Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-sixth report of the 44th Parliament

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Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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Chapter 1 - New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 10 to 13 August 2015 and legislative instruments received from 12 June to 6 August 2015.

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

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

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

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

Bills not raising human rights concerns

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

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

- Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015; and
- Maritime Transport and Offshore Facilities Security Amendment (Inter-State Voyages) Bill 2015.

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

- Aged Care Amendment (Independent Complaints Arrangements) Bill 2015;
- Asian Infrastructure Investment Bank Bill 2015;
- Banking Laws Amendment (Unclaimed Money) Bill 2015; and

- Parliamentary Expenses Amendment (Transparency and Accountability) Bill 2015.

Instruments not raising human rights concerns

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

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

Deferred bills and instruments

1.11 The committee has deferred its consideration of the following legislation:

- Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015;
- Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877];
- Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878];
- Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014) [F2015L01093];
- Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015) [F2015L01094];
- Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015) [F2015L01095];
- Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015) [F2015L01096];
- Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015) [F2015L01097];
- Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015) [F2015L01098]; and
- Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015) [F2015L01099].

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

1.12 The committee also continues to defer its consideration of the Shipping Legislation Amendment Bill 2015 (deferred 11 August 2015) and the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

1.13 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.[2]

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

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015).

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

Response required

1.15 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Comptroller-General of Customs (Use of Force) Directions 2015 [F2015L01044]

Comptroller Directions (Use of Force) 2015 [F2015L01085]

Portfolio: Immigration and Border Protection
Authorising legislation: Customs Act 1901
Last day to disallow: 17 September 2015 (Senate)

Purpose

1.16 The Comptroller-General of Customs (Use of Force) Directions 2015 and the Comptroller Directions (Use of Force) 2015 (the new directions) give directions, respectively, to mainland customs officers and customs officers of the Indian Ocean Territories Customs Service regarding the deployment of approved firearms and other approved items of personal defence equipment in accordance with Operational Safety Order (2015).

1.17 A customs officer may only use force in accordance with the procedures set out in Operational Safety Order (2015), including where a customs officer is exercising powers to:

- direct;
- detain;
- physically restrain;
- arrest;
- enter or remain on coasts, airports, ports, bays, harbours, lakes and rivers;
- execute a seizure or search warrant;
- remove persons from a restricted area; or
- board, detain vessels or require assistance.

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

Background

1.19 The committee commented on the Customs Act 1901 - CEO Directions No. 1 of 2015 and Customs Act 1901 - CEO Directions No. 2 of 2015 (the previous

directions) in its *Nineteenth Report of the 44th Parliament*.[4] A response was received and commented on in the committee's *Twenty-second Report of the 44th Parliament*.[5]

Use of lethal force

1.20 The previous directions were, in the main, in the same form as the new directions. It has been necessary to remake the directions to reflect the introduction of the Australian Border Force and the integration of the Australian Customs and Border Protection Service within the Department of Immigration and Border Protection.

1.21 The new directions permit the use of force in accordance with procedures set out in the Operational Safety Order (2015).

1.22 The committee considers that the use of force engages and may limit the right to life.

Right to life

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

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

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

1.25 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.

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4 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 45-50.

5 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 187-190.

Compatibility of the measures with the right to life

1.26 The statement of compatibility for each instrument states that the directions promote the right to life:

> …as they only direct officers of Customs to use lethal force when reasonably necessary (noting that they must act appropriately and in proportion to the seriousness of the circumstances), when other options are insufficient and only in self-defence from the immediate threat of death or serious injury or in defence of others against who there is an immediate threat of death or serious injury. The Order specifically states that lethal force is an option of last resort, and that an officer of Customs who considers using lethal force must do so with a view to preserving human life.[6]

1.27 The committee considers that the limitation on the right to life may be justifiable. However, given the directions rely on the Operational Safety Order (2015), which has not been provided to the committee, the committee is unable to complete its assessment of the compatibility of the measures with the right to life.

1.28 The committee notes that the Chief Executive Officer of the Australian Customs and Border Protection Service made a copy of the previous Use of Force Order (2015) available to the committee and undertook to make an edited version of the document available through the website.

1.29 The committee notes that the statement of compatibility for both instruments states that the Operational Safety Order (2015) supersedes the Use of Force Order (2015) and makes minor amendments to the order. As such, the committee needs to review the new order in order to properly assess its compatibility with human rights.

1.30 **The committee therefore requests a copy of Operational Safety Order (2015) to enable a complete assessment of the instrument with the right to life. Noting the likely considerations around the exemption of the document from publication, the committee is willing to receive a copy of the order on an in-confidence basis.**

1.31 **Additionally, the committee notes that a commitment was made to the committee to make an edited version of the previous Use of Force Order available on a public website. The committee therefore recommends that the Operational Safety Order (2015) be similarly published (and redacted if necessary).**

6 Explanatory Statement (ES), Statement of Compatibility (SoC) 3.

Crimes Legislation (Consequential Amendments) Regulation 2015 [F2015L00787]

Portfolio: Justice
Authorising legislation: Australian Crime Commission Act 2002; *Crimes Act 1914*; *Crimes Legislation (Serious and Organised Crime) Act 2010*; *Financial Transaction Reports Act 1988*; *Law Enforcement Integrity Commissioner Act 2006*; and *Proceeds of Crime Act 2002*
Last day to disallow: 8 September 2015 (Senate)

Purpose

1.32 The Crimes Legislation (Consequential Amendments) Regulation 2015 (the regulation) makes amendments to a range of Commonwealth instruments that support Australian criminal justice arrangements. In particular, the regulation:

- makes amendments to a number of instruments to reflect the new name of the Queensland Crime and Misconduct Commission;
- amends the Proceeds of Crime Regulations 2002 to update references to state and territory proceeds of crime laws and update the list of offences that are considered 'serious offences' for the purposes of the *Proceeds of Crime Act 2002* (POC Act); and
- makes technical amendments to remove redundant references.

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

List of 'serious offences' under the Proceeds of Crime Act

1.34 Under the POC Act various actions can be taken in relation to the restraint, freezing or forfeiture of property which may have been obtained as a result, or used in the commission, of specified offences, including a 'serious offence'. The term 'serious offence' is defined in the Act as including 'an indictable offence specified in the regulations'.

1.35 The regulation amends regulation 9 of the Proceeds of Crime Regulations 2002 to expand the type of indictable offences that will be considered as a 'serious offence' under the POC Act. This will include:

- new offences under the *Criminal Code Act 1995* relating to slavery-like practices, trafficking in persons and child sexual abuse material; and
- offences under the *Copyright Act 1968* (Copyright Act), relating to infringement of copyright.

1.36 The measures, in expanding the application of the POC Act to apply to a new range of offences, engage and may limit the right to a fair trial and fair hearing.

Right to a fair trial and a fair hearing

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

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

Compatibility of the measure with the right to a fair trial

1.39 The statement of compatibility for the regulation states that proceedings under the POC Act do not engage the fair trial rights in article 14 of the ICCPR as '[t]hese proceedings are civil, not criminal, and do not involve the determination of a person's guilt or innocence with respect to a criminal offence'.[1]

1.40 However, as set out in the committee's Guidance Note 2, even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the ICCPR, such as the right to be presumed innocent.

1.41 The committee has previously raised concerns that parts of the POC Act may involve the determination of a criminal charge.[2] The POC Act enables a person's property to be frozen, restrained or forfeited either where a person has been convicted or where there are reasonable grounds to suspect a person has committed a serious offence. As assets may be frozen, restrained or forfeited without a finding of criminal guilt beyond reasonable doubt, the POC Act limits the right to be presumed innocent, which is guaranteed by article 14(2) of the ICCPR.

1.42 The forfeiture of property of a person who has already been sentenced for an offence may also raise concerns regarding the imposition of double punishment, contrary to article 14(7) of the ICCPR.

1.43 As the statement of compatibility does not acknowledge that the right to a fair trial is engaged and limited, no justification is provided for this limitation.

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1 Explanatory Statement (ES), Statement of Compatibility (SoC) 3.

2 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013) 189-191.

Compatibility of the measure with the right to a fair hearing

1.44 The statement of compatibility acknowledges that the right to a fair hearing may be engaged but states that the impact of the regulation is limited:

> This Regulation will mean that a proceeds of crime authority will be able to obtain a greater range of orders with respect to offences in the Criminal Code and the Copyright Act. However this regulation does not vary the requirements that a proceeds of crime authority is required to meet in order to obtain a proceeds of crime order, where a person has been convicted, or is reasonably suspected of committing a 'serious offence', and does not diminish the fair hearing rights of a person against whom the order is sought.[3]

1.45 However, while the regulation does not vary any of the POC Act requirements for obtaining a proceeds of crime order against a person, it does broaden the application of the POC Act by expanding the range of offences to which it applies. Because the POC Act engages and may limit the right to a fair trial and right to a fair hearing (see above), it is therefore necessary to assess whether expanding its application to the new offences is justifiable under international human rights law.

1.46 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[4] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[5] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

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3 ES, SoC 3.

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

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

1.47 The statement of compatibility states in general terms the objective of the expansion of the POC Act to new offences in the Criminal Code relating to slavery-like practices, trafficking in persons and child sexual abuse material. It states that including these offences 'provides proceeds of crime authorities with more tools to target the profit incentives behind this exploitative conduct'.[6]

1.48 Providing more tools for crime authorities to target the incentives behind such serious offences as slavery, trafficking and child abuse material is likely to be considered a legitimate objective for the purposes of international human rights law.

1.49 However, in relation to including offences relating to copyright infringement, the statement of compatibility states that the objective is to 'strengthen Australia's copyright enforcement regime and assist in minimising lost revenue to the Government through the detection of other economic-related crime such as tax evasion and money laundering'.[7] In this regard, it is not clear that including such offences necessarily supports a legitimate objective for the purposes of international human rights law. No evidence has been provided as to why it is necessary to strengthen the copyright enforcement regime, including why existing offence provisions are not sufficient to regulate this area.

1.50 In addition, it is not clear what is meant by the statement that including copyright offences as serious offences for the POC Act will assist in the 'detection of other economic related crime'; and how the ability to investigate unrelated offences is relevant and appropriate when considering whether any limitation on the right to a fair trial or fair hearing is justifiable in relation to the inclusion of copyright offences for the purposes of the POC Act.

1.51 In assessing the proportionality of the regulation against the right to a fair trial and fair hearing, it is also relevant as to whether the POC Act itself sets out sufficient safeguards to protect this right. As noted above, the committee has previously raised concerns that parts of the POC Act may involve the determination of a criminal charge and the process rights in the POC Act may not satisfy the requirements of a fair trial. It would therefore assist the committee if further information were provided setting out the basis on which orders are made under the POC Act and whether this process is compatible with both the right to a fair trial and the right to a fair hearing.

1.52 **The committee's assessment against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial and fair hearing) of the inclusion of copyright offences as 'serious offences' for the purposes of the *Proceeds of Crime Act 2002* raises questions as to whether expanding the application of this Act is a justifiable limit on the right to a fair trial and fair hearing.**

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6 ES, SoC 3.

7 ES, SoC 3.

1.53 **The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Justice as to:**

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

Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 [F2015L01027]

Portfolio: Trade and Investment
Authorising legislation: Export Market Development Grants Act 1997
Last day to disallow: 17 September 2015 (Senate)

Purpose

1.54 The Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 (the 2015 Guidelines) are being made to replace the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004. The 2015 Guidelines set out what the Chief Executive Officer (CEO) of Austrade is to comply with in:

- making decisions regarding 'excluded consultants' under the *Export Market Development Grants Act 1997* (the EMDG Act);
- determining who is an 'associate' of a person for the purposes of the EMDG Act; and
- forming an opinion whether a person, or any associate, is a fit and proper person to receive a grant.

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

Criteria for establishing a person is a 'fit and proper' person

1.56 Under the EMDG Act grants can be made to specified Australian businesses which have incurred expenses promoting the export of their Australian goods, services, intellectual property rights and know-how. The EMDG Act sets out that the CEO can form the opinion, in accordance with the guidelines, that a person, or associate of a person, is not a 'fit and proper' person for the purposes of a grant.

1.57 The 2015 Guidelines set out a very broad basis on which the CEO of Austrade can determine whether a person, or associate of a person, is not to be considered to be a 'fit and proper person', including whether:

- the person or associate has been convicted of an offence under Australian law or a law of a foreign country, other than a spent conviction;
- a civil penalty or an administrative sanction has been imposed on the person or associate under Australian law or a law of a foreign country;
- the person or associate is involved in proceedings which may result in a civil penalty or administrative sanction being imposed;
- the person or associate has been the subject of a comment or assessment by a court, tribunal or regulator that the CEO is satisfied is critical of the person or associate;

- the person or associate is the subject of any other proceedings before a court, tribunal or regulator in which a comment or assessment critical of the person or associate may be made;
- the person or associate has been under insolvency administration or has been an officer of, or otherwise in control of, a business that has failed; or
- there are any other matters that the CEO considers relevant 'to the personal, commercial, financial or professional status or reputation of the person or associate'.[1]

1.58 The committee considers that the broad basis on which the CEO can declare that a person is ineligible for a grant on the basis that they are not a 'fit and proper' person engages and may limit the right to privacy (right to reputation).

Right to privacy (right to reputation)

1.59 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 and prohibits unlawful attacks on a person's honour and reputation.

1.60 This right includes protection of the professional and business reputation of a person. The article is understood as meaning that the law must provide protection against attacks on a person's reputation (for example, through the law of defamation), as well as requiring that any law which affects a person's reputation must not be arbitrary.

1.61 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 (right to reputation)

1.62 The statement of compatibility merely states that the determination is compatible with human rights.

1.63 The committee notes that it previously examined this same issue when it considered legislation relating to the fit and proper person test in respect of the EMDG Act.[2] In its earlier assessment, the committee noted that a finding that a person is not a 'fit and proper' person to be involved in the process of preparing an application for a government grant is a finding that is likely to have an adverse

1 See sections 3.2 to 3.6 of the 2015 Guidelines.

2 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (March 2013) 12-15 and Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013) 205-211.

impact on a person's business reputation. This is the case even if the number of people who are aware of the finding is relatively small.

1.64 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[3] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[4] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.65 The committee notes that the committee's previous assessment noted that any guidelines setting out the fit and proper person test should be accompanied by a full statement of compatibility addressing the human rights compatibility of the guidelines, including whether there are any procedural safeguards in making such a determination. However, the 2015 Guidelines contain no information about the effect of the instrument, nor an assessment of the compatibility of the 2015 Guidelines with the right to reputation.

1.66 **The committee's assessment against article 17 of the International Covenant on Civil and Political Rights (right to privacy and reputation) of the fit and proper person test raises questions as to whether the criteria for determining whether a person is a 'fit and proper person' are proportionate to any limitation on a person's right to reputation.**

1.67 **As set out above, the condition engages and limits the right to privacy and reputation. The statement of compatibility does not provide any justification for that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Trade and Investment as to:**

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

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

- **whether the proposed 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 a reasonable and proportionate measure for the achievement of that objective.**

Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 [F2015L00876]

Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 [F2015L01114]

Portfolio: Communications
Authorising legislation: Radiocommunications Act 1992
Last day to disallow: 16 September 2015 (Senate)

Purpose

1.68 The Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 (CB Class Licence) revokes and replaces the Radiocommunications (Citizen Band Radio Stations) Class Licence 2002.

1.69 The Citizen Band (CB) radio service is a two-way communications service that may be used by any person in Australia. The operation of a CB radio station is subject to the regulatory arrangements set out in the CB Class Licence. The CB Class Licence sets out the conditions for operating CB stations.

1.70 The Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 revokes and replaces the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2008 (Overseas Amateurs Class Licence).

1.71 The Overseas Amateurs Class Licence authorises visiting overseas qualified persons to operate amateur stations in Australia and applies conditions to the operation of these stations.

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

Condition of Class Licences not to seriously alarm or affront a person

1.73 Both the CB Class Licence and the Overseas Amateurs Class Licence sets out the general conditions which apply to a person operating a CB radio or amateur stations, including that a person must not operate the station:

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.[1]

1.74 Section 46 of the *Radiocommunications Act 1992* provides that a person must not operate a radiocommunications device other than as authorised by a class licence. There are penalties for breach of the class licence, including, if the device is a

1 Paragraph 6(f) of the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 and subsection 8(4) of the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015.

radiocommunications transmitter, imprisonment for up to two years or 1500 penalty units, and if it is not a transmitter, 20 penalty units.

1.75 It appears that communication over a CB radio or amateur station may be considered to be over a radiocommunications transmitter,[2] rendering a person who operates the station liable to imprisonment for up to two years if they operate the station in a way that causes a reasonable person to be 'seriously alarmed or seriously affronted'.

1.76 The committee considers that making it an offence to breach a condition of a class licence that is to not seriously alarm or affront a person engages and limits the right to freedom of expression.

Right to freedom of expression

1.77 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.

1.78 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, 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 expression

1.79 The statement of compatibility for both instruments acknowledge that the relevant condition of the class licences engage and may limit the right to freedom of expression. However, both conclude that any such limitation is reasonable, necessary and proportionate. The statement of compatibility for the CB Class Licence provides more information, explaining:

> The condition at paragraph 6(f) of the Class Licence has been in force for the past 13 years (by virtue of its inclusion in the Radiocommunications (Citizen Band Radio Stations) Class Licence 2002, which the Class Licence

2 See subsection 7(2) of the *Radiocommunications Act 1992* which defines a 'radiocommunications transmitter' as a transmitter designed or intended for the purpose of radiocommunication. Section 6 defines 'radiocommunication' as radio emission or reception of radio emission for the purpose of communicating information. Subsection 8(2) defines a transmitter as anything designed, intended or capable of radio emission.

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).

> replaces) and provides a useful tool for managing the appropriate operation of citizen band radio stations. Over that period, the ACMA (and its predecessor agencies) have received and investigated complaints concerning behaviour relavant [sic] to the condition at paragraph 6(f) of the Class Licence and in some cases individuals have been successfully prosecuted for breaching the condition. Accordingly, it is considered that any limitation on the right to freedom of expression established by the operation of paragraph 6(f) of the Class Licence is a reasonable, necessary and proportionate for the purpose of protecting the rights of others and for the protection of public order (paragraphs 19.3(a) and (b) of the ICCPR).[4]

1.80 The committee notes that the sole reason given in the statement of compatibility for the CB Class Licence as to why the condition is justifiable is that it has been in force for 13 years and has been previously used to investigate complaints and prosecute operators of CB stations. The existence of the condition under Australian domestic law is not relevant to an assessment of whether such a condition is justified under international human rights law. The statement of compatibility for the Overseas Amateur Class Licence provides no justification for why the limitation on the right to freedom of expression is justifiable.

1.81 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[5] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[6] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. Simply stating that the provision has been in force

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4 Explanatory Statement (ES), Statement of Compatibility (SoC) 6.

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

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

for some time and has been used to prosecute persons in the past does not justify the limitation on the right to freedom of expression.

1.82 The right to freedom of expression includes a right to use expression 'that may be regarded as deeply offensive'.[7] The right to freedom of expression protects not only favourable information and ideas but also those that offend, shock or disturb because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.[8]

1.83 If the government wishes to limit the right to freedom of expression it must demonstrate there is a specific threat that requires action which limits freedom of speech, and it must be demonstrated there is a direct and immediate connection between the expression and the threat.[9]

1.84 Maintaining public order is a basis on which it may be permissible to regulate speech in public places. Common 'public order' limitations include prohibiting speech which may incite crime, violence or mass panic. However, speech that merely alarms or affronts (even if it 'seriously' alarms or affronts a person) would not generally be sufficient to justify limiting freedom of expression.

1.85 **The committee's assessment against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) of the condition in both class licences not to seriously alarm or affront a person raises questions as to whether the condition is compatible with the right to freedom of speech.**

1.86 **As set out above, the conditions engage and limit the right to freedom of expression. The statements of compatibility for both instruments do not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Communications as to:**

- **whether the proposed 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 a reasonable and proportionate measure for the achievement of that objective.**

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7 See UN Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

8 *Handyside v United Kingdom* (1976) 1 EHRR 737.

9 See UN Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 35.

Social Security (Parenting payment participation requirements-classes of persons) Amendment Specification 2015 (No. 1) [F2015L00938]

Portfolio: Employment
Authorising legislation: Social Security Act 1991
Last day to disallow: 17 September 2015 (Senate)

Purpose

1.87 The Social Security (Parenting payment participation requirements—classes of persons) Amendment Specification 2015 (No. 1) (the 2015 Specification) amends the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1), with the effect that individuals will continue, from 30 June 2015 to 31 March 2016, to be considered to fall within the 'teenage parent' or 'jobless families' class of persons. These individuals will be subject to the Helping Young Parents (HYP) and Supporting Jobless Families (SJF) measures. These measures provide select recipients of Parenting Payments with additional support and additional responsibilities.

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

Extension of measures requiring certain classes of persons to participate in compulsory activities

1.89 Under the HYP and SJF measures, parents in receipt of Parenting Payments are required to attend appointments with the Department of Human Service and sign a Parenting Payment Employment Pathway Plan ('Parenting Plan'). Failure to attend appointments without a reasonable excuse, or sign their Parenting Plan, may result in the person's income support payments being suspended.

1.90 In addition, parents who fall within the 'teenage parent' class of persons are required to have a minimum of two compulsory activities in their Parenting Plan, including study or training and an activity focused on the health and development of their child. Failure to attend their two compulsory activities without a reasonable excuse may result in a person's social security benefits being suspended.

1.91 A 'teenage parent' is defined as a person who is aged 19 or under who receives Parenting Payment, has a child aged five or under, has not completed their final year of secondary school or equivalent and lives in one of 10 trial locations.[1]

1.92 A 'jobless family' is defined as a person who is either aged 22 or under or has been receiving income support for at least two years and who receives Parenting

1 See section 4 of the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1).

Payment, has a child aged five or under, has not engaged in work or study in the last four weeks and lives in one of 10 trial locations.[2]

1.93 The committee considers that the measure engages and may limit the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

Right to social security

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

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

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

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

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

1.97 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.

2 See section 4 of the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1).

Right to an adequate standard of living

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

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

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

1.100 The statement of compatibility recognises that the 2015 Specification engages and limits the right to social security and an adequate standard of living and sets out why this limitation is justifiable. In particular, it sets out that the objective of the measures that are being extended by the 2015 Specification, is:

> to provide services, opportunities and responsibilities to boost the educational attainment, job readiness, child wellbeing and functioning of young parents and jobless families with young children in highly disadvantaged locations in Australia.[3]

1.101 The committee considers that helping young parents and jobless families in this way seeks to achieve a legitimate objective for the purposes of international human rights law.

1.102 However, it is unclear whether the limitation on the right to social security and an adequate standard of living (in suspending a person's social security payments), is rationally connected to the objective being sought. In other words, it is unclear if the measures are likely to be effective in achieving the objective of boosting educational attainment, job readiness, child wellbeing and functioning of young parents and jobless families with young children. The committee understands that the HYP and SJF measures were initially intended to be undertaken for a trial period to determine whether they were effective in achieving the stated outcomes. No information is provided in the statement of compatibility or the explanatory statement as to whether the effectiveness of the measures has been evaluated. In addition, no information is provided as to why it is necessary to extend the measures by a further nine months. Without understanding whether the measures are likely to be effective in achieving the stated aim, or why the measures are being extended for a nine month period, it is difficult to assess whether the limitation is justifiable.

1.103 **The committee's assessment against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the**

3 Explanatory Statement, Statement of Compatibility, 1.

limitation on these rights is rationally connected to the objective sought to be achieved.

1.104 **As set out above, the condition engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective of helping teenage parents and jobless families, and in particular, is there evidence that demonstrates that the measures are likely to be effective in achieving the stated objective.**

Right to equality and non-discrimination

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

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

1.107 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[4] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[5] 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.[6]

1.108 Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

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

1.109 The statement of compatibility does not consider whether the measures engage and limit the right to equality and non-discrimination. Both measures

4 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.

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

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

distinguish between Parenting Payment recipients based on their age. The HYP measure only applies to parents who are 19 or under at the relevant time and the SJF measure applies to parents who are 22 or under at the relevant time (as well as to persons who have been on income support for two years or more).

1.110 The distinction between recipients based on age constitutes direct discrimination on the basis of a personal attribute, and therefore limits the right to equality and non-discrimination. This limitation requires justification.

1.111 The measures may also be indirectly discriminatory on the basis of sex, as the vast majority of those affected by the measures (Parenting Payment recipients) are likely to be female. No information is provided in the statement of compatibility as to the gender make-up of the people affected by the measure, however, ABS data indicates that women are more likely than men to be recipients of social welfare and are more likely to be the primary care giver of children (and in fact the statement of compatibility refers to 'teenage *mothers*' when explaining the measures). Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination.

1.112 Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. Nevertheless, under international human rights law such a disproportionate effect may be justifiable. More information is required to establish if the measure does impact disproportionately on females, and if so, if such a disproportionate effect is justifiable.

1.113 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,[7] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[8] To be capable of

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

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

justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.114 **The committee's assessment against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the limitation on these rights is justifiable.**

1.115 **As set out above, the extension of the measures engages and limits the right to equality and non-discrimination on the basis of age and gender. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to:**

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

Further response required

1.116 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Defence Legislation (Enhancement of Military Justice) Bill 2015

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

Purpose

1.117 The Defence Legislation (Enhancement of Military Justice) Bill 2015 (the bill) seeks to make a number of amendments to the *Defence Force Discipline Act 1982* (Defence Force Discipline Act) and the *Defence Act 1903.*

1.118 The bill also seeks to amend the *Military Justice (Interim Measures) Act (No. 1) 2009* to extend the period of appointment of the Chief Judge Advocate and full-time Judge Advocates by a further two years, making the period of appointment up to eight years instead of six years.

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

Background

1.120 In 2005, the Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the effectiveness of Australia's military justice system (the 2005 report).[1] Following the 2005 report, legislation[2] was introduced to create a permanent military court (the Australian Military Court) which was intended to satisfy the principles of impartiality, judicial independence and independence from the chain of command.[3]

1.121 In 2009 the High Court struck down this legislation as being unconstitutional.[4] In response, Parliament put in place a series of temporary measures pending the introduction of legislation to establish a constitutional court. The *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) largely returned the service tribunal system to that which existed before the creation of the Australian Military Court.[5]

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1 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005.

2 *Defence Legislation Amendment Act 2006*.

3 See Explanatory Memorandum (EM) to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

4 *Lane v Morrison* [2009] HCA 29.

5 See EM to the Military Justice (Interim Measures) Bill (No. 1) 2009, 1.

1.122 In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 amended the Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and judge advocates by an additional two years. The committee reported on this bill in its *Sixth Report of 2013*.[6]

1.123 The committee then reported on the current bill in its *Twenty-second Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the bill was compatible with the right to a fair trial.[7] The bill passed both Houses of Parliament on 25 June 2015 and received Royal Assent on 30 June 2015.

Extension of the appointments of Chief Judge Advocate and judge advocates

1.124 Initially, the Interim Act provided a fixed tenure of up to two years for both the Chief Judge Advocate and full-time judge advocates who were appointed pursuant to the provisions of the Interim Act. This was extended in 2011 and 2013.[8] That tenure is due to expire in September 2015. The bill amends Schedule 3 of the Interim Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years. The bill therefore provides a fixed tenure for the Chief Judge Advocate and current full-time judge advocates of up to eight years, or until the Minister for Defence declares, by legislative instrument,[9] a specified day to be a termination day, whichever is sooner.

1.125 The committee previously considered that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and judge advocates engages and may limit the right to a fair hearing and fair trial.

Right to a fair hearing and fair trial

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

1.127 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These

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6 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 40.

7 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 42-46.

8 See the *Military Justice (Interim Measures) Amendment Act 2011* (extended the period of appointment to four years) and *Military Justice (Interim Measures) Amendment Act 2013* (extended the period of appointment to six years).

9 The legislative instrument would not be subject to disallowance.

include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

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

1.128 The trial of members of the armed services for serious service offences by service tribunals (including courts-martial) has been identified as giving rise to issues of compatibility with the right to a fair hearing in the determination of a criminal charge. The question is whether a person who is a member of a military with a hierarchical chain of command and who serves as a judge or member of a military tribunal, can be said to constitute an independent tribunal in light of the person's position as part of a military hierarchy.

1.129 The UN Human Rights Committee has stated that 'the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception' and that 'the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military'.[10]

1.130 The question of whether a tribunal enjoys the institutional independence guaranteed by article 14(1) requires consideration of a number of factors, including whether the members of the court or tribunal are independent of the executive and the term of appointment of members. The fact that the term of appointment of a member of a court or tribunal is terminable at the discretion of a member of the executive, would appear to be incompatible with the requirement that tribunals be independent.[11]

1.131 The statement of compatibility states that it is necessary to further extend the statutory period of appointment, but does not assess whether this extension is compatible with the right to a fair trial. Rather, it has an overview statement of the human rights implications of the bill as a whole.[12]

1.132 The stated objective of maintaining and enforcing discipline within the Defence Force, including supporting the authority of commanders, is an important objective under international human rights law. However, the requirement under article 14 of the ICCPR for the independence and impartiality of a tribunal is an absolute right and not subject to any exceptions.

1.133 As set out above, the bill extends an interim arrangement. No information was provided in the statement of compatibility as to what steps are being taken to establish a permanent system of military justice.

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10 UN Human Rights Committee, General Comment No. 32 (2007) para [22].

11 UN Human Rights Committee, General Comment No. 32 (2007) paras [19]-[20].

12 EM 3.

1.134 The committee therefore considered that extending the appointments of the Chief Judge Advocate and full-time judge advocates, and thereby extending the current system of military justice, may limit the right to a fair hearing. The statement of compatibility does not address this issue. The committee therefore sought the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial.

Minister's response

> The purpose of the proposed amendments to the *Military Justice (Interim Measures) Amendment Act (No. 1) 2009* (Interim Measures Act) by the Bill is to continue the appointment arrangements made in the Interim Measures Act, by extending the appointment of the current Chief Judge Advocate (CJA) and full-time Judge Advocate (JA) for a further two year period and, as such, the Bill does not have an adverse impact on human rights.
>
> The Committee is concerned that the effect of the proposed amendments to the Interim Measures Act will be to limit the right to a fair hearing and fair trial and that the Statement of Compatibility in the Explanatory Memorandum does not address this issue. In fact, the Statement of Compatibility states that 'The Bill operates ... to extend the appointments of the current CJA and full-time Judge Advocate who contribute to the effective operation of the military justice system and the dispensation of military discipline...' (emphasis added). As discussed below, this statement reflects a commitment to the consistent conduct of fair trials and hearings.
>
> As you point out, the Interim Measures Act reinstated the service tribunal system that existed before the creation of the Australian Military Court to sustain that system until such time as the Parliament decided how to permanently address the issue of the trial of serious service offences in the Australian Defence Force. The current arrangements provided for in the *Defence Force Discipline Act 1982* (DFDA) have enabled the continuation of the delivery of military discipline via a system of trials by service tribunal (post the High Court decision in *Lane v Morrison* [2009] HCA 29), which operates in an independent and impartial manner. The amendments in the Bill, which extend the appointments of the CJA and JA, are required to continue to support that system.
>
> The Judge Advocate General, who must be a serving or former superior court judge, together with other Offices and appointments under the DFDA, combine to support the independence of the military justice system and the conduct of fair trials. For example, the establishment of the statutorily independent positions of the Director of Military Prosecutions, the Inspector General of the Australian Defence Force and the Registrar of Military Justice, together with the creation of (and statutory recognition that the Bill will give to) the position of the Director Defence Counsel Services and the abolition of convening authorities, have all ensured that

military discipline is dispensed in a manner separate to, and independent of, the military chain of command.

Of note, in 2003 and 2005, legislative amendments were made to the procedure for the Judge Advocate General to appoint officers to act as JAs for courts martial and for nominating officers as DFMs, as opposed to these members being appointed by the chain of command. These amendments removed the involvement of convening authorities and substituted the Registrar of Military Justice in the appointment of JAs. This was to ensure that any actual or perceived influence by the chain of command in the appointment process was avoided and to facilitate fair and independent service tribunal trials. JAs are, therefore, appointed by the Chief of the Defence Force or a Service Chief on the nomination of the Judge Advocate General. Defence Force magistrates are also appointed on the nomination of the Judge Advocate General (currently Rear Admiral, the Honourable Justice Michael Slattery QC, RANR of the Supreme Court of New South Wales).

Importantly, all courts martial and Defence Force magistrates trials are conducted in accordance with rules of evidence, accused members are provided with independent legal representation at Commonwealth expense and convicted members have their convictions and punishments automatically reviewed to ensure they are in accordance with the law. A convicted person may also lodge a petition against their conviction or punishment and, in addition, can appeal their conviction to the Defence Force Discipline Appeal Tribunal (consisting of a panel of superior court judges), the Federal Court of Australia and, if leave is granted, to the High Court of Australia.

The presence and application of all these elements in the military justice system is an indication of the delivery of fair trials and hearings.

Moreover, the High Court of Australia has consistently found the system of trials by Service tribunal to be constitutionally sound.

As noted in the 2009 Report on the *Independent Review on the Health of the Reformed Military Justice System* (Sir Laurence Street AC, KCMG, QC and Air Marshal Les Fisher (Rtd)):

> '*The military justice system is delivering and should continue to deliver impartial, rigorous and fair outcomes; has a greater transparency and enhanced oversight; is substantially more independent from the chain of command; and is effective in maintaining a high standard of discipline both domestically and in the operational theatre*' (emphasis added).

These findings reinforce Defence's ongoing commitment to delivering impartial, rigorous and fair military justice outcomes and it is continuing its commitment in this regard.

The proposed amendments to the Interim Measures Act are consistent with, and ensure the right to a fair hearing and fair trial (supporting the

military justice system). They are also consistent with the criteria of an independent and impartial tribunal as required by article 14(1) of the International Covenant on Civil and Political Rights (competence, independence and impartiality of a tribunal).[13]

Committee response

1.135 **The committee thanks the Minister for Defence for his response.** In particular, the committee thanks the minister for his additional advice as to how the current system of military justice operates in practice and how this delivers a fair trial and fair hearing. In particular, the committee notes the minister's advice:

- regarding the establishment of the statutorily independent positions of the Director of Military Prosecutions, the Inspector General of the Australian Defence Force, the Registrar of Military Justice and the proposed Director Defence Counsel Services;
- that convening authorities have been abolished;
- that the Judge Advocate General appoints officers to act as judge advocates for courts martial and for nominating officers as Defence Force Magistrates, as opposed to these members being appointed by the chain of command;
- that judge advocates are no longer appointed by the chain of command but by the Chief of the Defence Force or a Service Chief on the nomination of the judge advocate; and
- that convicted members can appeal their conviction to the Defence Force Discipline Appeal Tribunal.

1.136 Having regard to this advice and relevant comparative human rights law jurisprudence,[14] the committee considers that the current structure for conducting military justice would appear to meet the requirement that hearings are conducted by an independent and impartial body.

1.137 However, in determining whether a tribunal can be considered 'independent', regard must also be had to the term of office for those who conduct military justice hearings. The committee notes that under the transitional provisions of the Interim Act, which the bill extends, the Chief Judge Advocate and judge advocates are appointed for eight years from the date of the Interim Act.[15] However,

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13 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (dated 10 June 2015) 1-3.

14 See, for example, *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005 (cf the earlier system of military justice which raised concerns regarding the perception of independence and impartiality: *Findlay v United Kingdom* European Court of Human Rights, (1997) 24 EHRR 221).

15 See items 2 and 4 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

the Interim Act also provides that the minister may declare in writing any day to be the 'termination day' so the appointment of the Chief Judge Advocate or judge advocates will end on this earlier date.[16] There is no guidance as to when the minister may make such a declaration and this declaration, while a legislative instrument, is specifically excluded from being subject to disallowance.[17]

1.138 The European Court of Human Rights has said that the 'irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence' and this forms part of the requirement of a fair trial.[18] It is recognised that this irremovability does not always have to be recognised in law, if it is recognised in fact and other necessary guarantees are present. However, in this case, the opposite is true—the Interim Act expressly gives the executive the power to remove the Judge Advocate General and judge advocates simply by declaring a 'termination day'.

1.139 The committee notes that the requirements of independence and impartiality are not just that the tribunal must be independent, but it must also present an appearance of independence: it 'must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.[19] The minister's power to terminate the appointment of the Judge Advocate General and the judge advocates, at any time, raises concerns that the military courts could be perceived as not being independent or impartial. The minister's response did not address this aspect of the committee's concerns.

1.140 The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception, and this applies to both civilian and military courts.[20] It is therefore not possible to justify any limitation on this right.

1.141 **Accordingly, the committee considers that enabling the executive to terminate the appointments of the Chief Judge Advocate and judge advocates at any time gives rise to a perception that the system of military justice is not objectively independent. Therefore, the committee seeks the Minister for Defence's advice as to whether extending the appointments of the Chief Judge**

16 See item 8 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

17 See item 8(2) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

18 *Campbell and Fell v United Kingdom,* European Court of Human Rights, Application No. 7819/77 and 7878/77, 28 June 1984, para 80. See also *Morris v the United Kingdom*, European Court of Human Rights, Application No. 38784/97, 26 May 2002, para 68 and *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 118.

19 *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 104.

20 See UN Human Rights Committee, General Comment No. 32 (2007) para [22].

Advocate and judge advocates, and thereby extending the current system of military justice, limits the right to a fair hearing.

1.142 **Further, the committee seeks the Minister for Defence's advice as to whether the Interim Act should be amended to remove the power of the minister to unilaterally revoke the appointments of the Chief Judge Advocate and judge advocates.**

Advice only

1.143 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138]

Portfolio: Attorney-General
Authorising legislation: Family Law Act 1975 and *Federal Circuit Court of Australia Act 1999*
Last day to disallow: Disallowed on 11 August 2015, Senate

Purpose

1.144 The Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 (the regulation) makes amendments to the Family Law (Fees) Regulation 2012 to:

- increase the fee for certain divorce applications, consent orders and issuing subpoenas by a prescribed amount;
- increase all other existing family law fee categories (by an average of 11 per cent) except for the reduced divorce fee in the Federal Circuit Court and divorce fees in the Family Court of Australia; and
- establish a new fee category for the filing of an amended application.

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

Background

1.146 The regulation was disallowed in the Senate on 11 August 2015.[1]

Increased fees for family court proceedings

1.147 Schedule 1 of the regulation increased the costs in all fee categories by 11 per cent for all family law matters in the Family Court and the Federal Circuit Court. This includes the costs of commencing an application for a divorce and for appeals and the costs for the hearing of the application or appeal.

1.148 The committee considers that this engages and limits the right to a fair hearing (access to justice).

1 See Senate Standing Committee on Regulations and Ordinances website, 'Disallowance Alert 2015', http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Right to a fair hearing

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

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

Compatibility of the measure with the right to a fair hearing

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

1.152 However, the right to a fair hearing includes a right to access to justice. A substantial increase in the cost of making an application to the Family Court or Federal Circuit Court, and in conducting a case before the courts, engages the right to a fair hearing, as this right includes a right to access to justice. The UN Human Rights Committee has said that the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.[2] Family law decisions have been held to be included in the concept of when a person's 'rights and obligations' are being determined.

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

1.154 **The committee's assessment of the 11 per cent increase for all family law matters in the Family Court and the Federal Circuit Court against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing) raises**

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

questions as to whether the increase in court fees is a limitation on the right to access to justice.

1.155 **As set out above, the increase in fees engages and limits the right to a fair hearing. The statement of compatibility does not explore whether the measure limits the right to a fair hearing and does not justify any limitation for the purposes of international human rights law.**

1.156 **However, as the regulation has been disallowed by the Senate the committee draws the preceding analysis to the attention of the Attorney-General and makes no further comment.**

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.

Defence Trade Controls Amendment Bill 2015

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

Purpose

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

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

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

Background

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

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

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

2.7 The committee then considered the Minister for Defence's response in its *Twenty-third Report of the 44th Parliament*, and requested further information as to why it is necessary and proportionate to reverse the burden of proof in a number of cases.[2]

Reverse evidential burdens

2.8 The bill amended a number of existing offences to introduce statutory exceptions to those offences. These exceptions reverse the onus of proof and place an evidential burden on the defendant to establish (prove) that the statutory exception applies in a particular case.

2.9 The committee previously considered that reversing the burden of proof engages and limits the right to be presumed innocent.

Right to a fair trial (presumption of innocence)

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

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

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

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

2.13 The statement of compatibility notes that the bill limits the right to be presumed innocent.[3]

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

2.15 The committee also noted that while some aspects of the exceptions appear to be properly characterised as falling within the particular knowledge of the

2 Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) 7-11.

3 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 44.

defendant, it is not clear that it is reasonable to impose an evidential burden on the defendant in relation to all of the matters specified in the proposed new defences.

2.16 The minister's response did not justify the limitation for all of the specified matters. In particular, the committee considered that the minister had not addressed how the following matters would be particularly within the knowledge of the defendant, to such an extent, as to make it reasonable in all the circumstances to reverse the burden of proof. The committee considered that these matters would appear more likely to be within the government's particular knowledge and expertise:

- that the supply is within the scope of Part 2 of the Defence and Strategic Goods List, which is a list formulated by the minister;[4]
- that there is no notice in force in relation to the supplier and the technology;[5]
- that a country is a participating state for the purposes of the Wassenaar Arrangement; a participant in the Australia Group; a partner in the Missile Technology Control Regime; and a participant in the Nuclear Suppliers Group;[6]
- that a country is specified in a legislative instrument;[7] and
- that the supply is made under or in connection with a contract specified in a legislative instrument.[8]

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

- proving that the supply of DGSL technology is not the provision of access to that technology;[9] and
- proving that the supply is not for a military end-use nor for use in a Weapons of Mass Destruction Program.[10]

2.18 The minister's response did not deal with the specifics of the exceptions and therefore did not provide specific information to support a conclusion that they are

4 See item 21 of the bill.

5 See item 21 of the bill.

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

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

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

9 See item 17 of the bill.

10 See item 17 of the bill.

justified. Instead the response dealt with the offence provision more generally and reiterated how a reverse burden offence works in practice. The committee also noted the minister's comment regarding a defendant having a responsibility to satisfy themselves that their activity falls within an exception. While this may appear reasonable in itself, it doesn't address why the requirement to undertake due diligence is sufficient to warrant reversing the burden of proof and it doesn't support a conclusion that such matters are within the particular knowledge of the defendant.

2.19 Accordingly, the committee sought further information from the Minister for Defence as to why it is necessary and proportionate to reverse the burden of proof in the cases outlined at paragraphs [2.16] to [2.17] above.

Minister's response

> For the new exceptions that have been included in the Bill, as the Committee notes, there are key elements of the exceptions that are solely within a defendant's knowledge. For the other elements of the exceptions listed in paragraphs 1.36 and 1.37 of the Report, although I concede that these elements may sometimes be within the Government's knowledge, they would definitely be within a defendant's knowledge after the defendant has ascertained, through their own compliance checks, whether the exception applies to their activity. Given the defendant's lower evidentiary burden of only needing to produce evidence that suggests a reasonable possibility that the exception applies, it would not be burdensome or unreasonable for the defendant to prove these elements with the information collected from their compliance checks.
>
> These reversals are warranted and proportionate, considering the importance of the Bill's objective to strengthen national security by stopping proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs. Suppliers, publishers and brokers of these goods and technologies must ensure that their activity falls within the relevant offence exception if they decide to proceed without a permit under the legislation. It is reasonable to expect that if the defendant has not undertaken appropriate compliance checks to establish whether the exception applies and does not possess the evidence to establish the exception, they may not be able to rely on the exception.
>
> Although I consider that it is reasonable to reverse the burden for all elements of the relevant exceptions listed in paragraphs 1.36 and 1.37 of the Committee's Report, I have noted its concerns and, accordingly, will ensure that they are considered during the first review of the legislation conducted pursuant to section 74B.[11]

11 See Appendix 2, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (dated 30 July 2015) 1-2.

Committee response

2.20 **The committee thanks the Minister for Defence for his response, and welcomes his advice that certain elements of the relevant exceptions will be considered during the first review of the legislation.**

2.21 However, the committee reiterates that the reversal of the burden of proof in relation to the specified exceptions at [2.16] to [2.17] does not appear to be proportionate to the objective being sought to be achieved. Where the government seeks to limit the presumption of innocence it is incumbent on it to demonstrate why such a limitation is justified.

2.22 The committee notes that the minister has conceded that some of the elements to be initially proved by the defendant would sometimes be in the government's knowledge. The minister also notes that these elements would be in 'a defendant's knowledge after the defendant has ascertained, through their own compliance checks, whether the exception applies to their activity.' The ability of a defendant to undertake compliance checks to determine the lawfulness of their actions does not seem a reasonable basis on which to reverse the burden of proof and would result, if applied more broadly, on reverse burdens being the norm rather than an exception.

2.23 Moreover, the reason given for reversing the burden of proof is that it would not be burdensome or unreasonable for the defendant to prove these elements. This does not address the committee's concerns that any reversal of the burden of proof must be proportionate to the objective sought to be achieved, including that there are not any other less rights restrictive ways to achieve the same aim. In this case the less rights restrictive approach would be to not reverse the burden of proof except in situations where the circumstances are peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

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

Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 [F2015L00265]

Portfolio: Attorney-General
Authorising legislation: Federal Circuit Court of Australia Act 1999
Last day to disallow: 22 June 2015

Purpose

2.25 The Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 (the instrument) requires the Federal Circuit Court (FCC) to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW.

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

Background

2.27 The committee considered the Federal Courts Legislation Amendment Bill 2014 (the bill) in its *Eighteenth Report of the 44th Parliament*.[1] The bill sought to amend the *Federal Court of Australia Act 1976* and the *Federal Circuit Court of Australia Act 1999* to confer jurisdiction on the Federal Circuit Court of Australia (FCC) in relation to certain tenancy disputes to which the Commonwealth is a party. For example, such a dispute may arise in the case of public or government housing where the lessor is the Commonwealth government. The committee raised concerns in relation to the conferral of jurisdiction on the Federal Circuit Court for certain tenancy disputes, and requested further information from the Attorney-General as to whether this conferral is compatible with fair hearing rights.

2.28 The committee considered the Attorney-General's response in its *Nineteenth Report of the 44th Parliament*.[2] In his response to the committee, the Attorney-General stated that '…state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. This includes protection about unlawful and unjust eviction'.[3] However, the instrument makes a number of amendments to state and territory law applicable to such disputes.

2.29 The bill finally passed both Houses of Parliament and received Royal Assent on 25 February 2015 as the *Federal Courts Legislation Amendment Act 2015* (the Act).

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1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 37-39.

2 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 109-111.

3 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 110.

2.30 The committee previously considered the instrument in its *Twenty-second Report of the 44th Parliament* (previous report), and requested further information from the Attorney-General as to whether the instrument was compatible with Australia's international human rights obligations.[4]

Power of the FCC to dictate vacation date of tenant

2.31 As outlined, the instrument requires the FCC to apply NSW law (namely the *Residential Tenancies Act 2010* (NSW) (the NSW Residential Tenancies Act), the Residential Tenancies Regulation 2010, and the *Sheriff Act 2005* (NSW) (the Sheriff Act)) when determining Commonwealth tenancy disputes involving land within NSW. The instrument makes a number of modifications to the application of these laws, including subsection 8(2) which allows the FCC to dictate the date of vacant possession for tenants who have received a termination order. This differs from section 94(4) of the NSW Residential Tenancies Act which provides that long-term tenants must not be ordered to vacate premises earlier than 90 days after a termination order is made. As a result of this modification to the NSW law, this could result in tenants being given a date to vacate premises of less than 90 days.

2.32 The committee considers that the instrument engages and may limit the right to an adequate standard of living (housing).

Right to an adequate standard of living

2.33 The right to an adequate standard of living is guaranteed by article 11(1) of the International Covenant on Economic, Social and Cultural Rights (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.

2.34 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

2.35 The explanatory statement for the regulation acknowledges that the instrument engages the right to an adequate standard of living in relation to housing, but states that it does not limit the right.[5]

2.36 However, in its previous report the committee considered that the explanatory statement had failed to set out how amending existing NSW law which

4 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 111-115.

5 Explanatory Statement (ES) 12.

would allow the FCC to exercise discretion in determining a vacation date seeks to achieve a legitimate objective. In particular, there is no justification provided as to why the existing provisions of the NSW Residential Tenancies Act as detailed above at [2.31] would be inappropriate or ineffective when determining Commonwealth tenancy disputes. The committee therefore considered that the limitation had not been justified.

2.37 The committee therefore sought the advice of the Attorney-General 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.

Attorney-General's response

> The Committee has sought further advice regarding the Court's ability to determine dates for tenants to vacate premises in relation to Commonwealth tenancy disputes in New South Wales (NSW). This engages the right to an adequate standard of living.
>
> As the Committee points out, the Instrument applies the *Residential Tenancies Act 2010* (NSW), with some modifications, so that the Court can exercise jurisdiction in these matters. In particular, subsection 94(4) of the Residential Tenancies Act is modified in relation to long-term tenants to remove the minimum guaranteed 90 days to vacate premises after a termination order is made.
>
> Unlike other residential tenancies in NSW, a long term tenant is provided greater rights, whereby the landlord may not issue a termination notice alone to effect termination of the leasing arrangement. A landlord must seek a termination order from the Court instead. In this way, it ensures that due process is required to be followed through the Court with the opportunity for a tenant to be heard.
>
> The Court has been given the discretion to take all factors into account in determining a matter. Enabling the Court to take into account all relevant factors provides equity to both parties. The Committee has pointed out that this could result in an order being made for less than 90 days. Equally, the Court could order 90 days or more for vacant possession to occur. Ultimately, the Court has the discretion to decide what is reasonable and proportionate on a case by case basis in relation to an application to seek vacant possession of land.
>
> For example, tenants may be informed on an ongoing basis, months in advance, that termination of their tenancy will occur and vacant possession sought by a certain date. Other relevant factors that could be taken into account may include length of tenancy, size of the property,

ability to relocate in a given timeframe, reason for vacant possession being sought or similar reasons.[6]

Committee response

2.38 **The committee thanks the Attorney-General for his response.**

2.39 The committee notes that it previously concluded that the *Federal Courts Legislation Amendment Act 2015* was compatible with human rights on the basis of advice from the Attorney-General that the applicable state and territory law would continue to govern tenancy arrangements where the Commonwealth is a lessor.

2.40 The committee also notes that the Attorney-General's response sets out the rights that are provided to long-term tenants in NSW, including the obligation on landlords to obtain a termination order from the Federal Circuit Court before effecting termination of leasing arrangements and that the court will take into account a number of factors including the length of tenancy and ability to relocate.

2.41 **The committee considers that the power of the Federal Circuit Court to dictate the vacation date of a long-term tenant engages and limits rights to adequate standards of housing. However, noting the Attorney-General's advice regarding factors that will be taken into account during the court process, the committee considers that the measure may be compatible with the right to an adequate standard of living (housing).**

Powers when executing orders made by the Court

2.42 Section 10 of the instrument grants the Sheriff and Deputy Sheriff of the FCC any of the powers prescribed under section 7A of the Sheriff Act, including use of force powers, when enforcing a warrant for the possession of residential premises owned by the Commonwealth involving land in NSW.

2.43 The committee considers that the instrument engages and may limit the right to security of the person.

Right to security of the person

2.44 Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

6 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 24 June 2015) 1-2.

Compatibility of the measure with the right to security of the person

2.45 The committee considered in its previous report that empowering the Sheriff and the Deputy Sheriff to use force against a person in exercising a writ or warrant engages and limits the right to security of the person, as levels of force could be used that restrict or interfere with their personal integrity. However, a measure that limits the right to security of the person may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.46 The explanatory statement acknowledges that the instrument engages and limits the right to security of the person. It also sets out that 'section 10 of the Instrument is aimed at the legitimate and lawful objective of executing a warrant for possession of Commonwealth property in NSW where the FCC finds that the Commonwealth is entitled to possession of the premises'.[7] The committee accepts that the lawful execution of a warrant is a legitimate objective for the purposes of international human rights law, and that the measures are rationally connected to that objective. However, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, the least rights restrictive alternative to achieve this result).

2.47 The explanatory statement points to a range of safeguards to support its conclusion that the proposed measures are proportionate to their stated objective.[8]

2.48 It is likely, however, that despite these safeguards there could remain potential issues of proportionality in relation to the measures, and the committee considered in its previous report that further safeguards could have been put in place. These could include, for example, requirements that:

- the use of force only be used as a last resort;
- force should be used only if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force;
- the infliction of injury is to be avoided if possible; and
- the use of force be limited to situations where the officer cannot otherwise protect him or herself or others from harm.

2.49 The committee therefore considered that the instrument engages and limits the right to security of the person. The explanatory statement for the instrument does not provide sufficient information to establish that the instrument 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

7 ES 12-13.

8 ES 8.

Attorney-General as to whether the instrument imposes a proportionate limitation on the right to security of the person.

Attorney-General's response

The Committee has also sought further advice about the proportionality of powers granted to the Sheriff and Deputy Sheriff of the Court to execute orders made by the Court in relation to Commonwealth tenancy disputes. This engages the right to security of the person.

The object of the measures in section 10 of the Instrument is to enable the lawful execution of a warrant for possession as is permitted under NSW tenancy law. A number of safeguards have been built into the Instrument which clarifies the extent of a proportional response, should circumstances require it, on top of the basic powers set out in section 7A of the *Sheriff Act 2005* (NSW). The Committee has noted that despite these requirements, further safeguards should be put in place.

Sheriffs are responsible for the service and execution of all process of the Federal Circuit Court of Australia, as directed by the Sheriff (section 106, *Federal Circuit Court of Australia Act 1999*). While the Federal Circuit Court of Australia Act provides for Federal Circuit Court Sheriffs to execute Enforcement Orders, I understand that in practice Enforcement Orders would be executed by NSW Sheriffs Officers. NSW Sheriffs Officers are trained in use of force and must comply with NSW law including the Sheriff Act. Sheriffs Officers are subject to probation, internal and external training, on the job training and completion of a Certificate IV in Government (Court Compliance).

The Sheriff Act empowers a Sheriffs Officer to use such force as is reasonably necessary to enforce the writ or warrant for possession of land. Reasonable force is a well-established concept of law, with the principles set out in *Fontin v Katapodis* (1962) 108 CLR 177. Reasonable force is to mean that degree of force which is fair, proper, and reasonably necessary in the circumstances. Reasonableness generally means that the action taken was not excessive or disproportionate in the circumstances while necessity generally indicates a lack of any practicable alternatives to the action taken. At common law, a person is entitled to use reasonable force in self-defence or to protect another person where there is actual danger or a reasonable apprehension of immediate danger; to protect land or goods from unjustified interference; to remove a trespasser from land; and to recover goods from someone who has wrongfully taken and detained them. The safeguards in the Instrument essentially set out the common law.

In addition to the Instrument, Part 6 of the Residential Tenancies Act sets out various limitations as to the recovery of possession of premises. For example, section 120 makes it an offence to enter premises unless it is abandoned or given vacant possession, or unless the person is acting in accordance with a warrant, while subsection 121(4) of the Residential

> Tenancies Act provides that a warrant should be in the approved form and must authorise a Sheriff to enter specified residential premises and to give possession to the person in the warrant. This provides sufficient procedural checks prior to any warrant for possession being executed.
>
> The requirements in section 10 of the Instrument broadly encompass the Committee's suggestions, listed in 1.488 of the Committee's *Twenty-second Report of the 4th Parliament*. In particular, where the Committee suggests that infliction of injury is to be avoided if possible, this would fall within the safeguard that the Sheriff or Deputy Sheriff must not use more force than necessary and reasonable to execute the warrant. There is nothing in the provisions that would remove liability for any unnecessary infliction of injury.
>
> The combination of these various requirements ensures that the least rights restrictive approach will be taken by Sheriffs and Deputy Sheriffs in executing warrants for possession of land.[9]

Committee response

2.50 **The committee thanks the Attorney-General for his response.** The committee considers that the response demonstrates that the measures are likely to be proportionate to their stated objective. In particular, the committee notes the definition of 'reasonable force' as it relates to the use of force by a Sheriff or Deputy Sheriff, and the required necessity that there is a lack of any practicable alternatives to the action taken.

2.51 **The committee therefore considers that the measure may be compatible with the right to security of the person and has concluded its examination of this matter.**

The Hon Philip Ruddock MP

Chair

9 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 24 June 2015) 2-3.

Appendix 1

Correspondence

COPY

ORIGINAL HAND DELIVERED

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-001598

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

Dear Mr Ruddock

Thank you for your letter of 13 May 2015 requesting clarification of a matter in relation to the Defence Legislation (Enhancement of Military Justice) Bill 2015 (the Bill).

The purpose of the proposed amendments to the *Military Justice (Interim Measures) Amendment Act (No. 1) 2009* (Interim Measures Act) by the Bill is to continue the appointment arrangements made in the Interim Measures Act, by extending the appointment of the current Chief Judge Advocate (CJA) and full-time Judge Advocate (JA) for a further two year period and, as such, the Bill does not have an adverse impact on human rights.

The Committee is concerned that the effect of the proposed amendments to the Interim Measures Act will be to limit the right to a fair hearing and fair trial and that the Statement of Compatibility in the Explanatory Memorandum does not address this issue. In fact, the Statement of Compatibility states that 'The Bill operates ...to extend the appointments of the current CJA and full-time Judge Advocate who contribute to the effective operation of the military justice system and the dispensation of military discipline...' (emphasis added). As discussed below, this statement reflects a commitment to the consistent conduct of fair trials and hearings.

As you point out, the Interim Measures Act reinstated the service tribunal system that existed before the creation of the Australian Military Court to sustain that system until such time as the Parliament decided how to permanently address the issue of the trial of serious service offences in the Australian Defence Force. The current arrangements provided for in the *Defence Force Discipline Act 1982* (DFDA) have enabled the continuation of the delivery of military discipline via a system of trials by service tribunal (post the High Court decision in *Lane v Morrison* [2009] HCA 29), which operates in an independent and impartial manner. The amendments in the Bill, which extend the appointments of the CJA and JA, are required to continue to support that system.

The Judge Advocate General, who must be a serving or former superior court judge, together with other Offices and appointments under the DFDA, combine to support the independence of the military justice system and the conduct of fair trials. For example, the establishment of the statutorily independent positions of the Director of Military Prosecutions, the Inspector General of the Australian Defence Force and the Registrar of Military Justice, together with the creation of (and statutory recognition that the Bill will give to) the position of the Director Defence Counsel Services and the abolition of convening authorities, have all ensured that military discipline is dispensed in a manner separate to, and independent of, the military chain of command.

Of note, in 2003 and 2005, legislative amendments were made to the procedure for the Judge Advocate General to appoint officers to act as JAs for courts martial and for nominating officers as DFMs, as opposed to these members being appointed by the chain of command. These amendments removed the involvement of convening authorities and substituted the Registrar of Military Justice in the appointment of JAs. This was to ensure that any actual or perceived influence by the chain of command in the appointment process was avoided and to facilitate fair and independent service tribunal trials. JAs are, therefore, appointed by the Chief of the Defence Force or a Service Chief on the nomination of the Judge Advocate General. Defence Force magistrates are also appointed on the nomination of the Judge Advocate General (currently Rear Admiral, the Honourable Justice Michael Slattery QC, RANR of the Supreme Court of New South Wales).

Importantly, all courts martial and Defence Force magistrates trials are conducted in accordance with rules of evidence, accused members are provided with independent legal representation at Commonwealth expense and convicted members have their convictions and punishments automatically reviewed to ensure they are in accordance with the law. A convicted person may also lodge a petition against their conviction or punishment and, in addition, can appeal their conviction to the Defence Force Discipline Appeal Tribunal (consisting of a panel of superior court judges), the Federal Court of Australia and, if leave is granted, to the High Court of Australia.

The presence and application of all these elements in the military justice system is an indication of the delivery of fair trials and hearings.

Moreover, the High Court of Australia has consistently found the system of trials by Service tribunal to be constitutionally sound.

As noted in the 2009 Report on the *Independent Review on the Health of the Reformed Military Justice System* (Sir Laurence Street AC, KCMG, QC and Air Marshal Les Fisher (Rtd)):

> *'The military justice system is delivering and should continue to deliver impartial, rigorous and fair outcomes; has a greater transparency and enhanced oversight; is substantially more independent from the chain of command; and is effective in maintaining a high standard of discipline both domestically and in the operational theatre'* (emphasis added).

These findings reinforce Defence's ongoing commitment to delivering impartial, rigorous and fair military justice outcomes and it is continuing its commitment in this regard.

The proposed amendments to the Interim Measures Act are consistent with, and ensure the right to a fair hearing and fair trial (supporting the military justice system). They are also consistent with the criteria of an independent and impartial tribunal as required by article 14(1) of the International Covenant on Civil and Political Rights (competence, independence and impartiality of a tribunal).

I trust that the above clarification addresses the Committee's concerns.

Yours sincerely

KEVIN ANDREWS MP

10 JUN 2015

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-002255

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

Dear Chair

Thank you for your letter of 18 June 2015 drawing to my attention the *Twenty-third Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights, regarding the Defence Trade Controls Amendment Bill 2015.

For the new exceptions that have been included in the Bill, as the Committee notes, there are key elements of the exceptions that are solely within a defendant's knowledge. For the other elements of the exceptions listed in paragraphs 1.36 and 1.37 of the Report, although I concede that these elements may sometimes be within the Government's knowledge, they would definitely be within a defendant's knowledge after the defendant has ascertained, through their own compliance checks, whether the exception applies to their activity. Given the defendant's lower evidentiary burden of only needing to produce evidence that suggests a reasonable possibility that the exception applies, it would not be burdensome or unreasonable for the defendant to prove these elements with the information collected from their compliance checks.

These reversals are warranted and proportionate, considering the importance of the Bill's objective to strengthen national security by stopping proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs. Suppliers, publishers and brokers of these goods and technologies must ensure that their activity falls within the relevant offence exception if they decide to proceed without a permit under the legislation. It is reasonable to expect that if the defendant has not undertaken appropriate compliance checks to establish whether the exception applies and does not possess the evidence to establish the exception, they may not be able to rely on the exception.

Although I consider that it is reasonable to reverse the burden for all elements of the relevant exceptions listed in paragraphs 1.36 and 1.37 of the Committee's Report, I have noted its concerns and, accordingly, will ensure that they are considered during the first review of the legislation conducted pursuant to section 74B.

Yours sincerely

KEVIN ANDREWS MP

30 JUL 2015

ATTORNEY-GENERAL

CANBERRA

MC15-000413

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

Dear Chair

Thank you for your letter of 13 May 2015 regarding comments of the Parliamentary Joint Committee on Human Rights in the *Twenty-second Report of the 44th Parliament* concerning the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the Instrument).

Power of the Federal Circuit Court (the Court) to order vacation of premises
The Committee has sought further advice regarding the Court's ability to determine dates for tenants to vacate premises in relation to Commonwealth tenancy disputes in New South Wales (NSW). This engages the right to an adequate standard of living.

As the Committee points out, the Instrument applies the *Residential Tenancies Act 2010* (NSW), with some modifications, so that the Court can exercise jurisdiction in these matters. In particular, subsection 94(4) of the Residential Tenancies Act is modified in relation to long-term tenants to remove the minimum guaranteed 90 days to vacate premises after a termination order is made.

Unlike other residential tenancies in NSW, a long term tenant is provided greater rights, whereby the landlord may not issue a termination notice alone to effect termination of the leasing arrangement. A landlord must seek a termination order from the Court instead. In this way, it ensures that due process is required to be followed through the Court with the opportunity for a tenant to be heard.

The Court has been given the discretion to take all factors into account in determining a matter. Enabling the Court to take into account all relevant factors provides equity to both parties. The Committee has pointed out that this could result in an order being made for less than 90 days. Equally, the Court could order 90 days or more for vacant possession to occur. Ultimately, the Court has the discretion to decide what is reasonable and proportionate on a case by case basis in relation to an application to seek vacant possession of land.

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For example, tenants may be informed on an ongoing basis, months in advance, that termination of their tenancy will occur and vacant possession sought by a certain date. Other relevant factors that could be taken into account may include length of tenancy, size of the property, ability to relocate in a given timeframe, reason for vacant possession being sought or similar reasons.

Powers when executing orders made by the Court

The Committee has also sought further advice about the proportionality of powers granted to the Sheriff and Deputy Sheriff of the Court to execute orders made by the Court in relation to Commonwealth tenancy disputes. This engages the right to security of the person.

The object of the measures in section 10 of the Instrument is to enable the lawful execution of a warrant for possession as is permitted under NSW tenancy law. A number of safeguards have been built into the Instrument which clarifies the extent of a proportional response, should circumstances require it, on top of the basic powers set out in section 7A of the *Sheriff Act 2005* (NSW). The Committee has noted that despite these requirements, further safeguards should be put in place.

Sheriffs are responsible for the service and execution of all process of the Federal Circuit Court of Australia, as directed by the Sheriff (section 106, *Federal Circuit Court of Australia Act 1999*). While the Federal Circuit Court of Australia Act provides for Federal Circuit Court Sheriff's to execute Enforcement Orders, I understand that in practice Enforcement Orders would be executed by NSW Sheriff's Officers. NSW Sheriff's Officers are trained in use of force and must comply with NSW law including the Sheriff Act. Sheriff's Officers are subject to probation, internal and external training, on the job training and completion of a Certificate IV in Government (Court Compliance).

The Sheriff Act empowers a Sheriff's Officer to use such force as is reasonably necessary to enforce the writ or warrant for possession of land. Reasonable force is a well-established concept of law, with the principles set out in *Fontin v Katapodis* (1962) 108 CLR 177. Reasonable force is to mean that degree of force which is fair, proper, and reasonably necessary in the circumstances. Reasonableness generally means that the action taken was not excessive or disproportionate in the circumstances while necessity generally indicates a lack of any practicable alternatives to the action taken. At common law, a person is entitled to use reasonable force in self-defence or to protect another person where there is actual danger or a reasonable apprehension of immediate danger; to protect land or goods from unjustified interference; to remove a trespasser from land; and to recover goods from someone who has wrongfully taken and detained them. The safeguards in the Instrument essentially set out the common law.

In addition to the Instrument, Part 6 of the Residential Tenancies Act sets out various limitations as to the recovery of possession of premises. For example, section 120 makes it an offence to enter premises unless it is abandoned or given vacant possession, or unless the person is acting in accordance with a warrant, while subsection 121(4) of the Residential Tenancies Act provides that a warrant should be in the approved form and must authorise a Sheriff to enter specified residential premises and to give possession to the person in the warrant. This provides sufficient procedural checks prior to any warrant for possession being executed.

The requirements in section 10 of the Instrument broadly encompass the Committee's suggestions, listed in 1.488 of the Committee's *Twenty-second Report of the 44th Parliament*. In particular, where the Committee suggests that infliction of injury is to be avoided if possible, this would fall within the safeguard that the Sheriff or Deputy Sheriff must not use more force than necessary and reasonable to execute the warrant. There is nothing in the provisions that would remove liability for any unnecessary infliction of injury.

The combination of these various requirements ensures that the least rights restrictive approach will be taken by Sheriffs and Deputy Sheriffs in executing warrants for possession of land.

I trust that this information is of assistance to the Committee.

Yours faithfully

(George Brandis)

24 JUN 2015

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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