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

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

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.**

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

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]

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

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]

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)

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.[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;

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

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**

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

25 SOC 37.

26 SOC 37.

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**

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

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

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**

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

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.**

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

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.

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.

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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.
>
> 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

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

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 (Intercountry 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

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