Government recognises that the transition of these vulnerable people from psychiatric confinement back into the community is not as straightforward as for those who have been imprisoned. It is for this reason that the Bill allows for a Legislative Instrument to be made to set out circumstances in which a person can be taken to be in a period of integration back into the community. During this period, the person will not be taken to be undergoing psychiatric confinement and as a result, they may be eligible to receive social security payments, particularly where the person has a degree of autonomy. The Government believes that this goes some way to support the original intent of the psychiatric

> confinement provisions in the Act, and is a reasonable and proportionate way to address this issue.[2]

Committee response

2.307 **The committee thanks the Minister for Social Services for his response.** The response states, in terms of the bill's legitimate objective and the proportionality of the measure, that 'a person who is undergoing psychiatric confinement because they have been charged with a serious offence will have their basic needs met by the state or territory, in the same way as a person who is on remand or convicted and held in prisons.'

2.308 However this statement assumes direct equivalence between the needs of persons held in psychiatric confinement and those in prison. It also assumes that the services provided by the state and territories for those in psychiatric care fully meet their needs for social security.

2.309 However, no evidence is provided to support this statement. Forensic patients often have significant mental health conditions and their recovery and rehabilitation can be a gradual process and one that is not necessarily linear. Recovery and rehabilitation programs run by the states and territories typically provide for graduated periods of return to the community and during such periods individuals are reliant on their social security payments to meet their expenses whilst in the community. It is not clear how the states and territories would meet these costs.

2.310 Moreover persons in psychiatric confinement are often confined for indefinite periods of time, the length of which will be determined by the extent to which they are able to recover sufficiently to return to the community. For some patients, this may be a relatively short period and in such cases it would be reasonable that such individuals may have ongoing expenses which they meet from their social security payments including rent and other periodic payments. How such payments would be made in the absence of social security payments is not set out in the response.

2.311 The minister's response notes that a legislative instrument will be made to set out circumstances in which a person will be considered to be undertaking integration back to the community and, as such, eligible for social security payments. While this is a welcome measure, it does not completely address the limitation on the right social security imposed by the bill.

2.312 In the absence of the terms of the instrument, it is not possible to determine whether the instrument will fully address the needs of those undertaking graduated

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2 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Social Services, to the Hon Philip Ruddock MP (dated 25 June 2015) 1-3.

return to the community or whether such an instrument fits within the broad range of programs and procedures of each state and territory.

2.313 Given the important distinction between prisoners and those in psychiatric confinement, particularly in terms of the way in which they return to the community, it would be a more robust safeguard if the information proposed to be included in the legislative instrument was included in the bill.

2.314 While it may be proportionate to remove the social security benefits of those patients for whom there is no likelihood of undertaking a graduated return into the community (as it may be said in such circumstances that all their needs would be met while in confinement) this does not apply to those who may have graduated periods of return to the community.

2.315 **Accordingly, the committee considers that the bill, which would result in certain individuals in psychiatric confinement losing existing entitlements to social security, may be incompatible with the right to social security. The committee recommends that the bill be amended to set out the circumstances in which a person will be considered to be undertaking integration back to the community and, as such, eligible for social security.**

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

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

Purpose

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

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

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

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

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

Background

2.319 The committee previously considered the regulation in its *Twenty-Second 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 regulation were compatible with human rights.[1]

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

2.320 As noted at [2.317] above the regulation amends the Citizenship Regulations to allow children adopted by Australian citizens in accordance with a bilateral arrangement to be registered as Australian citizens. Previously section 6 of the Citizenship Regulations provided only for children adopted by an Australian citizen in accordance with the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption to be registered as Australian Citizens (Hague Convention).[2]

2.321 This aspect of the regulation reflects the amendments in the Australian Citizenship Amendment (Intercountry Adoption) Act 2015 (the Act) which allowed for the acquisition of Australian citizenship by a person adopted outside Australia by an Australian citizen in accordance with a bilateral arrangement between Australia and another country. Specifically, the Act amended the Citizenship Act to create an entitlement to citizenship for persons adopted in accordance with a bilateral arrangement.[3] The entitlement is equivalent to that provided to persons adopted in accordance with the Hague Convention.[4]

2.322 The Act received Royal Assent on 25 February 2015 after passing both Houses of Parliament. The committee first reported on the Australian Citizenship Amendment (Intercountry Adoption) Bill 2014 (the bill) in its *Eighth Report of the 44th Parliament* and raised concerns in relation to the compatibility of the bill with the rights of the child.[5] The committee reported on the minister's response in its

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1 Parliamentary Joint Committee on Human Rights, *Twenty-Second Report of the 44th Parliament* (13 May 2015) 116-124.

2 Explanatory Statement (ES), Attachment B 12.

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

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

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

Tenth Report of the 44th Parliament and concluded that the bill was likely to be incompatible with the rights of the child.[6]

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

Rights of the child

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

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

2.325 State parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:

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

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

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

- is authorised only by competent authorities;
- is subject to the same safeguards and standards equivalent to which apply to national adoption; and

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

- does not result in improper financial gain for those involved.

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

2.328 As noted in the committee's previous analysis of the bill, compliance with the Hague Convention is a critical component of ensuring the protections required by article 21 of the CRC are maintained in any inter-country adoption.[7] The minister has previously acknowledged that whether Australian inter-country adoption arrangements meet Hague Convention standards is relevant to compliance with article 21 of the CRC.[8]

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

2.330 As the committee noted in its consideration of the bill (now Act), the limitation potentially arises as it specifies no standards or safeguards that will apply to inter-country adoptions under a bilateral agreement, and it is therefore not clear whether lower standards, or fewer safeguards, may apply to inter-country adoptions under a bilateral agreement than those that apply under the Hague Convention and the framework it sets out to ensure the best interests of the child. Neither are such standards or safeguards contained in this or other regulations.[9]

2.331 The Australian government previously advised that it only establishes international adoption arrangements with countries which can apply the standards required by the Hague Convention. However, this response did not provide information on how Australia establishes that a country that is not a party to the Hague Convention can nevertheless apply the standards required by that convention.[10]

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

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

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

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

10 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 140-142.

support a conclusion that the bill (now Act) is compatible with article 21 of the CRC. The committee therefore concluded that the bill (now Act) is likely to be incompatible with Australia's international human rights obligations under the CRC.[11]

2.333 The committee previously noted the statement of compatibility provides no further information in respect of these matters in response to this conclusion. Rather, the statement of compatibility asserts that the measure does not engage the rights of the child. It is the committee's usual expectation that where a regulation relates to a bill with which the committee has previously raised concerns, that the regulation is accompanied by a statement of compatibility addressing the issues previously identified by the committee.

2.334 The committee therefore sought the views of the Minister for Immigration and Border Protection as to the compatibility of the measure with the obligation to ensure that inter-country adoption is performed in the child's best interests.

Minister's response

> The Government has provided its response to the Committee regarding the *Australian Citizenship Amendment (Intercountry Adoption) Act 2015* and its compatibility with Article 21 of the Convention on the Rights of the Child. This response was provided by former Minister the Hon Scott Morrison MP on 5 August 2014. I note the contents of this response to the Committee and the Committee's findings in the 10th Report. I note the following excerpts from the response to the Committee by the former Minister:
>
> > *'Given that all of the country programmes which the Australian Government has established must meet the standards of the Hague Convention, the government is of the view that Australia's intercountry adoption programme as a whole is consistent with Article 21 of the CRC.*
> >
> > *The guiding principle of all intercountry adoptions undertaken by Australia, including through the bilateral arrangements with non-Hague countries, is that the best interests of the child shall be the paramount consideration. An application for Australian citizenship is simpler and quicker than an application for a subclass 102 Adoption visa and is certainly less expensive. A more efficacious means of an adopted child's entry into Australia where supported by a Hague Convention compliant programme is in the child's best interests because it means the child can begin their life with their adoptive family in Australia more quickly without compromise to their safety and well-being.*
> >
> > *Therefore, the bill is consistent with Article 21 of the CRC.*

11 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 140-143.

> *The proposal is a/so in keeping with Articles 9 and 18 of the Hague Convention, which respectively encourage expediting adoption processes and taking the necessary steps to ensure an adopted child can reside permanently in Australia.'*
>
> I concur with the former Minister's response and rely on its contents in respect to Schedule 6 of the Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014. As such, I have no further advice to the Committee.[12]

Committee response

2.335 **The committee thanks the minister for his response, which confirms the advice provided by the previous minister.**

2.336 **Some committee members noted the minister's advice that all of the country programs which the Australian government has established must meet the standards of the Hague Convention, and consider the measure is justified.**

2.337 **Other committee members supported the committee's previous conclusion that the *Australian Citizenship Amendment (lntercountry Adoption) Act 2014* is likely to be incompatible with the Australia's obligations under the Convention on the Rights of the Child. Accordingly, as the instrument implements aspects of that Act, those committee members consider that the regulation is also likely to be incompatible with Australia's obligations under the Convention on the Rights of the Child.**

Disclosure of information

2.338 Section 5.34F of the Migration Regulations permits the Department of Immigration and Border Protection (the department) to disclose certain information to the Australian Federal Police (AFP) and to state and territory police for the purpose of supporting existing powers to cancel a Bridging Visa E. This includes names, addresses, dates of birth, sex and immigration status of Bridging E visa (Class WE) visa (BVE) holders and people subject to a residence determination (community detainees).[13]

2.339 The committee initially examined the regulation implementing these measures in its *Second Report of the 44th Parliament* and requested the further advice of the Minister for Immigration and Border Protection as to the compatibility of the measures with the right to privacy.[14] The committee reported on the minister's response in the *Fourth Report of the 44th Parliament* and sought further

12 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 25 June 2015) 3-4.

13 ES, Attachment B 12.

14 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 124.

advice noting that many of the key safeguards and procedures for implementing the new disclosure powers were to be contained in a Memoranda of Understanding which was to be negotiated with the federal, state and territory police.[15] The committee reported on the minister's response in its *Seventh Report of the 44th Parliament* and noted the minister's commitment to provide the committee with a copy of the Memoranda of Understanding once finalised.[16] On this basis the committee noted it would conclude its examination of the instruments once it had received and considered a copy of the final Memoranda of Understanding.[17]

2.340 Schedule 3 to this current regulation further amends section 5.34F to authorise the disclosure of personal information of BVE visa holders and community detainees to the CrimTrac Agency.

2.341 This regulation also amends section 5.34F of the Migration Regulations to allow the disclosure of a unique identifier to prevent misidentification (the Central Names Index (CNI) Number, an identifier used by the National Automated Fingerprint Identification System) and the disclosure of the departmental Client ID reference number.

Right to privacy

2.342 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy encompasses respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.343 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

2.344 The committee previously considered that the further amendments to the disclosure requirements in section 5.34F of the Migration Regulations engage and may limit the right to privacy. The statement of compatibility relies on the terms of a

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15 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (20 March 2013) 75.

16 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 97-98.

17 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 97.

yet to be finalised memorandum of understanding to justify the proportionality of this limitation.

2.345 In accordance with previous conclusions, the committee noted that as many of the key safeguards and procedures for implementing the disclosure powers are to be contained in the relevant memorandum of understanding being negotiated with the federal, state and territory police and CrimTrac, the committee was unable to complete its assessment of whether the amendments to section 5.34F are compatible with human rights until it can consider the specific content of the memorandum of understanding.

Minister's response

2.346 The minister's response did not address this issue.

Committee response

2.347 **The committee reiterates its previous comments in relation to its assessment of the regulation with the right to privacy. The committee previously noted the minister's commitment to provide the committee with a copy of the memorandum of understanding. The committee will conclude its examination of the disclosure powers and the further amendments to those powers in section 5.34F once it has received and considered a copy of this memorandum of understanding. The committee looks forward to receiving a copy of the memorandum of understanding as soon as it is finalised.**

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC15/06437

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

14 JUL 2015

Dear Chair Philip,

Response to the Human Rights Scrutiny Report on the Copyright Amendment (Online Infringement) Bill 2015

I am writing in relation to information that the Parliamentary Joint Committee on Human Rights (the Committee) has sought regarding the Copyright Amendment (Online Infringement) Bill 2015 (the Bill), as detailed in its report dated 13 May 2015.

The Committee has considered that the Bill engages and limits the right to freedom of opinion and expression and has sought advice on whether this limitation is proportionate.

The injunction power contained in the Bill is intended to target sources that supply significant amounts of infringing copyright content to Australian consumers. The Bill asks the Federal Court to balance a variety of interests in making an order and I expect the Court will be very circumspect in using this process.

Mechanisms that aim to change the behaviour of individual consumers through an educational approach, such as the Copyright Notice Scheme contained in the industry code submitted to the Australian Media and Communications Authority on 8 April 2015, would effectively complement but not replace a measure that disrupts the supply of infringing content. International experience has shown that disrupting the supply of infringing content will steer consumers towards legitimate avenues. Direct proceedings against individual infringers is not an effective means of addressing online copyright infringement due to the large number of infringers and the small quantum of damages that could be recovered from each infringer.

The Bill does not seek to limit the ability of persons to access or communicate information or ideas, other than where doing so would infringe another person's copyright. Where an online location provides a mixture of legitimate and infringing material, it is open to the Court to issue an injunction with regard to only specific pages, directories or indexes provided this is technically feasible. Moreover, the primary purpose test, combined with the factors in

subsection 115A(5) make it clear that only online locations that are deliberately and flagrantly infringing copyright will be captured. The injunction power is not intended to capture incidental infringement.

Furthermore, there are a number of reasons that make it impractical for copyright owners to take direct proceedings against infringing foreign-based online locations. The territorial nature of copyright means that copyright owners often face complex issues of private international law when enforcing their rights in the online environment.

This was discussed in a 2011 article published in the European Intellectual Property Review and authored by Ms Fiona Rotstein of the University of Melbourne, which stated:

> It is often difficult to know which nation's courts have jurisdiction over intellectual property disputes involving a foreign element and which conditions need to be met for decisions of foreign courts to be recognised and enforced within a country. It is also not easy to determine which nation's laws are to be applied to govern the substance of legal relationships involving a foreign element.[1]

The article also noted that it is unknown whether the copyright owner can bring an action in one forum in respect of multiple infringements in different countries.

The legal complexities and the possibility that copyright owners will need to attend foreign courts to enforce their rights means that any direct proceeding against a foreign online location are likely to be prohibitively costly, particularly for individual or lesser known copyright owners. In contrast, the process of seeking an injunction against a Carriage Service Provider would be a much simpler and more accessible process.

The Committee has also found that the Bill engages and limits the right to a fair hearing and has sought further advice on whether this limitation is proportionate.

The Committee has raised the concern that the opportunity for the operator of the online location to apply to be joined as a party is dependent on notification by the copyright owner and there may be circumstances in which the operator cannot be contacted despite reasonable efforts. However, in circumstances where the identity or address of the operator cannot be ascertained, the possibility of initiating direct proceedings against the operator would also be precluded. Therefore, if the requirement for notification was absolute, the copyright owner would be left with no remedy in these cases. An important objective of the Bill is to enable copyright owners to overcome the practical difficulties they face in taking action against foreign online locations. This objective would not be achieved if the operator of the online location could avoid any action by hiding their identity and location.

The rights of users will only be affected to a limited extent by an order. Where the user has a contractual relationship with the operator of the online location, this relationship will govern the consequences for the user of an injunction order which results in the blocking of the online location and any recourse that the user may have against the operator. To the extent that the user is denied access to legitimate information, this impact will only be significant if the information cannot be accessed from legitimate sources. Furthermore, the operator of the online location is not prevented from providing a modified, legitimate source of information at a new online location.

[1] Rotstein, Fiona, 'Is there an international intellectual property system? Is there an agreement between states as to what the objectives of intellectual property laws should be?' *European Intellectual Property Review*, Vol 33, Iss 1, 2011

Therefore in my opinion, the Bill limits the right to freedom of opinion and expression and the right to a fair hearing to an extent that is proportionate to achieving its objective of reducing online copyright infringement.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

ATTORNEY-GENERAL

CANBERRA

MC15/01744

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

17 JUN 2015

Dear Chair Philip

I refer to the letter of 13 February 2015 from Senator Dean Smith, the former Chairman of the Parliamentary Joint Committee on Human Rights, requesting my advice on matters raised in the committee's *Human rights scrutiny report 10 February 2015*, about the Freedom of Information Amendment (New Arrangements) Bill 2014.

The purpose of the Bill is to abolish the Office of the Australian Information Commissioner (OAIC), as part of the Government's commitment to reduce the size of government, streamline the delivery of government services and reduce duplication. The Bill does not affect the legally enforceable right of every person to request access to documents of an agency or official documents of a Minister. It does not make any changes to the objects of the *Freedom of Information Act 1982* (FOI Act) or the matters that agencies and ministers are required to consider in making decisions on FOI requests. It simply removes an anomalous and unnecessary layer of external merits review of FOI decisions.

The dual layers of merits review was examined in the 2013 report on the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Hawke FOI Review). The report noted that a number of submissions to the review, including that of the OAIC, questioned whether having access to three levels of merits review was the most efficient model for reviews of FOI decisions. A multiple review process where applicants can access a range of dispute resolution mechanisms can be confusing and creates complexity which adds to the resource burden for both applicants and FOI decision makers.

The establishment of the OAIC created an unnecessarily complex, multi-levelled system resulting in duplication of complaint handling and significant processing delays. These issues have existed from conception and are inherent in the design of the system, as opposed to practice or procedure of the OAIC. No amount of time to consolidate practices or refine procedures would redress the underlying issues with the system.

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Prior to the establishment of the OAIC, there was compulsory internal review of FOI decisions before an applicant could apply for merits review at the Administrative Appeals Tribunal (AAT). Since the commencement of the OAIC, internal review has been available, but not compulsory, prior to seeking review in the OAIC.

Under the new arrangements, the AAT will have sole responsibility for external merits review of FOI decisions as it did for thirty years from commencement of the FOI Act in 1982 until the establishment of the OAIC in 2010. If an FOI applicant is not satisfied with an agency decision, they can apply for an internal review of the decision. There is no application fee for an internal review.

Compulsory internal review will ensure access to low-cost and timely review for applicants. It also provides an opportunity for agencies to reconsider the merits of the initial decision and give agencies primary responsibility for overseeing original FOI decisions. Following the abolition of the OAIC, agencies will again have sole responsibility for the initial review of agency decisions. If an applicant is not satisfied with an internal review decision, they may then apply to the AAT for an external review of the decision.

No changes are proposed for the AAT application fee under the new arrangements for FOI reviews. While there is a reduced fee of $100 that applies in cases of hardship, there are also circumstances where no application fee is payable. This includes where the FOI review relates to a decision about Commonwealth workers' compensation, family assistance and social security payments and veteran's entitlements. Further information is provided in the enclosed extract from the AAT website. Consistent with other AAT matters, a successful applicant before the AAT will receive a refund of all but $100 of the application fee.

It is appropriate that the existing fee regime applies to FOI applicants in the same way as it applies to other government decisions being reviewed by the AAT. Requiring the payment of a fee for an AAT application may also lead to consideration by applicants of whether or not seeking review is appropriate in the circumstances, rather than simply an automatic response to an agency decision that is not favorable to the applicant.

The Bill corrects the fundamental problems in the current system by streamlining FOI regulation to remove a layer of unnecessary external merits review. By doing so, the Bill brings the process into line with review arrangements for other government decisions. This will mean that FOI applicants will no longer need to navigate a complex multi-level system nor be subject to significant processing delays.

As noted above, under the new arrangements those applicants who wish to seek review of the initial FOI decision will be able to seek internal review of the decision. Where a party is not satisfied with the internal review decision, there is a further right of review to the AAT. There is a further right of appeal to the Federal Court of Australia on a question of law from a decision of the AAT and the AAT is also able to refer a question of law to the Federal Court during a review.

Those applicants who wish to make a complaint about agency processing under the FOI Act will be able to make their complaint directly to the Ombudsman, who will take over the OAIC's role of investigating FOI complaints.

In my view the removal of a layer of external merits review does not impinge on the right to an effective remedy for FOI applicants. The continued availability of internal review, external merits review, access to judicial review and a right of complaint to the Ombudsman ensures comprehensive access to an effective remedy.

The new arrangements were to commence on 1 January 2015. However, as the Bill is still before the Parliament, the OAIC remains responsible for privacy and FOI regulation and continues to exercise its functions under both the *Privacy Act 1988* and the *Freedom of Information Act 1982* (FOI Act).

Resources are being reappropriated to the OAIC for the remainder of 2014-15 to allow it to continue the exercise of privacy and FOI functions, and the OAIC will also receive an appropriation in 2015-16 for these functions.

The OAIC has implemented a streamlined approach for applications for merits review of FOI decisions. Straightforward matters are being finalised by the OAIC, and where appropriate more complex or voluminous matters are being referred to the AAT if the Information Commissioner decides that it is desirable in the interests of the administration of the FOI Act that the matter be reviewed instead by the AAT. In such an event, an applicant may apply to the AAT in accordance with regular AAT procedures. All new FOI complaints are being referred to the Ombudsman.

The appointment of the Information Commissioner ends at the end of October 2015. If the Bill has not passed by then, the Government will ensure that arrangements are in place for the continued exercise of all of the Information Commissioner functions. The former Freedom of Information Commissioner, Dr James Popple, was appointed as a full-time Senior Member of the AAT on 1 January 2015. Dr Popple has been appointed until 31 December 2017

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

AAT Application Fees *(information from the AAT website: AAT.gov.au).*

When are you eligible to pay a reduced fee?

If a full application fee is usually payable for an application, you can pay a reduced fee of $100 instead of the full application fee if you fall into one of these groups:

- you are receiving legal aid for your application
- you hold a health care card, a pensioner concession card, a Commonwealth seniors health card or any other card issued by the Department of Social Services or the Department of Veterans' Affairs that certifies entitlement to Commonwealth health concessions
- you are in prison or lawfully detained in a public institution
- you are under 18 years of age; or
- you are receiving youth allowance, Austudy or ABSTUDY.

You can also ask the AAT to reduce the fee you have to pay, if paying the full fee would cause you financial hardship.

Reduced fee because of financial hardship

The Registrar, a District Registrar or Deputy Registrar of the AAT can order that a reduced fee of $100 must be paid instead of the full application fee, if he or she decides that paying the full fee would cause you financial hardship.

In making a decision about whether paying the full fee would cause you financial hardship, a Registrar will take into account your financial circumstances. This includes a range of factors, such as the amount you earn, your living expenses, your assets and debts.

When do you not have to pay an application fee?

In certain circumstances, you do not have to pay an application fee.

1. No fee is payable if the decision to be reviewed is listed in Schedule 3 to the *Administrative Appeals Tribunal Regulations 1976* (see list below). This includes decisions about Commonwealth workers' compensation, family assistance and social security payments and veterans' entitlements.
2. No fee is payable if the decision was made under the *Freedom of Information Act 1982* in relation to a document which relates to a decision under Schedule 3 to the *Administrative Appeals Tribunal Regulations 1976.*

Decisions which do NOT attract an application fee under Schedule 3 of the *Administrative Appeals Tribunal Regulations 1976*

Decisions under the following Acts or enactments:

- Any determination under section 58B of the *Defence Act 1903*
- *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, Schedules 5 and 6 to the *A New Tax System (Family Assistance and Related Measures) Act 2000*
- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Service Homes Act 1918*
- Part III of the *Disability Services Act 1986*
- *First Home Owners Act 1983*
- *Home Deposit Assistance Act 1982*
- *Homes Savings Grant Act 1976*

- *Military Rehabilitation and Compensation Act 2004*
- *National Disability Insurance Scheme Act 2013*
- Subsection 40AA(8), 40AA(10), section 40AB, 40ABA or 40AC of the *National Health Act 1953*
- Subsection 4(7) of the *Nursing Homes Assistance Act 1974*
- *Papua New Guinea (Staffing Assistance) Act 1973* and Papua New Guinea Staffing Assistance (Superannuation) Regulations
- *Safety Rehabilitation and Compensation Act 1988*
- *Seafarers Rehabilitation and Compensation Act 1992*
- *Social Security Act 1991*, *Social Security (Administration) Act 1999*, *Social Security (International Agreements) Act 1999*
- Section 33 of the *Social Services Act 1980* of Norfolk Island
- *Superannuation Act 1976*
- *Student and Youth Assistance Act 1973*, other than Division 6 of Part 4A
- *Veterans' Entitlements Act 1986*.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MC15-064719

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

Dear ~~Mr~~ Philip. Ruddock

Thank you for your two letters of 13 May 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015, the Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014, and the Australian Border Force Bill 2015. I apologise for the delay in responding.

The Committee's remarks are contained in its *Twenty-Second Report of the 44th Parliament*. My response addressing the remarks is enclosed.

Please note that my response to the Australian Border Force Bill 2015 (passed on 14 May 2015) will be provided at a later date, as the Committee is likely to consider a range of related instruments shortly.

Thank you for bringing the Committee's views to my attention.

Yours sincerely

PETER DUTTON 25/6/15

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Attachment A

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Breadth of discretion

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

The approach in the Bill is proportionate as personal identifiers can only be collected for a purpose set out in the *Migration Act 1958* or *Migration Regulations 1994*. These legislated purposes ensure the collection of personal identifiers is not done arbitrarily, and are necessary to the Department's functions and activities. As stated in the Explanatory Memorandum to the Bill, the Department collected an additional personal identifier (i.e., fingerprints) from less than two percent of people granted a visa in 2013/14. This very small number evidences that the current purpose for the collection of personal identifiers is appropriate and limited to legitimate needs to not only verify identity, but also to conduct necessary immigration, security and law enforcement checks to protect the Australian community.

The Bill expands the circumstances in which personal identifiers may be collected beyond those currently set out in the Migration Act:

- visa decision-making (sections 40 and 46) – non-citizens only;
- at Australia's border, on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175) – citizens and non-citizens;
- evidencing that a non-citizen holds a lawful visa (section 188) and when a non-citizen is being detained on the basis that they hold a visa that is subject to cancellation on certain grounds (section 192) – non-citizens only; and
- immigration detention decision-making (section 261AA) – non-citizens only.

The Bill <u>does not</u>:

- add new types of personal identifiers that the Department is authorised to collect
- expand the circumstances where Australian citizens can be required to provide personal identifiers to locations other than the border
- amend the existing legislative rules and public scrutiny that the Department's handling of personal identifiers is subject to.

Developments in biometric technologies are at the forefront of the reforms in the Bill. Technological innovation now allows the Department to collect personal identifiers quickly, using non-intrusive scanners and other devices. Yet, the Department cannot utilise this new technology effectively because of limitations in current legislation. The Bill authorises the use of verification checks that take advantage of advances in biometric technology collection.

A verification check is a non-invasive, quick scan of a person's fingers using a hand-held mobile scanner. A verification check is able to be completed in approximately 30 seconds.

The Department currently collects personal identifiers, namely a facial image and fingerprints, by a time-consuming identification test. It is impractical to use identification test procedures at Australia's border because it is:

- time consuming - the current process that involves collecting both facial-image and 10 fingerprints may take 30-60 minutes to complete; and
- ineffective as the Department does not have resources to conduct more than a few identification tests per flight.

The safeguards that apply to an identification test are not necessary for a verification check, noting that unlike an identification test a person's biometric information is not retained after the completion of a verification check. The Department has been conducting verification checks in public at two international airports since 2012. More than 12,000 checks have been conducted on a consent basis, without incident, indicating the broad acceptance of the check among travellers. Conducting verification checks in public is consistent with other technology-enabled checks currently conducted in public at airports, such as the explosives trace detection test that is accepted by the travelling public as a necessary part of the overall security apparatus at airports.

Collecting personal identifiers by a means of a verification check provides the Department with flexibility to meet the increasing challenges at Australia's borders to identify persons of concern and conduct appropriate security checks accurately and quickly, and in a way that does not burden legitimate travellers. A verification check is efficient and quick. Only those individuals identified as being of higher risk would be subject to a verification check.

Officers conducting verification checks must act in accordance with the Australian Public Service Code of Conduct and the Department's professional integrity framework. Administrative and criminal penalties may apply for breaches.

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

It is the Government's view that the Bill is not discriminatory in its purpose or its impact. Individuals are not currently targeted for additional scrutiny at Australia's borders because of any single characteristic, such as religion or nationality, and the Bill provides no change to the current approach.

The Department has developed a range of sophisticated and innovative tools and capabilities to analyse risk when making visa application decisions and when people are crossing Australia's border. These mathematical, statistical and intelligence techniques produce evidence-based data that can be used to detect persons of higher risk. Examples where these tools are used include where a person:

- 'fails' automated immigration clearance through Smartgate or a manual face-to-passport check, because their facial image does not 'match' the passport photo or the passport is listed as 'stolen';
- an alert is triggered against the Department's Central Movement Alert List; and
- matches a profile (e.g., a person might match a profile for identity fraud, which may include combinations or patterns of a range of variables, such as age or where and how a ticket was purchased).

These same tools and capabilities will continue to be used to detect persons of risk. Under the Bill, the Department will be able to respond to such risks more effectively by using biometrics to resolve identity and security concerns, rather than relying on paper-based documents.

The Committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality before the law, particularly in relation to profiling and targeting of individuals for scrutiny. As noted above, the statement of compatibility does not provide a specific assessment of whether the right to equality before the law is engaged and limited. The Committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is compatible with the right to equality before the law and particularly whether the limitation is a proportionate measure for the achievement of that objective.

As stated above, the same tools and capabilities that are currently used to detect persons of risk will continue to be used and the Bill makes no changes to the methods used to identify persons who may be requested to provide their personal identifiers to resolve concerns about a person's identity or their immigration, security or criminal histories. The Bill will authorise the use of new technology to conduct a more accurate, faster and higher-integrity check using a fingerprint scan in less than one minute.

The recent case of the convicted terrorist Khaled Sharrouf, who in December 2013 used his brother's passport to leave Australia to participate in terrorist-related activities, illustrates the need to expand the use of fingerprint-based checks to resolve concerns at the border. Under the Bill, the Department will be able to respond to such risks more effectively and quickly by using a verification check to resolve identity and security concerns.

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

The Bill aims to amend existing consent and presence requirements for minors to protect vulnerable children from trafficking and exploitation, and detect radicalised individuals who may seek to harm the Australian community.

The Department is currently prohibited by law from collecting certain types of personal identifiers from minors under the age of 15 years. In locations away from Australia's border, the Migration Act currently requires that a parent, guardian or independent person must consent to, and be present for, the collection of personal identifiers from minors. This means that a parent, guardian or independent person can prevent the Department from collecting personal identifiers from a minor by refusing consent or refusing to be present with a minor during collection of personal identifiers.

Allowing the current consent and presence requirements to remain unaltered reduces the effectiveness of using personal identifiers to combat identity fraud, including trafficking, and to detect undisclosed adverse security, law enforcement and/or immigration information of minors. The reasons for the amendments relating to minors are already outlined in the Explanatory Memorandum and Statement of Compatibility with Human Rights for the Bill. These include:

- improved integrity of identity data to more accurately identify that the right person is subject to action, and not another person who is misidentified;
- greater consistency with partner countries where fingerprints are collected based on operational policy
- enabling the case-by-case collection of personal identifiers from individual minors identified as of concern
- more protection for children who have been, or who are at risk of being trafficked
- effectively addressing the current problem of a person claiming to be a minor under 15 years of age to avoid identity, security, law enforcement and immigration checks that would otherwise apply
- detecting radicalised minors who are returning after participating in conflicts in the Middle East and elsewhere, where an increasing number of cases are evident, including some now reported in the media and are involved in violent extremism.

It is anticipated that the Bill will impact on only a small number of minors in specific circumstances, including:

- offshore to protect minors from people smugglers and traffickers;
- on entry and departure at Australia's border in certain circumstances where a minor is identified as at risk or as of concern; and
- applicants from the Refugee and Humanitarian caseload, who are a particularly vulnerable group.

Existing safeguards in the Migration Act relating to access, disclosure and retention of biometrics will continue to provide robust protections for all people affected by amendments in the Bill, including minors. The Department will implement additional policy guidelines that provide guidance to officers on how the new power to collect personal identifiers is to be exercised. The policy guidance will cover how personal identifiers are to be collected from minors and it will ensure that this is done in a respectful way. The policy guidance will be publicly available.

<u>**Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]**</u>

1.507 In accordance with its previous analysis, the Committee considers that providing for the registration of children adopted through inter-country adoption proceedings engages and may limit the rights of the child, and in particular the obligation to ensure that inter-country adoption is performed in the best interests of the child under article 21 of the Convention on the Rights of the Child. As set out above, the statement of compatibility does not provide any information to justify that limitation for the purpose of international human rights law. The Committee has already consulted that the Australian Citizenship Amendment (Intercountry Adoption) Act 2014 which the measure in the measure in the regulation implements is likely to be incompatible with the rights of the child. The Committee therefore seeks the views of the Minister of Immigration and Border Protection as to the compatibility of the measure with the obligation to ensure that inter-country adoption is performed in the child's best interests.

The Government has provided its response to the Committee regarding the *Australian Citizenship Amendment (Intercountry Adoption) Act 2015* and its compatibility with Article 21 of the Convention on the Rights of the Child. This response was provided by former Minister the Hon Scott Morrison MP on 5 August 2014. I note the contents of this response to the Committee and the Committee's findings in the 10th Report. I note the following excerpts from the response to the Committee by the former Minister:

> *'Given that all of the country programmes which the Australian Government has established must meet the standards of the Hague Convention, the government is of the view that Australia's intercountry adoption programme as a whole is consistent with Article 21 of the CRC.*
>
> *The guiding principle of all intercountry adoptions undertaken by Australia, including through the bilateral arrangements with non-Hague countries, is that the best interests of the child shall be the paramount consideration. An application for Australian citizenship is simpler and quicker than an application for a subclass 102 Adoption visa and is certainly less expensive. A more efficacious means of an adopted child's entry into Australia where supported by a Hague Convention compliant programme is in the child's best interests because it means the child can begin their life with their adoptive family in Australia more quickly without compromise to their safety and well-being.*
>
> *Therefore, the bill is consistent with Article 21 of the CRC.*
>
> *The proposal is also in keeping with Articles 9 and 18 of the Hague Convention, which respectively encourage expediting adoption processes and taking the necessary steps to ensure an adopted child can reside permanently in Australia.'*

I concur with the former Minister's response and rely on its contents in respect to Schedule 6 of the Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014. As such, I have no further advice to the Committee.

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

30 JUN 2015

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

Dear Mr Ruddock

This letter is in response to your letter of 13 May 2015, concerning the request for further information about the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 by the Parliamentary Joint Committee on Human Rights. I apologise for the delay in this response.

Any suggestion that this Bill seeks to deny injured workers their "right" to social security or to health and a healthy environment is not supported by the facts. This Bill's fundamental premise is to improve the Comcare scheme to better support injured workers, improve return to work rates and ensure a sustainable scheme into the future.

The amendments are essential for the Comcare scheme to succeed in supporting injured employees to return to work while retaining its long tail, leaving it as the most generous workers compensation scheme in Australia. The focus of the amendments on return to work or recovery at work for injured workers reflects strong evidence internationally that being at work is actually good for health. Studies show that, if an injured worker is off work for 20 days, then the chance of ever getting back to work is 70 per cent but this drops off to just 35 per cent if an injured worker is off work for 70 days. Extended time off work is not conducive to rehabilitation. Return to work rates in the Australian Public Service have been falling and claim costs have been rising. In the public service, for example, the cost of psychological claims has risen in real terms by almost 40 per cent since 2010. The amendments will achieve better outcomes in recovery and return to work, especially for workers with psychological injuries. In all cases, medical and rehabilitation support will be available much earlier to enable workers to have better opportunities to recover from workplace injury. This Bill would see injured workers better supported to recover faster and to return to work. It would be disappointing if the Committee would rather continue with the status quo which has led to workers staying at home and developing secondary conditions such as mental ailments as a result of having a lack of purpose.

Injured workers, their colleagues, their employers and taxpayers are entitled to better performance from the Comcare scheme. Under the Government's changes, the scheme will ensure injured workers and employers work together to achieve productive and safe workplaces. Under this 'two-way street' approach, employers will be required to ensure healthy workplaces and to support injured workers and employees will be required to attend medical treatments, participate in rehabilitation and do their best to get back to work when they can.

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MC15-001890

I have attached a comprehensive response to the issues raised by the Committee and trust that the Committee will see these important reforms are for the betterment of workers and ensuring a sustainable scheme into the future.

I trust this information will be of assistance to the Committee.

Yours sincerely

ERIC ABETZ

Encl.

ATTACHMENT

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

Response to Parliamentary Joint Committee on Human Rights

Redefining work related injuries (Schedule 1)

Right to social security

Right to health and a healthy environment

At paragraph 1.304, the Committee requested further information to show that 'redefining work related injuries ... pursues a legitimate objective'.

Schedule 1 to the Bill contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**) which tighten the criteria which must be satisfied before particular injuries, such as heart attacks, strokes or spinal disc injuries, are compensable as work-related injuries.

Article 9 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) provides for the right to social security, including the right to social insurance. General Comment 19 elaborates on the right of social insurance in the context of workers' compensation: 'States parties should also ensure the protection of workers who are injured in the course of employment or other productive work.'[1] The legitimate objective of these amendments is to more clearly define when an injury occurs 'in the course of employment or other productive work' for the purposes of eligibility for workers' compensation. This is to ensure that an employer's liability will not extend to diseases or injuries that are manifestations of underlying medical conditions which have no significant basis in employment.

The Committee requested further information on the sustainability of the Comcare scheme and the ability of insured employers to meet premium increases.

The Comcare scheme has come under increasing financial pressure. A $687 million deficit (based on the asset to liability ratio) in 2011-2012 was identified following a change in actuarial model in 2011-2012. It was driven by reductions in market interest rates and increases in average claims costs. There have been sharp increases in the premiums charged to Commonwealth entities and authorities. In February 2015, the ACT government announced its intention to leave the scheme due to the high premium costs resulting from a 180 per cent increase in nine years to $97 million for 2014-2015.

Successive governments have applied an efficiency dividend to the resourcing of government agencies. For the past decade, this has averaged 1.88 per cent. In essence this means that, after allowing for changes in responsibilities, agencies' administrative funding has declined in real terms each year. At the same time, Comcare premiums have risen by 50 per cent over the four year period from 2010-11 to 2013-14. This has put significant pressure on agencies.

[1] Committee on Economic, Social and Cultural Rights, General Comment No. 19 para 17.

Rational connection between measure and objective

The rational connection between the legitimate objective and these amendments is to distinguish between heart attacks, strokes and spinal disc injuries which are connected to employment only because they happened to occur at the workplace, and those which are significantly contributed to by a person's employment.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable because they seek to clarify the injuries which are attributable to employment. The amendments are proportionate because they maintain coverage under the Comcare workers' compensation scheme for injuries which have a sufficient nexus to employment. Historically, heart attacks, strokes and some spinal disc injuries were considered to be the culmination of a disease and therefore the 'significant contribution test' was applied to determine liability for compensation. In *Health Insurance Commission v Van Reesch* [1996] FCA 1118, the Full Federal Court applied the High Court decision in *Zickar v MGH Plastic Industries Pty Limited* [1996] HCA 31 to the 1971 Act (the predecessor to the SRC Act) and, by implication of its relevant terms, to the SRC Act. The High Court in *Zickar* held that the sudden rupture of blood vessels was an 'injury'. In applying *Zickar*, the Full Court noted that a spinal disc prolapse, which was not an inevitable consequence of a pre-existing back condition, could also properly be identified as an 'injury'. As a result the range of compensable injuries has considerably expanded.

The Committee requested further information on other support available to individuals who are injured or unwell and who would no longer be eligible for workers' compensation.

The purpose of workers' compensation is to give greater protection and security to workers against injury, illness and death occurring in the course of employment. It is not a substitute for a social security/welfare system. For people who are not eligible for workers' compensation for injuries, because their injury was not caused by their employment, social security/welfare payments will continue to be available. The Commonwealth's disability support and discrimination, superannuation, social security and health care legislation all maintain a person's right to health and social security support.

Social Security

Australia's social security system provides payments for those unable to work, either partially or wholly, because of injury/illness, including access to:

- the *Disability Support Pension*, which provides financial support where there is a physical, intellectual or psychiatric condition that prevents a person from working, or if a person is permanently blind
- the *Sickness Allowance*, which is a short-term payment to a person who is employed or self-employed, but who temporarily cannot work or study because of a medical condition
- the *Mobility Allowance*, which helps a person participate in approved activities where a person has a disability, illness or injury—the allowance helps with transport costs if a person uses public transport without substantial assistance, either permanently or for an extended period

Australia's social security system also provides for a carer's allowance and payment. If a person's medical condition is such that they require care in the home, their relatives/partner may receive a carer's allowance through the Australian Government social security system. The carer payment is an income support payment for people who personally provide constant care in the home of someone with a severe disability or illness.

Australian Government services that are available nationally to persons with a disability or injured as a result of a non-work related injury include Job Access and employment services such as Disability Employment Services (**DES**), jobactive and the Remote Jobs and Communities Program (**RJCP**). JobAccess is a free information and advice service about the employment of people with disability. JobAccess helps people with disability, employers, service providers and the community to access information about services, financial assistance and workplace solutions.

Disability Employment Services, jobactive and Remote Jobs and Communities Program

The services that are available to persons injured as a result of a non-work related injury include **DES** to help all eligible job seekers with disability, injury or health condition to prepare for, find and keep a job. DES providers develop return-to-work plans and work with the person and their employer (if the person is employed) to ensure all the supports are in place the keep them in employment. If the person is not employed they develop a return-to-work plan to assist the person to secure appropriate new employment. Examples of the types of on-the-job supports provided include on-the-job training, co-worker and employer support, access to incentives for the employer, free workplace modifications and adjustments to cater to the employees' restrictions. Alternatively, many people with a disability are supported by jobactive providers to find employment.

jobactive

On 1 July 2015, the Australian Government is introducing new employment services called jobactive to better meet the needs of job seekers and employers and improve job outcomes.

Job seekers will have access to tailored help from a jobactive organisation, based on their assessed needs. This could include:

- help looking for work, writing a resume and preparing for interviews
- referrals to jobs in their local area
- training that is suited to the skills that local employers need
- case management so that job seekers are ready to take up and keep a job
- support to complete Work for the Dole or other eligible activities to provide them with work-like experiences, to help them learn new skills and improve their chances of finding a job.

RJCP

The RJCP provides a jobs, participation and community-development service in 60 remote regions across Australia. The programme supports people to build their skills and get a job or to participate to their capacity in activities that contribute to the strength and sustainability of communities. It also helps remote-area employers to meet their workforce needs and supports communities in remote Australia to plan and build a better future.

Key features of RJCP are:

- Employment and participation activities, including personalised support for job seekers;
- The Remote Youth Leadership and Development Corps (Youth Corps) to help young people move successfully from school to work;
- Providers and communities working together through the development of Community Action Plans to identify the strategies and resources needed to overcome barriers to employment and participation; and
- The Community Development Fund to help communities build strong social and economic foundations

National Disability Insurance Scheme

For people who suffer a disability as a result of heart attacks, strokes or spinal injury, the National Disability Insurance Scheme provides support including access to community services, funded personal plans and supports over a person's lifetime.

Medicare

The health needs of injured people whose injuries are not covered under workers' compensation, are covered by the Australian Government's Medicare system. Medicare provides access to medical and hospital services for all Australian residents and certain visitors to Australia. Medicare covers free and subsidised treatment by health professionals such as doctors, specialists, optometrists and, in certain circumstances, dentists and other allied health practitioners. Medicare also provides free treatment and accommodation in a public hospital.

PBS Scheme

The *Pharmaceutical Benefits Scheme* (**PBS**) provides highly discounted medications to the Australian public and an additional discount for those on a low income who hold a Health Care Card (**concession card**). The payment for all PBS listed medications for those with a concession card is $6.10 (1 January 2015) while those without a concession card pay up to $37.70 (1 January 2015). The Australian Government pays the remaining cost.

Disability discrimination legislation

The Commonwealth's *Disability Discrimination Act 1992* (**DD Act**) covers direct and indirect discrimination, and places positive obligations on employers in relation to employees with a disabling health condition, injury or illness. An employer's main obligations under the DD Act are:

- not to discriminate directly by less favourable treatment
- not to discriminate indirectly by treatment which is less favourable in its impact
- to make reasonable adjustments (e.g. performance requirements, equipment and facilities provided) where required
- to avoid and prevent harassment.

Superannuation and related insurances

The Australian Government has legislated that all Australian employers must provide superannuation coverage to all employees. The new 'My Super' legislation, commencing in 2013 with full compliance required by 2017, requires that all superannuation funds must provide default opt-out death and total and permanent disability insurance coverage. A majority of superannuation schemes also currently provide opt-in income protection insurance at lower than market rates.

Introduction of 'Compensation Standards' (Schedule 1)

Right to social security

Right to health and a healthy environment

Schedule 1 to the Bill inserts a new section 7A which empowers Comcare to determine a Compensation Standard that relates to a specified ailment and sets out the factors that must, as a minimum, exist before it can be said that an employee is suffering from the ailment. A Compensation Standard can also set out matters that must be taken into account in determining whether an ailment or the aggravation of an ailment was contributed to, to a significant degree, by an employee's employment.

The Committee agreed that ensuring that an employer's liability does not extend to diseases or injuries which have no significant basis in employment could be a legitimate objective. The Committee also agreed that the measure is rationally connected to this objective. This is because the amendments will enable Comcare to establish criteria for particular ailments which will determine whether an employee is eligible for workers' compensation.

The Committee stated at paragraph 1.312 that it required further information to show that the amendments were proportionate to the stated objective.

Measure is a reasonable and proportionate means of achieving the objective

This amendment is reasonable and proportionate to the stated objective because Compensation Standards will provide greater transparency and consistency in relation to the matters that are taken into account in determining whether a person suffers from a compensable injury or disease. Compensation Standards will be subject to the *Legislative Instruments Act 2003* (**LI Act**) and will contribute to ensuring the integrity of the scheme while having the benefit of parliamentary scrutiny.

The Department of Veterans' Affairs currently uses similar decision support tools to determine liability for claims made by Australian Defence Force (**ADF**) members under the *Military Rehabilitation and Compensation 2004* (**MRC Act**) and the *Veterans' Entitlements act 1986.* The Statements of Principles (**SoPs**) used under those Acts are determined by the Repatriation Medical Authority. The SoPs include a set of diagnostic criteria based on sound medical-scientific evidence that are used to establish a connection between a medical condition and service in the ADF. The SoPs also identify the factors which must exist, as a minimum, to cause a particular kind of disease, injury or death. The SoPs were created to provide a more equitable, efficient, consistent and non-adversarial system of dealing with claims for liability. It is anticipated that Comcare will develop the Compensation Standards along similar lines to the SoPs. However, unlike the SoPs, which are specific to defence-related service, the Compensation Standards will be specific to employment-related injury and disease and will enable a more equitable and consistent approach to determining liability for workers' compensation claims.

Under the SRC Act, an employee who believes that an injury or disease was significantly contributed to by his or her work can lodge a claim for workers' compensation based on a diagnosis from a medical practitioner linking the claimed condition to employment. However, given that medical practitioners do not have access to the employee's workplace, and are unlikely to have specific knowledge of relevant workplace events, it is questionable whether workplace causality can be based on medical diagnosis alone. This is particularly the case for psychological or psychiatric injury claims. Where a medical practitioner does not have full knowledge of relevant workplace events, a Compensation Standard can be used to support the practitioner's assessment of causation. A causality-based diagnostic model will:

- inform medical practitioners about what constitutes a compensable injury and
- provide greater scheme-wide consistency and transparency in the initial liability decision-making process.

In cases of physical injury, it is relatively easy to establish workplace causality. However, for psychological or psychiatric injuries, this can be difficult because a person's mental health is compromised. Currently, when claims are rejected, an injured employee may be subjected to a lengthy dispute resolution process involving reconsideration of a claim and possible referral to the Administrative Appeals Tribunal (**AAT**). This is not an ideal outcome, particularly for someone who has compromised health.

Compensation Standards will establish clear, transparent criteria for determining workplace causality for a limited range of conditions, such as adjustment disorder, to support better decision making and reduced disputation. Liability for most conditions will be determined without a Compensation Standard, making the development of a Compensation Standard the least restrictive measure for determining liability for conditions where diagnoses are currently inconsistent across the scheme. Clearer rules, as outlined in a Compensation Standard, may further reduce the need for an injured employee to engage in lengthy disputation. In particular, Compensation Standards will assist where workplace causality is disputed or harder to establish and will make it simpler for employees, especially those with mental injuries, to negotiate the claims process.

The Committee expressed concern that there appears to be no requirement for the Compensation Standards to be based on objective evidence. The Committee also expressed concern at the broad discretion available to Comcare in establishing the Compensation Standards and regarding whether appropriate consultation would be carried out.

Comcare will be establishing a working group to develop Compensation Standards with membership to include representatives from relevant expert groups including employers, employee advocates and medical experts. This working group will be tasked with ensuring that any Compensation Standards developed are based on objective evidence.

Further, a Compensation Standard will be a legislative instrument and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken. Furthermore, a Compensation Standard will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section

42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Workplace rehabilitation plans (Schedule 2)

Rights of persons with disabilities to rehabilitation

Right to health and a healthy environment

Schedule 2 to the Bill contains amendments which emphasise the vocational (rather than medical) nature of rehabilitation services.

The Committee agrees that the measure pursues a legitimate objective to pursue a core purpose of the Comcare scheme to, as far as possible, provide for early intervention and rehabilitation support for injured employees to stay in or return to suitable employment. The Committee seeks advice as to:

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

Rational connection between measure and objective

The amendments distinguish medical and vocational rehabilitation, thereby clarifying the roles and responsibilities of participants in the system (i.e. to provide medical treatments or vocational treatments). This clarification will enable the Comcare scheme to better provide for early intervention and rehabilitation support for injured employees to enable them to stay in or return to suitable employment. This is the rational connection between the amendments and the legitimate objective.

Medical rehabilitation is the process of enhancing and restoring functional ability and quality of life to those with physical or mental impairments or disabilities.

Vocational rehabilitation is aimed at maintaining injured or ill employees in, or returning them to, suitable employment.

Providers of vocational rehabilitation are engaged to provide specialised expertise in addition to that generally available within the employer's and insurer's operations. Providers are engaged for those injured employees where return to work is not straight forward. Service provision is largely delivered at the workplace by:

- facilitating an early return to work of the employee;
- identifying and designing suitable duties for the injured employee and assisting employers to manage the employee in these duties;
- identifying and coordinating rehabilitation strategies that ensure employees are able to safely perform their duties;
- providing the link between the claims manager, the employer and treatment providers to ensure a focus on safe and sustainable return to work; and

- arranging appropriate retraining and placement in alternative employment when an employee is unable to return to pre-injury duties.

The vocational rehabilitation model has been refined and developed over the last 25 years and the SRC Act has not kept up to date with those developments. The current definition of rehabilitation program in the Act, in that it includes provision for medical services, is out of step with the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers (**National Rehabilitation Framework**).The National Rehabilitation Framework was developed by the Heads of Workers' Compensation Authorities, a group comprising the Chief Executives (or their representatives) of the peak bodies responsible for the regulation of workers' compensation in Australia and New Zealand.

The National Rehabilitation Framework which has been in place since 1 July 2010 specifically limits the work of approved rehabilitation program providers to vocational tasks, so as to minimise the perceived conflict of interest for the delivery of treatment services together with vocational programs.

Comcare's operational standards, to be met by all persons who are approved as rehabilitation program providers require, that:

> *A provider must ensure that no conflict of interest arises when providing rehabilitation services. Specifically, treatment and occupational rehabilitation services must not be provided to the same individual.*

The removal of the provision of medical treatment from the definition of a workplace rehabilitation plan in the Bill is consistent with contemporary thinking in relation to vocational rehabilitation.

Measure is a reasonable and proportionate means of achieving the objective

These amendments are reasonable and proportionate to the stated objective. This is because access to medical rehabilitation and the right to health are not restricted by removing the references to medical treatment in the workplace rehabilitation plan. The Bill positively engages the right to health by providing for access to rehabilitation from injury notification rather than as currently provided for, on acceptance of a claim. The Bill also positively engages the right to health by providing access to provisional medical expense payments before a claim is determined.

Further, safeguards have been put in place to ensure that an injured employee is medically fit to participate in workplace rehabilitation. For example, an employer is obliged to consult with the employee and any treating medical practitioner when developing a workplace rehabilitation plan.

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

Right to a fair hearing

Schedule 2 to the Bill contains amendments to the formulation of workplace rehabilitation plans. Not every part of a workplace rehabilitation plan will be subject to review. The employee's responsibilities and the obligations of the liable employer contained in the workplace rehabilitation plan, will not be reviewable.

The Committee, at paragraph 1.331, has requested further information as to why the measure is needed in pursuit of the objective, which is to promote compliance with rehabilitation plans, rather than arguments regarding particular employee responsibilities and obligations of the liable employer. The Committee has also requested further information as to whether there is a rational connection between the objective and the amendments, and whether the amendments are reasonable and proportionate.

Rational connection between measure and objective

By ensuring that the details of the plans are not reviewable, the amendments will provide for greater flexibility in the plans to accommodate changes in the employee and employer's circumstances. The plans will therefore more accurately reflect each party's circumstances. This is the rational connection between the objective and these amendments.

A workplace rehabilitation plan outlines the rehabilitation objectives or goals and related services, supports and activities that will assist an employee with their rehabilitation and return to work. A workplace rehabilitation plan will include an employee's responsibilities and an employer's obligations in relation to the employee's rehabilitation. Where a rehabilitation provider is engaged, the plan will also include the rehabilitation provider's services and estimated costs.

Typical employee responsibilities include undertaking medical treatment and counselling with an expected outcome of continuing to recover and commencing graduated return-to-work according to an agreed schedule and within medical restrictions. The expected outcome is that the employee will have a safe and durable return to work.

A typical employer obligation for a supervisor is to support and monitor the employee's performance while in the workplace and to ensure that suitable work, within the employee's current medical restrictions, is available. This responsibility will support rehabilitation and graduated return to work programs.

Typical responsibilities of a workplace rehabilitation provider include liaising with the employee to ensure the employee is supported through the rehabilitation process and liaising with the employee's treating GP to discuss medical restrictions and the recovery process.

Under the proposed amendments, the goals of a workplace rehabilitation plan will be reviewable. An engaged rehabilitation provider's services and estimated costs will also be reviewable.

The most important component of a workplace rehabilitation plan is the stated objectives or goals. A workplace rehabilitation plan's goals will be reviewable when the plan is first developed and whenever any change is made to those goals.

The more detailed elements of a workplace rehabilitation plan tend to be responsibilities allocated to the rehabilitation provider.

The Bill introduces a new section (s36E) which allows an employee who has sustained a workplace injury to request that the liable employer formulate a workplace rehabilitation plan for the injury. Under existing legislation, an employee does not have the power to request a rehabilitation plan be developed in relation to the injury to assist their return-to-work. The section places an obligation on the employer to consider the request and if the employer decides not to formulate a workplace rehabilitation plan, that decision is reviewable.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable and proportionate because:

- the content of rehabilitation plans are developed in consultation with the employee, their medical practitioners and their employer;
- the goal or objective which informs an employee's responsibilities and employer obligations in the plan is reviewable; and
- the amendments promote compliance with the goals and objectives of a rehabilitation plan rather than more administrative arrangements regarding particular employee responsibilities and obligations of a liable employer.

While some areas of a workplace rehabilitation plan are not subject to merits review by the AAT, procedural fairness in the decision-making process is preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make decisions in a fair and reasonable manner.

Expanded definition of suitable employment (Schedule 2)

Right to work

Right to just and favourable conditions at work

Right of persons with disabilities to work

Right to rehabilitation

Schedule 2 to the Bill includes an amendment which broadens the definition of 'suitable employment' to include any employment which is suitable employment. Currently, suitable employment as defined in section 4 of the SRC Act does not allow for employment by a different employer to be 'suitable employment', even if that employment would otherwise be suitable for the employee. For an injured employee who continues to be employed by the Commonwealth or a licensee, 'suitable employment' must be employment within the Commonwealth or the relevant licensee.

The Committee, at paragraph 1.340, has requested further information on how the new definition of 'suitable employment' is proportionate for the achievement of the legitimate objective to strengthen the obligations of employers to provide greater opportunities for injured employees to engage in suitable employment and thereby improve health and return to work outcomes for injured employees.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable and proportionate in that there are substantial safeguards in place to ensure that suitable employment is appropriate to the individual circumstances of an employee. What constitutes suitable employment is specific to an individual and must take into account the employee's age, experience, training, language and other skills, and the employee's suitability for rehabilitation or vocational training and any other relevant matter.

The capacity of an employee to remain or engage in suitable employment must be assessed in consultation with the employee and their medical practitioner to ensure that the employment reflects the capacity and abilities of an employee.

The restriction in the definition of 'suitable employment' under the SRC Act is unique to the Commonwealth legislation and is at odds with the nationally recognized return-to-work hierarchies as outlined in the National Rehabilitation Framework.

The rehabilitation process outlined in the National Rehabilitation Framework is aimed at encouraging and returning an injured employee to 'suitable employment'/suitable duties as soon as it is safe to do so, and incorporates:

- assessment of need:
  - early, accurate identification of risks and needs ensures the most appropriate intervention is applied to achieve a safe return to work
  - assessment of need continues throughout the course of service delivery as new information is received
- return to work planning—return to work planning is required when all necessary assessments have been completed and an employee needs assistance to:
  - return to work with the pre-injury employer;
  - undertake physical upgrading or transitional duties with a host employer prior to return to work with the pre-injury employer; or
  - find a new job.

Return to work planning will:

- specify strategies that address the identified risks, needs, strengths and capacities having regard to the 'employee's medical status, functional capacity, vocational status, psychosocial concerns, employer requirements, workplace issues and any other return to work barriers
- take place in consultation with the employee, the treating doctor, the employer (if the employee is still employed) and the union (if involved), to align expectations of key parties
- be consistent with the insurer's Injury/Case/Claim Management Plan
- consider personnel management and industrial issues in the workplace and adopt strategies to address these issues if they are barriers to the employee's return to work
- take account of the preferred hierarchy for placement but not at the expense of the employee's needs or the employer's capacity, namely:
  - same job/same employer
  - different job/same employer
  - similar job/different employer
  - different job/different employer.

The process also requires active implementation and review of the employee's return to work and providing support to the employee and the employer to ensure the return to work is durable.

As can be seen from the process outlined above, the return-to-work process is highly consultative and sensitive to the needs of the employee in ensuring that their rehabilitation back to the workplace is managed taking into account their specific needs. The majority of employees are encouraged and supported to return to work, there are only a very small percentage of employees for whom mandating a return to work is required. For those employees who do not cooperate with the return to work process, the SRC Act currently requires that an employee's rights to compensation under the Act are suspended until the employee begins to co-operate.

The changes to the definition of 'suitable employment' therefore enable access to greater opportunities in returning injured employees to work and bring the Commonwealth legislation into line with the National Rehabilitation Framework and with state and territory workers' compensation schemes.

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

Right to social security

Right to health and a healthy environment

Schedule 5 contains amendments which allow for Comcare to set a schedule of fees (the 'medical services table') for the reimbursement of costs for medical treatment obtained by an employee. The medical services table will not limit the types of medical treatment, but will limit the amount payable by the relevant authority for specified treatments. Schedule 5 also contains amendments which allow for Comcare to prescribe Clinical Framework Principles, which must be taken into account when determining whether medical treatment was reasonably obtained.

The Committee, at paragraph 1.349, requested further information as to how these measures are proportionate to the legitimate objectives of improving the sustainability of the scheme by focussing limited resources on medical treatment that is reasonable, and containing medical costs under the scheme.

Medical services table

A key objective of the Bill, in addition to improving the sustainability of the scheme, is to improve the health, recovery and return-to-work outcomes of injured employees. This will be achieved by ensuring that medical treatment is evidence-based, outcomes-focussed and provided by registered and accredited health practitioners. In addition, new measures will ensure early reimbursement of medical expenses, even before a claim for compensation is lodged.

Fee schedules are currently used in other Australian workers' compensation jurisdictions and thorough investigation of their effectiveness has been undertaken. There is evidence that fee schedules prevent overcharging for the same service.

The Committee expressed concern at the broad discretion available to Comcare in setting scheduled fees in the medical services table for specific medical treatments, and the lack of requirement to consult with, or have regard to figures set by, the Australian Medical

Association. The medical services table will be a legislative instrument, and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken.

Furthermore, the medical services table will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Whether treatment was reasonably obtained

In determining whether treatment was reasonably obtained, the amendments require that regard must be had to the Clinical Framework Principles and any other matter Comcare considers relevant.

This provision has a two-fold purpose in that it establishes key medical principles (as outlined in the Clinical Framework) and maintains the discretionary element that is a feature of current scheme practice by taking other factors, including non-medical factors, into consideration when making a determination as to the compensability of the treatment. For example, an injured employee living in a remote area may not be able to access treatment that fully satisfies Clinical Framework Principles. In this case, the remoteness of the location would be a relevant factor that Comcare would be able to take into account in order to determine that a treatment was reasonably obtained. It is reasonable that relevant non-medical factors are taken into regard when determining whether treatment was reasonably obtained, so that the treatment can be examined in the context of the employee's circumstances.

The Clinical Framework Principles will also be a legislative instrument, and the requirements of the LI Act apply (see above).

Measure is a reasonable and proportionate means of achieving the objective

The amendments to establish the medical services table and the Clinical Framework Principles, which together will assist in determining whether medical treatment was reasonably obtained, and the amount which will be reimbursed in respect of this medical treatment, are reasonable and proportionate. The establishment of a fee schedule will specify the maximum compensable amount payable for a number of medical treatments. However, this measure also contains flexibility in that treatments that are not specified in the fee schedule will be assessed and paid as charged, providing they meet the standards outlined in the Clinical Framework. This ensures the sustainability of the scheme – by limiting some amounts payable, but retaining enough flexibility to ensure that items that fall outside the schedule are able to compensated.

Compensable household and attendant care services (Schedule 6)

Right to social security

Right to health and a healthy environment

Schedule 6 to the Bill contains amendments which provide that attendant care services will only be compensable if they are provided by a qualified provider of attendant care services.

The Committee agreed that ensuring that individuals providing attendant care services are appropriately trained and qualified is a legitimate objective, and that the measures are rationally connected to that objective. However, the Committee noted the difficulty that the qualification and registration process could present to family members who wanted to provide attendant care services, particularly in circumstances where a family member is providing sufficient and appropriate care but is unable to meet the qualifications or registration requirements. The Committee (at paragraph 1.358) considered that it could be possible to include statutory exemptions for family members to provide attendant care services without registration at the discretion of Comcare. Subsequently, the Committee requested further information to demonstrate that the amendments were proportionate to the legitimate objective.

Items 11 and 16 of Schedule 6 to the Bill provide that compensable attendant care services can be provided by accredited, registered or approved providers of attendant care services. These items also contain a provision that compensable attendant care services may be provided by an individual authorised by the relevant authority in relation to the employee, with the requirement that the relevant authority may only authorise such an individual if there are special circumstances. These provisions are designed to, and will allow, a family member in special circumstances to be able to provide compensable attendant care services without obtaining qualifications or undergoing the registration process. These provisions ensure that the amendments are reasonable and proportionate to a legitimate objective.

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

Right to social security

Right to an adequate standard of living

Schedule 9 contains an amendment which corrects a significant undermining of disciplinary processes which currently allows an employee who would not otherwise receive an income due to being suspended from work to continue to receive weekly incapacity payments for workers' compensation during that period of compensation.

The Committee, at paragraph 1.368, has requested more information as to how the measure is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is reasonable and proportionate.

Addresses a pressing concern

This situation arose as a result of the Federal Court decision in *Comcare v Burgess* [2007] FCA 1663 which ruled that paragraph 8(10)(a) of the SRC Act – which is expressed to apply to an injured employee who continues to be employed during his or her incapacity – does not contemplate the situation where an employee continues to be employed but is suspended from that employment without pay, and therefore does not apply in this situation. The result of this decision is that an employee who would not have earned anything if free from incapacity (because he or she is suspended without pay) is able to receive an income because of his or her incapacity.

Rational connection between measure and objective

The employment relationship contains certain rights and obligations under law. Where an employee has been suspended for misconduct, they have acted in a manner which breaches the terms of this relationship. To allow a suspended employee to continue to receive income replacement for workers' compensation under these circumstances fails to respect the employment relationship and associated entitlement systems; in this case, the workers' compensation safety net.

Measure is a reasonable and proportionate means of achieving the objective

This measure is reasonable in that it recognises and supports the rights of employers to suspend an employee, and their entitlements, for actions endangering the safety of other employees or the workplace. It ensures the integrity of the suspension process where periods of suspension and compensation occur simultaneously.

This measure is reasonable and proportionate in that, while suspended, an employee continues to receive other workers' compensation entitlements. These include payment of medical expenses, permanent impairment lump sum compensation, household and attendant care services and any other benefit for which the employee is eligible. This measure only reduces the income replacement benefit amount to zero to reflect the amount that the employee would be earning while suspended from employment. Payment of incapacity benefits will recommence when the period of suspension ends.

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

<u>*Right to social security*</u>

Schedule 9 to the Bill contains amendments which provide for earlier structured reductions ('step downs') to weekly incapacity payments.

At paragraph 1.378, the Committee requested further information as to how these amendments were proportionate to the legitimate objective of addressing a concern identified by the Review that a single step down point after 45 weeks creates a disincentive for early return to work by injured employees.

Measure is a reasonable and proportionate means of achieving the objective

In most schemes across Australia, there is more than one step-down of incapacity payments, with the first step-down occurring reasonably early in the life of a claim. Victoria and South Australia have their first step-downs after 13 weeks. The majority of States and Territories have at least one step-down by 26 weeks. In contrast, the first (and only) step- down in the Comcare scheme occurs much later, at 45 weeks.

The Review of the *Safety, Rehabilitation and Compensation Act 1988* considered three models of compensation step-down and recommended a three level system of step-down that had earlier step down points than the current scheme but ultimately resulted in employees receiving 80 per cent of their normal weekly earnings, a higher level than the 75 per cent currently received.

The step-down model subsequently chosen for the SRC Act reduces the final income to 70 per cent of the employee's pre-injury average remuneration, which is lower than the final step-downs available in Queensland and New South Wales, where injured employees receive 85 per cent or 90 per cent respectively of their pre-injury earnings. However, both

Queensland and New South Wales significantly cap the total amount of income replacement that can be paid to employees. It is worth noting that the Commonwealth workers' compensation schemes (the SRC Act, the MRC Act and the *Seafarers Rehabilitation and Compensation Act 1992*) as well as the Australian Capital Territory workers' compensation scheme are the only 'long tail' schemes left in Australia, which means that income replacement under the SRC Act is paid for the duration of an employee's incapacity until age 65. The Bill will extend eligibility for incapacity payments to the age of eligibility for the age pension.

The majority of long term claimants will not be impacted by the reduction of the final step-down from 75 per cent to 70 per cent of pre-injury average weekly remuneration. This is because the SRC Act currently requires that for those employees who are in receipt of superannuation payments, incapacity payments are reduced by a further 5 per cent to 70 per cent (this requirement is being removed by the Bill). It is anticipated that approximately 26 per cent of long term claimants[2] will be impacted by the reduction to 70 per cent, however, these claimants may benefit from the increased support available in the Bill for those with serious injuries.

The Bill also significantly increases (by over $100,000) the lump sum payable for permanent impairment and introduces an algorithmic formula to ensure that those with more serious impairments receive a greater proportion of the lump sum than is currently the case.

The current weekly cap on household and attendant care services is also being removed for those employees who have suffered catastrophic injuries.

The final step-down will be reduced to 70 per cent of the employee's average remuneration, while at the same time:

- removing the 5 per cent reduction for those in receipt of superannuation;
- extending the payment of incapacity benefits in line with the increases in the age of eligibility for the age pension;
- significantly increasing the lump sum permanent impairment payments for the severely injured and; and
- removing the cap on payments for household and attendant care support for the catastrophically injured.

This balances the reduction in the step-downs in incapacity benefits to 70 per cent and is therefore a proportionate limitation on the right to social security.

Capping of legal costs (Schedule 11)

Right to a fair hearing (equal access)

Schedule 11 to the Bill contains amendments which allow for Comcare to prescribe a schedule of legal costs, which will cap the amount that the AAT will be able to award to a successful claimant.

The Committee, at paragraph 1.388, stated that it was unable to complete its assessment of whether this measure is proportionate to the legitimate objective of removing incentives for

[2] Based on data obtained from Comcare, as at 1 May 2015.

employees to participate in drawn out proceedings until it has reviewed the schedule of legal costs.

The schedule of legal costs will be a legislative instrument, and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken.

Furthermore, the schedule of legal costs will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

In the period from 2011-12 to 2013-14, legal costs in the Comcare scheme increased by more than 34 per cent. In 2013-14, this equated to an amount of $122,243,305(Table 1). This was driven partly by:

- the length of time it takes to resolve disputes; for example, in 2012-13, nationally, 88.6 per cent of workers' compensation disputes were resolved within nine months but only 47.7 per cent of disputes within the Comcare scheme were resolved during this time. In comparison, Queensland and Western Australia resolved more than 90 per cent of their workers' compensation disputes within 9 months;
- a dispute system that offers little incentive to resolve scheme disputes before they reach hearing stage at the AAT—legal costs are currently not reimbursed at the reconsideration stage, meaning there is little incentive to resolve a dispute before proceeding to the AAT; and
- limited ability for an employer or Comcare to recover legal costs for a claim that is either vexatious or dismissed by the AAT.

If dispute times are not reduced and spending on legal costs continues to increase at this rate, the scheme will not be sustainable in the long-term.

In addition to a schedule of legal costs, the Bill is introducing several measures to address the spending on legal costs and improve dispute resolution timeframes. These include:

- statutory timeframes for initial claim determination liability and all reconsiderations (there are currently no timeframes);
- in eligible cases, the scheme will reimburse costs at the reconsideration stage providing the dispute does not progress to the AAT. If the claimant wishes to proceed to the AAT, the claimant will be required to repay reconsideration legal costs before being able to make an application, but will retain current eligibility for reimbursement of certain costs at the AAT stage; and
- once the case has proceeded to the AAT, a party to the proceeding (such as Comcare, or an employer) can apply for costs to be awarded against the claimant if the

application is dismissed by the AAT (for example, because the application is frivolous or vexatious).

These steps will encourage claimants to engage legal representation at the reconsideration stage and avoid the lengthy dispute resolution process associated with a disputed claim progressing to an AAT hearing. Currently, it is the AAT's practice to award a successful applicant legal costs, including counsel's fees, at a rate equal to 75 per cent of the Federal Court scale. This is regardless of the length of time it takes to resolve an application and offers little incentive for parties to resolve applications as soon as possible. The schedule of legal costs, which will be developed by Comcare, in consultation with relevant stakeholders, will be designed to create an incentive to reduce the time taken to resolve claims and reduce the overall cost of applications.

Table 1. Legal costs in the Comcare scheme 2009-2014

2009-10		2010-11		2011-12		2012-13		2013-14	
No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost
2493	$88,260,691	2023	$92,665,754	1746	$104,452,097	1985	$114,136,794	2237	$122,245,305

Source: Comcare

The Committee expressed concern that, in the schedule of legal costs, the cap on the amount of legal fees that may be awarded would be set so low that law firms may not provide representation for clients without the means to pay. As noted above, the schedule of legal costs will be a legislative instrument, and therefore subject to the requirements under the LI Act. It is expected that Comcare will undergo extensive consultations in accordance with section 17 of the LI Act with the legal community to ensure that the schedule of legal costs both discourages proceedings being unnecessarily drawn out and represents a fair rate to enable employees to be able to afford legal representation. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken. Furthermore, the schedule of legal costs will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Changes to payments for permanent impairment (Schedule 12)

Right to social security

At 1.395, the Committee has requested evidence to show that the changes to calculations of permanent impairment are the most effective in responding to degrees of impairment and that any individual's loss of compensation under the amendments is both necessary as a result of resource constraints and proportionate in the operation of the whole scheme.

The approach to the calculation and assessment of permanent impairment compensation in Australian workers' compensation jurisdictions is generally informed by both policy and the need to protect the financial viability of the scheme. The diversity in approach to assessment means that benefits can vary significantly from one scheme to another, and that there is little capacity for scheme administrators to learn from shared experience. Medical assessors also have difficulty in developing assessment skills that can be used across the schemes. This is particularly important for the Comcare scheme given its national operation.

The Hanks Review of the scheme, undertaken in 2013, also identified deficiencies in the way the scheme compensated the most severely impaired employees and the Government sought a cost neutral solution that directed compensation to those who needed it most without increasing employer costs.

At present, compensation for permanent impairment is comprised of 2 elements – a payment to reflect the degree of permanent impairment and a payment to reflect the loss of quality of life. Non-economic loss is assessed both quantitatively, in reference to the percentage of permanent impairment, and qualitatively, using questionnaires. This process has been open to criticism on the basis that the effect on quality of life is unpredictable and, consequently, unquantifiable. Where measurement of a component of non-economic loss is qualitative, it is inconsistent and highly subjective. Also, the process of calculating the permanent impairment value already includes an assessment on the impact on activities of daily living.

Additionally, it has been argued that assessing the degree of permanent impairment in a linear fashion is an overly simplistic and fails to take into account the variances between and within impairment levels.

The Department reviewed the methods of calculating permanent impairment lump sum compensation in other jurisdictions and considered both linear and algorithmic models. Australian schemes use both linear and algorithmic models to calculate the amount of compensation payable but, because of the variability of approaches, there is no evidence to indicate that one is better or more effective than the other. However, it was found that the algorithmic model used in NSW more closely aligned with the policy intent to increase compensation for the most seriously injured.

Consequently, the changes proposed by the Bill will:

- achieve a degree of consistency with practices in other schemes;
- address criticisms of the current methods of assessment and calculation of permanent impairment;
- provide maximum support to those with higher levels of impairment; and
- achieve a higher degree of scheme sustainability.

Under the changes, permanent impairment and non-economic loss payments will be combined. The current combined total of these payments is $243,000 but the maximum payable will be increased to $350,000. There will still be assessment of the effect on quality of life but this will be part of the overall assessment of the percentage of permanent impairment, which will then be calculated as a percentage of overall permanent impairment.

The scheme will adopt a national permanent impairment assessment guide that is currently being developed by Safe Work Australia. This will allow for some jurisdictional variation but will establish nationally consistent methods of assessment. The planned guide will be based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended by the NSW Scheme, and currently in use by the NSW scheme.

Based on an analysis of models used in state schemes and informed by the recommendations of the Hanks' Review, an algorithmic compensation calculation model was developed that allows an increase in the maximum compensation available to target employees with the most serious injuries while maintaining cost neutrality in respect of all permanent impairment compensation claims. Adoption of the NSW compensation calculation model also provides

greater alignment with Safe Work Australia's proposed national guide for the assessment of permanent impairment, which will be based on the permanent impairment guidelines currently used by the NSW scheme.

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

Right to social security

Right to equality and non-discrimination

Schedule 12 to the Bill contains amendments which remove compensation for permanent impairment for psychological injuries and ailments which are secondary injuries.

The Committee, at paragraph 1.401, agreed that improving scheme equity by better targeting support [so that] the level of compensation payable for permanent impairment should reflect the severity of an employee's injury and the impact it has on their life. The Committee further agreed that it is necessary to prioritise resources in the Comcare scheme and ensure that severely impaired employees are properly compensated.

However, the Committee requested information and evidence to explain the economic cost to Comcare of compensating secondary psychological or psychiatric injuries and ailments to show that the amendments are a proportionate limitation on the right to social security.

In the last five years, claims for psychological conditions in the Comcare scheme have consistently increased in both number and cost (Table 2). This has resulted in an increase in the number and cost of claims for permanent impairment due to psychological injury, not just for primary psychological injuries, but also for secondary psychological injuries.

Table 2. Psychological injury/disease claims in the Comcare scheme 2009-2014

2009-10		2010-11		2011-12		2012-13		2013-14	
No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost
3187	$70,098,884	3209	$78,330,633	3218	$81,521,166	3558	$95,908,948	3749	$103,800,066

Source: Comcare

Lump sum permanent impairment payments for psychological injury constitute the largest single category of permanent impairment liabilities for Comcare and are a significant liability for all employers covered by the SRC Act. For example, in 2009-2010, approximately 20 per cent of the total cost of all permanent impairment claims was attributed to claims for psychological injury. Based on available data, it is difficult to quantify the proportion that relates to secondary psychological injuries, however it is estimated that this proportion is significant.

Measure is a reasonable and proportionate means of achieving the objective

The removal of lump sum compensation for secondary psychological or psychiatric permanent impairment is a proportionate means to achieving the stated objective. This is because the removal of the entitlement will allow for a wide range of benefits to continue to be available to injured employees, including those with a secondary psychological condition. These ongoing benefits are described in Table 3 and, it should be noted, include eligibility for lump sum permanent impairment compensation (of up to $350,000) for the primary injury.

The Government's approach to achieving the stated objective was informed by an examination of permanent impairment lump sum compensation practices in Australian state workers' compensation schemes. Permanent impairment lump sum compensation is payable for primary psychological conditions in New South Wales, Tasmania, Victoria and Western Australia, but is not paid for secondary psychological conditions. South Australia and the ACT do not pay any permanent impairment lump sum compensation for psychological injuries, regardless of whether they are primary or secondary injuries.

After considering alternative state compensation models, the Government adopted the measure it considered the least restrictive, yet allowed it to achieve its objective of long-term sustainability and the provision of support to the most severely injured employees in the scheme. The scheme will continue to pay permanent impairment lump sum compensation for all primary injuries, including psychiatric and psychological injuries, yet also increase the maximum amount payable by over $100,000. This will ensure that adequate support is provided for the catastrophically injured in terms of lump sum compensation. At the same time, in order to improve long-term scheme viability, the scheme will remove permanent impairment lump sum compensation for secondary psychological injuries, while ensuring psychological injury claimants retain access to all other scheme benefits. As referred to in Table 3, this includes, but is not limited to, access to income support, medical treatment and compensation for dependents in the event of an employee's death.

Table 3. Summary of workers' compensation benefits for eligible employees with primary and secondary (psychological) conditions

Benefit	Primary condition covered?	Secondary psychological or psychiatric condition covered?	Conditions
Permanent impairment lump sum compensation (whether for physical or psychological injury)	Yes	No	Up to $350,000 (increased from previous maximum of up to $243,000)
Combine multiple permanent impairments	Yes	Yes	Increases eligibility for permanent impairment lump sum compensation
Income support	Yes	Yes	Until pension age
Payment of medical expenses	Yes	Yes	Lifetime, if required
Household services	Yes	Yes	Limits based on severity of injury: Non-catastrophic: $442.40 weekly for 3 years Catastrophic: no limits (previously capped at $442.40 weekly)
Attendant care services	Yes	Yes	Limits based on severity of injury: Non-catastrophic: $442.40 weekly for 3 years Catastrophic: no limits (previously capped at $442.40 weekly)
Post-surgery services	Yes	Yes	Up to 6 months after surgery
Aids, appliances & modifications to home, car, equipment	Yes	Yes	As required
Death payments – dependent lump sum	Yes	Yes	Up to $504,419.16
Death payments – dependent weekly	Yes	Yes	$138.72 weekly per dependent child (up to 16 years of age, or 25 years of age if studying full-time)
Death payments – funeral expenses	Yes	Yes	Up to $11,267

Obligations of mutuality (Schedule 15)

Right to social security

Right to health and a healthy environment

Right to rehabilitation

The Act currently provides for a number of employee obligations which result in the suspension of all compensation entitlements in cases of non-compliance. However, due to a lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature, they do not provide effective support for the achievement of rehabilitation and return-to-work outcomes.

Schedule 15 to the Bill contains new provisions, which share similarities with some state and territory workers' compensation schemes and which amend the Act to streamline and enhance the existing regime of sanctions. In particular, these amendments:

- identify specified activities that an injured employee must comply with as 'obligations of mutuality'. These are fair and reasonable activities to expect people receiving workers' compensation payments to undertake to improve their health and their ability to work; and
- provide for the mandatory application of a 3-stage sanctions regime that results in the suspension of compensation rights, and finally the cancellation of compensation, including medical treatment, rehabilitation and most appeal rights,

where obligations of mutuality have been repeatedly breached without reasonable excuse.

The Committee has requested clarification of the following items and that the Minister demonstrate that they are proportionate to achieving the outcomes sought. At paragraph 1.420, the Committee requires the Minister to show that the obligations of mutuality are proportionate to achieving improvement of health and rehabilitation outcomes and the integrity of the Comcare scheme.

Measure is a reasonable and proportionate means of achieving the objective

The obligations are proportionate as they have been drafted in such a way as to ensure they are suitably prescriptive to ensure clarity, but broad enough to respect the limitations or scope of the objects they prescribe. For example, an employee is required to follow reasonable treatment advice, but the obligations do not interfere with the practitioner/patient relationship. Also, rehabilitation and work readiness plans are highly dependent on a number of very specific factors, not the least of which relate to the type of injury, the patient's general health and the requirements of a job. It is not possible to prescribe these items other than broadly without severely limiting an employee's right to make decisions about their health, recovery and rehabilitation.

As mentioned earlier, the Bill takes a broad, yet suitably prescriptive approach to ensure obligations are clarified. At paragraph 1.422 the Committee believes that the obligation to seek suitable employment is more restrictive than is strictly necessary to achieve the objective (i.e. disproportionate) as the bill does not specify how it will be determined that an employee has 'failed to seek' suitable employment. The Minister believes that this requirement is proportionate, as there is currently a requirement in the SRC Act for an employee to undertake job seeking, with prescribed sanctions for not meeting these obligations (s19(4)(e)). Therefore there are already a suite of measures which are currently used to demonstrate that job seeking obligations are being met, and which will continue to demonstrate whether an employee is seeking suitable employment. These measures include, but are not limited to providing copies of employees' job seeking diaries, job applications and employer responses to job applications where available.

The Committee is concerned (paragraph 1.423) that that a person's right to compensation 'must be permanently removed if the person has failed to follow medical treatment advice'. The Bill does not require a person to follow <u>all</u> medical treatment advice provided in order to avoid being subject to the sanctions or cancellation regime. The obligation upon an employee is to follow medical treatment advice from a legally qualified medical practitioner or legally qualified dentist (health practitioners, such as physiotherapists or chiropractors, are not included in this category). An employee is also able to defer following advice in order to seek a second opinion, and where the employee has advice from two or more medical practitioners or dentists, the employee is free to choose which advice to follow. In addition, an employee is free to refuse to follow medical treatment advice to undergo surgery or take or use a medicine without breaching the obligation of mutuality. This ensures an employee's right to alternative treatment or a treatment they prefer over another and, so doing, preserves an employee's right to make decisions about their own recovery. The obligation merely requires employees to actively participate in their own treatment, whatever that may be.

The Committee was concerned in paragraph 1.424 that the nature of a 'workplace rehabilitation plan' means that there may be a high degree of specificity in relation to an injured employee's responsibilities under the plan. Workplace rehabilitation plans outline the responsibilities of an employee, their supervisor, their claims manager and/or their rehabilitation provider. The plan is developed in consultation with an employee so that there is mutual agreement about the ability to carry out and comply with the content and objectives of the plan. The plan contains a greater degree of specificity for rehabilitation providers as to how they will assist an employee achieve the stated objectives. The responsibilities in the workplace rehabilitation plan are generally at a high enough level that suspension of an employee for specific activities would be appropriate.

The Committee was concerned at paragraph 1.425 as to whether the limitation on the right to social security and the right to health was proportionate. The sanctions regime has been developed in an escalating framework to ensure that the consequences for non-compliance are transparent and that the system provides an effective deterrent. The Bill provides three levels of sanctions, making it easy for employees to understand how their entitlements will be reduced if they breach their obligations. The determination that an employee has breached an obligation and is subject to level 1 or 2 of the sanctions regime must also be accompanied by a statement that sets out (if the breach has not already stopped), what actions the employee should take to stop the breach. Compensation and rehabilitation will only be cancelled when an employee has refused, without reasonable excuse, to comply with their obligations under the Act on three qualifying occasions. An employee, then, will not lose their right to compensation, except where they have made a conscious choice to breach their obligations on three qualifying occasions.

Similarly, the scheme will not restrict an employee's right to health, except where the employee has made a conscious choice to not participate in activities to manage their recovery. Such activities fall well within the boundaries of reasonableness and include attending medical assessments, following reasonable medical treatment advice and complying with rehabilitation obligations. The scheme cannot provide the impetus to engage in the recovery process, but it does provide an employee with every assistance and encouragement to do so. The sanctions recognize that most people are willing and eager participants in the injury management and rehabilitation process but, where it is clear that a person receiving workers' compensation payments does not intend to engage in any, or all, of the activities designed to facilitate their recovery and improve return-to-work outcomes, the sanctions provisions will be engaged.

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

Right to social security

Right to health and a healthy environment

Right to rehabilitation

Schedule 15 to the Bill contains amendments to the effect that employees who breach (without reasonable excuse) an obligation of mutuality in relation to an injury or an associated injury will be subject to a 3-stage sanctions regime. At the final stage, an employee's right to compensation, rehabilitation and the right to continue to institute or

continue proceedings (other than in relation to the sanctions or cancellation regime) are cancelled for that injury and any current or future associated injuries.

At paragraph 1.430, the Committee accepted that the stated objective of seeking to improve health and rehabilitation outcomes (by ensuring that employees actively participate in their rehabilitation) and improving the integrity of the Comcare scheme is a legitimate objective. The Committee also accepted that the measures are rationally connected to that objective. However, the Committee required further information as to the proportionality of the amendments.

Measure is a reasonable and proportionate means of achieving the objective

An employee's compensation rights will only be cancelled after three breaches of an obligation of mutuality without reasonable excuse. As discussed in the Statement of Compatibility with Human Rights, and by reference to the High Court's judgment in *Corporate Affairs Commission v Yuill* [1991] HCA 28, 'reasonable excuse' refers to physical or practical difficulties in complying with a requirement. In order to strongly encourage compliance with the obligations of mutuality, which are rationally connected to the stated legitimate objective, a rigorous deterrent is needed against refusal to comply with the obligations of mutuality, where such refusal occurs without reasonable excuse and not because of physical or practical difficulties in complying. It is therefore proportionate that employees who continually refuse to comply with obligations to actively participate in their rehabilitation and return-to-work cease to be supported by the Comcare scheme, after those repeated breaches of the obligations of mutuality without reasonable excuse.

Paragraph 24 to the General Comment 19 to ICESCR provides that the withdrawal, reduction or suspension of benefits (being social security benefits) should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law. The Committee on Economic, Social and Cultural Rights noted that, under ILO Convention No. 168 (1988) on Employment Promotion and Protection against Unemployment, such action can only be taken in certain circumstances. One permissible circumstance is when the person has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work. This circumstance is directly applicable to suspension or cancellation of compensation rights after failures to meet the obligations of mutuality in relation to suitable employment. It is also analogous to the suspension or cancellation of compensation rights where an employee fails to meet the other obligations of mutuality. That is, in General Comment 19, and in the ILO Convention No. 168, there exists a concept that the right to social security may also be balanced with a concept of requiring the recipient of social security benefits to fulfil certain obligations to work towards re-employment. A similar concept is borne out by the suspension and cancellation regime provisions.

Although there is no express requirement in the Bill that requires a relevant authority to contact an employee and undertake appropriate inquiries before determining that an employee has breached an obligation of mutuality, procedural fairness is preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make decisions in a fair and reasonable manner.

An employee's right to compensation for medical treatment will not be suspended at any stage; cancellation will occur after three breaches, without reasonable excuse, of the obligations of mutuality. Cancellation of an employee's right to compensation for medical treatment will not cancel an employee's right to medical treatment. An employee whose right to compensation for medical treatment has been cancelled will continue to have access to medical treatment, although compensation will no longer cover the cost. In that situation, the employee, supported by schemes such as Medicare and the Pharmaceutical Benefits Scheme, would need to cover the cost of the necessary or desired medical treatment as though the treatment sought was in relation to a non-work related injury suffered outside the workers' compensation scheme.

A determination that a breach of an obligation of mutuality has occurred cannot be made unless the relevant authority is 'satisfied' that the employee breached an obligation of mutuality. There is no intention in the legislation that requiring a relevant authority to be 'satisfied', rather than 'reasonably satisfied', will lessen the test that the relevant authority is to apply. Throughout the SRC Act, each requirement that a body be satisfied of a particular condition is a reference that the body must be 'satisfied', rather than 'reasonably satisfied'. Even if the requirement in the Bill were for the relevant authority to be 'reasonably satisfied', the degree of satisfaction of the relevant authority will be immaterial if the relevant factual pre-condition is not met on the balance of probabilities.

The Bill does not allow a relevant authority the discretion to decide not to apply the sanctions or cancellation regimes, or to reinstate compensation rights once they have been cancelled. This policy decision is proportionate to the objective of strongly encouraging compliance with the obligations of mutuality, with the deterrent that suspension or cancellation will occur if the obligations of mutuality are breached. It also ensures a transparent and equal process so that each employee is treated the same under the SRC Act. An employee will not have breached an obligation of mutuality if the employee had a reasonable excuse for complying with the requirement.

A suspension or cancellation in respect of an injury will also apply in respect of associated injuries. Associated injuries are injuries which arise out of, or in the course of, the same incident or state of affairs, or which result from another injury. Associated injuries are also diseases which are contributed to, to a significant degree, by the same incident or state of affairs, or which result from another disease. As associated injuries are closely related to each other, they are often not distinguishable for the purposes for workers' compensation. An employee who suffers a leg injury and a back injury in an accident and whose compensation rights were suspended as a result of a failure to follow reasonable medical treatment in respect of the back injury would not continue to be eligible for compensation (such as weekly incapacity payments) in respect of the leg injury. A piece-meal approach to compensation and rehabilitation would undermine the legitimate objective of improving health and rehabilitation outcomes by ensuring employees actively participate in their rehabilitation.

Removal of review rights in certain circumstances (Schedule 15)

Right to a fair hearing

The current suspension mechanisms in the SRC Act discussed above in the context of mutual obligations are:

- not fair in that they operate automatically to suspend compensation and can result in overpayments spanning long periods;

- not consistent (for example, the sanction relating to the suitable employment obligations differs to the sanction relating to rehabilitation obligations); and
- not effective in supporting the existing compliance framework.

To address these issues, Schedule 15 to the Bill provides for the suspension of an employee's rights to institute or continue proceedings in relation to compensation (other than proceedings in the AAT in relation to the sanctions regime). However this will only occur while the employee:

- is subject to either the level 1 or 2 sanctions regime because of a breach of mutuality (other than an obligation relating to suitable employment) and
- remains in breach of the obligation.

If an employee becomes subject to the cancellation regime, the employee's rights to institute or continue any proceedings in relation to compensation and rehabilitation (other than proceedings in the AAT in relation to the sanctions regime) are cancelled. These amendments only apply in so far as the rights relate to that injury (or an associated injury).

At paragraph 1.441, the Committee agreed that the stated objective of improving health and rehabilitation outcomes (by ensuring employees actively participate in their rehabilitation) and to ensure the integrity of the scheme is a legitimate objective. However, the Committee required further information as to the rational connection to the objective and proportionality of the amendments.

In particular, the Committee has requested information to explain how the removal of review rights would be effective or capable of achieving this stated objective or that this is the least restrictive rights alternative.

The rational connection between the objective and these amendments is to support active engagement in the rehabilitation process by employees through a mix of encouragement and sanctions in the form of a graduated response to employees who are not actively engaged in their recovery and rehabilitation.

Effective rehabilitation requires active participation. It is detrimental to the health outcomes of an injured employee for that employee to remain the passive recipient of compensation where the employee has some capacity or potential to be in suitable employment. An employee's return to work will clearly be impeded if that employee chooses not to engage in the process.

Early recovery from injury brings with it a range of benefits, for both injured employees and their employers. For employees, there is the obvious benefit of recovering from injury more quickly, and returning to work and life. For employers, early rehabilitation means that the investment in existing employees is not lost, productivity and workplace morale are improved and premiums (for premium payers) compensation costs (for licensees) are lowered.

As discussed above, in the context of the definition of suitable employment, the majority of employees are actively engaged in their rehabilitation and return to work. There is only a small percentage of employees for whom mandating a return to work is required. To provide for such employees to institute or pursue proceedings in relation to compensation while they

are subject to the sanctions regime would defeat the purpose of the regime and contribute to unnecessary costs and delay being incurred by parties to the proceedings.

As discussed above, before determining that an employee has breached an obligation of mutuality resulting in the suspension, requirements to procedural fairness are preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make fair and reasonable decisions.

The amendments are reasonable and proportionate because they do not affect an employee's rights of review and to pursue proceedings in the AAT in relation to the sanctions regime. They provide for an effective means of graduated enforcement response to ensure that injured employees are actively engaged in their recovery and rehabilitation. They are proportionate in that they are complemented by other more supportive amendments proposed including early access to medical treatment and rehabilitation and access to a greater range of suitable employment options that must be responsive to the recovery and personal circumstances of an injured employee.

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

29 JUN 2015

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

Dear ~~Chair~~ Philip,

This letter is in response to your letter of 18 March 2015 concerning the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015.

The Committee has raised concerns regarding the potential impact of the Bill on a purported right to social security. This Bill simply sought to address a Federal Court decision which fundamentally changed the historic application of the Act and would have left thousands of formerly injured workers in a state of limbo.

But for the Government's swift action, the Federal Court decision meant there was the potential for workers who had been compensated under the Seacare scheme to repay all monies paid and to have those claims reassessed under the relevant state scheme that applied at the time of injury in the state where the injury occurred. It is disappointing that the Committee's report failed to reflect this fact.

Following the introduction of the Government amendments, the Bill was passed in the Senate on 13 May 2015 with the support of Government, Opposition and Greens Senators. The Bill was passed in the House on 14 May 2015.

The Government amendments to the Bill adequately address the concerns of the Committee that the Bill may limit access to compensation under the Seafarer Act for some seafarers who have historically been considered to be covered by the Act. To any extent that the Bill limits the rights of seafarers who have been injured and received compensation under state workers' compensation legislation to claim additional compensation under the Seafarers Act, this is proportionate and appropriate since the Bill also protects the sustainability of the Seacare scheme, limits the exposure of maritime industry employers to compensation claims for which they are not likely to be insured and will assist with protecting the validity of compensation payments already paid to seafarers under state workers' compensation legislation.

I trust this response will assist the Committee.

Yours sincerely

ERIC ABETZ

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MB15-000059

The Hon Scott Morrison MP
Minister for Social Services

MC15-006188

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter dated 13 May 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Social Services Legislation Amendment Bill 2015. I welcome the opportunity to address the Committee's questions on the Bill as presented in the *Twenty-second Report of the 44th Parliament.*

The Committee seeks advice whether the proposed changes are aimed at achieving a legitimate objective.

This policy is intended to ensure the integrity and sustainability of the income support system. The purpose of social security payments such as the Disability Support Pension is to provide a safety net for those most in need to help meet their daily living needs in the community. It is the responsibility of states and territories to provide for a person who is in prison or psychiatric confinement in accordance with a state or territory law. Part of this responsibility is to provide for a person's basic needs such as sustenance, health care and shelter. The Australian Government considers that a person who is undergoing psychiatric confinement because they have been charged with a serious offence will have their basic needs met by the state or territory, in the same way as a person who is on remand or convicted and held in prisons. It is therefore a legitimate objective to provide that a person is not eligible to receive a social security payment while they are undergoing that confinement.

The Committee seeks advice whether there is a rational connection between the limitation and that objective.

The amendments made by the Bill will ensure the same social security treatment for people charged with a serious offence in the criminal justice system, whether they are confined in a psychiatric institution or prison. The amendment will support the original intent of section 1158 of the *Social Security Act 1991* (the Act), that income support payments are not payable to a person who is in gaol or a person who is undergoing psychiatric confinement because the person has been charged with an offence.

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The Act currently provides that a person is not taken to be undergoing psychiatric confinement while the person is undertaking a course of rehabilitation. In *Franks v Secretary, Department of Family & Community Services [2002]* FCAFC 436, the Federal Court considered that 'a course of rehabilitation' should be interpreted broadly. The effect of this decision is that the vast majority of people who are undergoing psychiatric confinement will be taken to be undertaking a course of rehabilitation. This means that a social security payment will be payable to almost everyone who is undergoing psychiatric confinement because the person has been charged with an offence.

This broad interpretation of when a person is undertaking a course of rehabilitation is not however consistent with the original policy intent that most people who are undergoing psychiatric confinement as a result of being charged with an offence are not eligible to receive social security payments.

Providing that a social security payment is not payable to a person who is undergoing psychiatric confinement because the person has been charged with a serious offence, seeks to support the original policy intent and will assist albeit in a small way, in ensuring the sustainability of the social security system by ensuring that payments are appropriately targeted to those in need.

The Committee seeks advice whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This policy is proportionate and will not have an unreasonable impact on persons in psychiatric confinement because they are already receiving in-kind benefits in the form of accommodation and other services in the relevant institution where they are confined.

This policy does not have a punitive intent, rather it is a recognition that people in these circumstances, like those in gaols, have a reduced need for social security payments as their basic needs are met by the states and territories that confine them.

This measure will not apply to a person who is undergoing psychiatric confinement because they have been charged with an offence that is not a serious offence, or for reasons unrelated to the commission of an offence. The Government recognises that people can be caught up in criminal proceedings, and then psychiatric confinement, by being charged with minor offences that in some cases would not result in them being confined if they did not have a disability.

With regards to the impact of this measure on the families of patients, the current arrangements for social security payments make provisions for the partners of people in psychiatric confinement. While a social security payment recipient's partner is imprisoned or undergoing psychiatric confinement because the partner has been charged with an offence, the recipient can be paid a higher partnered rate of their social security payment which is equal to the single rate of the payment. Where a social security recipient was a carer for a child (or other person) prior to undergoing psychiatric confinement, and that caring responsibility has passed to another person, that other person is able to claim social security payments in respect of the child (or person), subject to all standard eligibility criteria. This may include Parenting Payment, Family Tax Benefit, Carer Payment and Carer Allowance.

The Government recognises that the transition of these vulnerable people from psychiatric confinement back into the community is not as straightforward as for those who have been imprisoned. It is for this reason that the Bill allows for a Legislative Instrument to be made to set out circumstances in which a person can be taken to be in a period of integration back into the community. During this period, the person will not be taken to be undergoing psychiatric confinement and as a result, they may be eligible to receive social security payments, particularly where the person has a degree of autonomy. The Government believes that this goes some way to support the original intent of the psychiatric confinement provisions in the Act, and is a reasonable and proportionate way to address this issue.

Thank you again for corresponding on behalf of the Parliamentary Joint Committee on Human Rights.

Yours sincerely

The Hon Scott Morrison MP
Minister for Social Services
25/6/2015

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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[1] For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

[2] The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

[3] See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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[5] This is because the mandatory minimum sentence may be seen by courts as a ‘sentencing guidepost’ which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

[6] The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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