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 12 to 22 October 2015, legislative instruments received from 18 September to 1 October 2015, and legislation previously deferred by the committee.

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

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

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

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

Bills not raising human rights concerns

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

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

- Australian Crime Commission Amendment (Criminology Research) Bill 2015;
- Defence Legislation Amendment (First Principles) Bill 2015;
- Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015; and
- High Speed Rail Planning Authority 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):

- Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015;
- Higher Education Legislation Amendment (Miscellaneous Measures) Bill 2015;
- Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015;
- Migration Amendment (Mandatory Reporting) Bill 2015; and
- Tax and Superannuation Laws Amendment (2015 Measures No. 5) 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 instruments:

- Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464];
- Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]; and
- Military Superannuation and Benefits (Eligible Members) Declaration 2015 [F2015L01527].

1.12 The committee also defers the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422] pending a response from the Minister for Foreign Affairs regarding a number of related instruments.[2]

1.13 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

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

2 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38.

1.14 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.[3]

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

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.

Crimes Legislation Amendment (Harming Australians) Bill 2015

Portfolio and sponsor: Attorney-General and Senator Xenophon
Introduced: Senate, 15 October 2015

Purpose

1.16 The Crimes Legislation Amendment (Harming Australians) Bill 2015 (the bill) seeks to amend the *Criminal Code Act 1995* (the Criminal Code) to extend provisions that make it an offence to, outside of Australia, murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian citizen or resident to conduct that occurred at any time before 1 October 2002.

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

Background

1.18 The *Criminal Code Amendment (Offences Against Australians) Act 2002* (the 2002 Act) inserted a new Division 104 (Harming Australians) into the Criminal Code. This established new offences of murder, manslaughter, and the intentional or reckless infliction of serious harm on Australian citizens or residents abroad. The 2002 Act commenced operation on 14 November 2002 but operated retrospectively, with effect from 1 October 2002.

1.19 Senator Xenophon then introduced the Criminal Code Amendment (Harming Australians) Bill 2013 (the previous bill) on 11 December 2013, which was substantially similar to the current bill, seeking to extend the retrospective application of the above offences. The committee considered the previous bill in its *Second Report of the 44th Parliament*,[1] and sought further information from the legislation proponent as to whether the bill was compatible with the prohibition against retrospective criminal laws. The committee also invited comment from the Attorney-General as the minister responsible for the Criminal Code, and considered this response in its *Fourth Report of the 44th Parliament*.[2]

1.20 The current bill includes a number of amendments to the previous bill, including amended penalty provisions, extension of absolute liability to the new offences, and safeguards relating to double jeopardy. It also provides that in order

1 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 31-35.

2 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014) 39-40.

for an offence to have occurred under the new laws, the conduct constituting the offence must have also constituted an offence against the law of the country in which it occurred, at the time that it occurred.

Extended application of absolute liability

1.21 The bill proposes to amend subsections 115.1(2) and 115.2(2) of the Criminal Code to apply absolute liability to the new elements of the offence provisions, concerning the murder or manslaughter of an Australian citizen or resident of Australia in a foreign country before 1 October 2002. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved as to whether, the victim was an Australian citizen or resident or whether, at the time the conduct was engaged in, the conduct constituted an offence against a law of a foreign country. In addition, the defence of mistake of fact is not available to a defendant.

1.22 The committee considers that as the existing application of absolute liability has been expanded and applied to a new element of the offence, the bill engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

1.23 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). 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.

1.24 Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. However, absolute liability 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 offences must be reasonable, necessary and proportionate to that aim.

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

1.25 As set out in the committee's Guidance Note 2,[3] absolute liability offences engage the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault.

1.26 The statement of compatibility for the bill does not acknowledge that the presumption of innocence is engaged by these measures, and as such has not set out

3 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2 – Offence provisions, civil penalties and human rights* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en.

to explain how extending the application of absolute liability is a justifiable limit on the right to a fair trial.

1.27 It is the committee's usual expectation that, where absolute liability criminal offences or elements are introduced or expanded, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with the committee's Guidance Note 1.[4]

1.28 **The committee's assessment of the extended application of absolute liability against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial (presumption of innocence)) raises questions as to whether the measure is justifiable.**

1.29 **As set out above, the extended application of absolute liability engages and limits the right to a fair trial (presumption of innocence). The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponents as to whether the measure is compatible with the right to a fair hearing, and particularly:**

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

Retrospective application of culpability for offences committed overseas

1.30 The bill extends retrospectively the application of subsections 115.1 and 115.2 of the Criminal Code relating to the murder or manslaughter of Australians overseas. In order for an act to constitute an offence under these amendments, the act must have been an offence against the law in the country where it was committed at the time that it was committed.

1.31 The bill also amends the penalty provisions that would apply to the above offences which occurred before 1 October 2002. The new provisions provide for the maximum term of imprisonment to be no more than what the maximum would be under the law of the foreign country. For countries where a non-custodial penalty would apply to the offence, the Australian maximum penalty would apply.

1.32 The committee considers that the retrospective application of culpability for offences committed overseas in relation to the nature of the offence and the

4 Appendix 2; 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_2/guidance_note_2.pdf.

relevant penalty provisions engages and may limit the prohibition against retrospective criminal laws.

Prohibition against retrospective criminal laws (nature of the offence)

1.33 Article 15 of the ICCPR prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. This is an absolute right and it can never be justifiably limited. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

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

1.35 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law. This relates to crimes such as genocide, war crimes and crimes against humanity.

Compatibility of the measure with the prohibition against retrospective criminal laws (nature of the offence)

1.36 The statement of compatibility for the bill acknowledges that the prohibition against retrospective criminal laws is engaged. It states that:

> 'While retrospective offences are generally not appropriate, retrospective application is justifiable in these circumstances because the conduct which is being criminalised – murder and manslaughter – is conduct which is universally known to be conduct which is criminal in nature.'[5]

1.37 However, the committee has stated in its previous analysis that while murder, manslaughter and the infliction of serious harm are crimes under the ordinary criminal law of most, if not all, countries, they are not the sort of international crimes understood as falling within the exception in article 15(2) (which applies to breaches of international humanitarian law, such as genocide, war crimes or crimes against humanity).[6] To constitute an exemption from the prohibition against retrospective criminal laws, the conduct must be recognised by the general principles of law recognised by the international community as being criminal, as discussed at [1.35] above.

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5 Explanatory memorandum (EM), Statement of Compatibility (SoC) 4.

6 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014) 40.

1.38 Accordingly, the test for compatibility with article 15 is whether the conduct was criminal under national law at the time it was committed. In the situation envisaged by the bill, the conduct in question occurs in a third country and so it must be that the conduct is already criminal under the national law in that third country. In this regard, the bill provides that the conduct constituting the offence must also have constituted an offence against the law of the foreign country in which the conduct occurred. However, the bill does not require that the conduct was an offence of manslaughter or murder (or its equivalents) in the third country – merely that it is 'an offence'. While it may be that in many cases the construction of the offence provision in the third country is equivalent to that under Australian law, there are also likely to be differences between countries as to what constitutes the offence of murder compared to manslaughter and the specific fault elements that apply to each offence. There are also likely to be differences between countries as to the liability of an individual where a person is killed as part of joint criminal enterprise such as burglary.

1.39 The rationale behind article 15 is that it would be unfair for someone to be found guilty of a criminal act if it was not criminal at the time they committed the act. The UN Human Rights Council has suggested that article 15 may be violated where a person is convicted of an offence that did not exist at the time of the alleged conduct even where the law in force at the time criminalised that conduct under other relevant offences.[7] Accordingly, it would likely be breach of article 15 if a person who committed an offence that would be subject to the charge of burglary in their home country to be subsequently, as a result of this bill, subject to the charge of murder in Australia.

1.40 The statement of compatibility does not deal directly with the possibility that individuals could be charged with a murder or manslaughter offence which is not equivalent to the offence that they allegedly committed in the foreign country.

1.41 **The committee's assessment of the retrospective application of culpability for offences committed overseas against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective criminal laws in relation to penalty provisions) raises questions as to whether the measure is compatible with human rights law.**

1.42 **The committee therefore seeks the advice of the legislation proponents as to how, in light of the committee's concerns raised above, the retrospective application of culpability could be compatible with the absolute prohibition against retrospective criminal laws.**

7 *Gómez Casafranca v Peru*, Communication No 981/2001, UN Doc. CCPR/C/78/D/981/2001.

Prohibition against retrospective criminal laws (penalty provisions)

1.43 The prohibition against retrospective criminal laws is contained within article 15 of the ICCPR. More information is set out above at paragraphs [1.33] to [1.35].

Compatibility of the measure with the prohibition against retrospective criminal laws (penalty provisions)

1.44 Items 5 and 12 of the bill seek to amend the penalties that would apply to persons convicted of the new offences (relating to murder and manslaughter respectively). If the conduct occurred before 1 October 2002 and is punishable in the country in which the conduct occurred by a term of imprisonment, the maximum sentence that may be handed down by an Australian court may not exceed the maximum imprisonment that would apply in the other country. However, if the conduct is punishable in the other country by a non-custodial sentence, the maximum penalty under the Criminal Code will apply.

1.45 As noted above at [1.34], article 15 of the ICCPR provides that laws must not impose greater punishments than those which would have been available at the time the acts were done. While the amendments in the bill do not seek to impose a higher *custodial* penalty than that which would apply in the country where the offence was committed, it is possible that where a non-custodial sentence would be applicable to the offence in that foreign country, an individual may receive a substantially more severe penalty under the proposed new law than that which applied at the time the conduct was committed.

1.46 The statement of compatibility for the bill acknowledges that the measure engages retrospective criminal laws, and states:

> Due to the difficulty of anticipating all possible punishments which may be applied in foreign jurisdictions for offences of murder and manslaughter, the Bill does not attempt to prescribe all possible punishments. Where a foreign law would impose a non-custodial punishment, particularly those that would not be consistent with other international human rights obligations, such as the prohibition on torture or cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR, these punishments will not be considered lower penalties for the purpose of these offences. As such, the defendant will be liable to the same maximum penalty which would be applicable to the offences if they had been committed on or after 1 October 2002.[8]

1.47 As such, while the statement of compatibility acknowledges other non-custodial sentences may apply in other jurisdictions, it dismisses these as not being considered as lower penalties. It goes on to state that:

8 EM, SoC 5.

> 'as not all possible punishments can be foreshadowed and prescribed, this [the maximum imprisonment penalty] provides a mechanism to ensure that it will be open to the court to impose a term of imprisonment commensurate with the penalty applicable in the foreign jurisdiction.[9]

1.48 The statement of compatibility does not deal with the situation where a person would, in the third country, be liable for a fine, to pay requisite compensation, or community service, yet by the retrospective application of this bill may be liable for a substantial custodial sentence under Australian law. Article 15 of the ICCPR provides that laws must not impose greater punishments than those which would have been available at the time the acts were done, which is an absolute right that can never be justifiably limited.

1.49 **The committee's assessment of the retrospective application of culpability for offences committed overseas against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective criminal laws in relation to penalty provisions) raises questions as to whether the measure is compatible with human rights law.**

1.50 **The committee therefore seeks the advice of the legislation proponents as to how, in light of the committee's concerns raised above, the imposition of higher penalties than previously existed could be compatible the absolute prohibition against retrospective criminal laws.**

9 EM, SoC 5.

Criminal Code Amendment (Private Sexual Material) Bill 2015

Sponsor: Tim Watts MP; Terri Butler MP
Introduced: House of Representatives, 12 October 2015

Purpose

1.51 The Criminal Code Amendment (Private Sexual Material) Bill 2015 (the bill) seeks to amend the *Criminal Code Act 1995* (Criminal Code) to criminalise what is colloquially referred to as 'revenge porn'. Specifically, the bill would introduce three new telecommunications offences that would make it an offence to:

- use a carriage service to, without consent, publish private sexual material;
- threaten to do so; or
- possess, control, produce, supply or obtain private sexual material for use through a carriage service.

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

Reversal of the burden of proof

1.53 Proposed section 474.24H of the bill provides a number of exceptions to the proposed new offences introduced by the bill, including if the conduct was:

- engaged in for the public benefit;
- in relation to news, current affairs, information or a documentary (and there was no intention to cause harm);
- by a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; or
- in the course of a assisting the Children's e-Safety Commissioner or relating to content filtering technology.

1.54 These exceptions reverse the burden of proof, requiring the defendant to bear an evidential burden if relying on these defences.

1.55 The committee considers that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

1.56 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. 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

1.57 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.

1.58 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.

Compatibility of the measure with the right to a fair trial

1.59 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures. The explanatory memorandum to the bill also provides little justification for these measures, other than asserting:

> It will generally be much easier for a defendant, rather than the prosecution, to produce evidence showing that the circumstances to which the defences apply do in fact exist.[1]

1.60 As set out the committee's Guidance Note 2,[2] reverse burden offences are likely to be compatible with the presumption of innocence where they are shown by the legislation proponent 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.

1.61 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 the committee's Guidance Note 1.[3]

1.62 **The committee's assessment of the reversal of the burden of proof against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial) raises questions as to whether the measure is justifiable.**

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1 Explanatory Memorandum, paragraph 46.

2 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 2 – Offence provisions, civil penalties and human rights (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en.

3 Appendix 2; 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_2/guidance_note_2.pdf.

1.63 **As set out above, the reversal of the burden of proof engages and limits the right to a fair trial. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponents as to:**

- **whether the proposed exceptions 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.**

Health Insurance Amendment (Safety Net) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 21 October 2015

Purpose

1.64 The Health Insurance Amendment (Safety Net) Bill 2015 (the bill) seeks to amend the *Health Insurance Act 1973* to introduce a new Medicare safety net, replacing three existing safety nets.

1.65 The new Medicare safety net will continue to cover up to 80 per cent of out-of-pocket medical costs once an annual threshold is met, however, it will introduce a limit on the amount and type of out-of-pocket costs that can be included in the calculation for the annual safety net threshold.

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

Limitations on the amount of out-of-pocket health costs that can be claimed

1.67 There are currently three Medicare safety nets:

- the Original Medicare Safety Net – which increases the Medicare rebate payable for out-of-hospital Medicare services to 100 per cent of the scheduled fee once an annual threshold of gap costs has been met;
- the Greatest Permissible Gap (GPG) – which increases the Medicare rebate for high cost out-of-hospital services so that the difference between the MBS fee and the Medicare rebate is no more than $78.40; and
- the Extended Medicare Safety Net (EMSN) – which provides a rebate for out-of-pocket medical costs (for out-of-hospital care) so that Medicare pays up to 80 per cent of further out-of-pocket costs once an annual threshold has been met.

1.68 Together these three schemes reduce both the individual costs of high cost out-of-hospital services for all Medicare recipients and provide increased rebates to individuals and families who have high annual medical bills that exceed certain thresholds.

1.69 The bill would replace these three safety nets with a new Medicare safety net.

1.70 The proposed new Medicare safety net would have a lower annual threshold for most people including concession card holders, singles and families.[1] Those

1 Current thresholds for concession card holders and recipients of FTB A is $638.40 and for singles and families is $2 000.

receiving FTB A will have to reach a slightly higher threshold than under current arrangements.[2]

1.71 Currently, all out-of-pocket costs for out-of-hospital Medicare service count towards the Medicare threshold and there are caps on benefits only for certain items.

1.72 The bill would limit the out-of-pocket costs that can accumulate per service to the threshold for all Medicare services and limit the amount of safety net benefits that are payable per service for all Medicare services. This will mean that some patients will incur out-of-pocket costs that are not included in their costs for medical expenses for the purposes of accessing the new Medicare safety net.

1.73 In addition, it would appear that the bill would remove the GPG which would result in some people incurring larger out-of-pocket expenses for individual high cost medical procedures.

1.74 The committee considers that the changes to Medicare engage and may limit the right to social security and the right to health.

Right to social security

1.75 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.

1.76 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).

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;

2 The proposed new threshold for concession card holders is $400; for singles is $700; for families is $1 000 and for recipients of FTB A is $700.

- 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.

1.78 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.

1.79 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Right to health

1.80 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

1.81 Article 2(1) of the ICESCR imposes on Australia the obligations listed above at paragraph [1.77] and article 4 of the ICESCR allows limitations on the right to health in the manner set out above at paragraph [1.79].

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

1.82 The statement of compatibility for the bill acknowledges that the bill engages the right to social security and the right to health. It explains that the objective of the bill is 'to ensure that the safety net arrangements for out-of-pocket costs for out-of-hospital Medicare services are financially sustainable'.[3]

1.83 It also notes that the bill seeks to address issues raised by two independent reviews which found that the existing safety net arrangements may have led to some people experiencing higher out-of-pocket costs. This is because there is evidence to suggest that the introduction of the EMSN led to doctors increasing their fees.[4]

3 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 9.

4 EM, SoC 9.

1.84 The committee considers that better targeting the safety net arrangements and ensuring they are financially sustainable is a legitimate objective for the purposes of international human rights law. The committee considers that the measures are rationally connected, and likely to be effective, to achieve this objective.

1.85 The statement of compatibility addresses whether the proposed changes are proportionate to achieving this objective:

> The Commonwealth will continue to provide an additional rebate for out-of-hospital medicare services once the threshold has been reached…
>
> While the average benefit paid under the new medicare safety net will reduce, the number of people that will receive a safety net benefit will increase compared to the number of people who will receive a benefit under the EMSN in 2015. It is anticipated that benefits under the new medicare safety net will be more equitably distributed between socio-economically advantaged and disadvantaged areas…
>
> The new medicare safety net threshold for people who qualify for a Commonwealth concession card is lower than under the EMSN. Therefore this Bill protects the benefits of individuals that are financially disadvantaged. Commonwealth concession cards are provided to people who meet a range of criteria including qualifying for a Commonwealth Seniors Health Card, Pensioner Concession Card, Low-income Health Care Card or Newstart Allowance.[5]

1.86 Under international human rights law, one of the considerations, in determining whether a limitation on a right is proportionate, is considering whether any affected groups are particularly vulnerable. Lowering the thresholds for certain groups may result in more people being eligible for the safety net. Importantly there is a lower threshold for concession card holders (though noting that recipients of FTB A will have their threshold increased).

1.87 However, the changes to the limits on the medical expenses included in the calculation of eligibility for the safety net threshold and limits on safety net benefits apply to everyone. This will mean a person is likely to incur more out-of-pocket expenses before the threshold is reached. This change does not take into account whether the persons incurring the costs are financially disadvantaged.

1.88 The statement of compatibility states that the bill will mean that the benefits of the safety net will be more equitably distributed between socio-economically advantaged and disadvantaged areas. However it does not explain whether the bill will result in many financially disadvantaged people being worse off as a result of the changes. If this is the case, it is also unclear what safeguards there are to ensure that financially disadvantaged people are not effectively barred from accessing

5 EM, SoC 9-10.

appropriate out-of-hospital healthcare due to a reduction in the benefits payable to them.

1.89 The committee also notes that it would appear that the bill would remove the GPG, which could result in some people incurring larger individual out-of-pocket expenses for high cost medical services. There is no information in the statement of compatibility as to how financially disadvantaged individuals, including concession card holders, will be supported to meet these individual one-off costs.

1.90 **The committee's assessment of the measures limiting the amount of out-of-pocket health costs that can be claimed against articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to health) raises questions as to whether the measures are a justifiable limitation on those rights.**

1.91 **As set out above, the measures engage and limit the right to social security and the right to health. 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 Health as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.**

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 14 October 2015

Purpose

1.92 The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- amend the statutory complementary protection framework standards for equivalency with the new statutory refugee framework, as inserted by Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*;
- amend the reference to 'protection obligations' in subsection 36(3) to specify the source of the obligations;
- amend the definition of 'country' in subsection 5H(1), which outlines the meaning of 'refugee', to be the same country as the 'receiving country' as applies in subsection 5(1) of the Migration Act;
- align the statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution' in section 5J of the Migration Act;
- amend subsection 36(2C), to remove duplication between paragraph 36(2C)(b) and subsection 36(1C) in the Migration Act, which both operate to exclude an applicant from the grant of a protection visa on character-related grounds;
- amend subsection 336F(5), which authorises disclosure of identifying information to foreign countries or entities, to include information pertaining to unauthorised maritime arrivals who make claims for protection as a refugee and fall within the circumstances of subsection 36(1C) of the Migration Act;
- amend subsection 502(1), which allows the Minister for Immigration and Border Protection to personally make a decision that is not reviewable by the Administrative Appeals Tribunal (AAT), to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person; and
- amend subsection 503(1), which relates to the exclusion of certain persons from Australia, to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

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

Changes to the statutory framework for complementary protection – real risk in the entire country

1.94 Currently, under the Migration Act a person will not be considered to be entitled to a protection visa on complementary protection grounds if it would be reasonable for that person to relocate to an area of their home country where they would not be at risk of significant harm. Complementary protection refers to persons who may not satisfy the criteria for recognition as a refugee but who, nevertheless, face a real risk of suffering significant harm if removed from Australia to the receiving country.[1]

1.95 The bill seeks to amend the Act such that a person will not be considered eligible for protection unless the risk they face relates to all areas of their home country. That is, if an individual is found to be able to live without a risk of significant harm in a small part of their home country they would be ineligible for protection regardless if it would be reasonable or practicable for them to travel to that area of their home country.

1.96 The committee considers that this provision engages Australia's non-refoulement obligations as a person who does not meet the statutory criteria under the Migration Act may be subject to return to their home country.

Non-refoulement obligations

1.97 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[2] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

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1 See section 36(2)(aa) of the *Migration Act 1958*.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

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

1.99 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[4]

1.100 Australia gives effect to its non-refoulement obligations principally through the Migration Act.

Compatibility of the measure with the right to non-refoulement

1.101 The statement of compatibility acknowledges that Australia's non-refoulement obligations are engaged by the bill, but states that:

> …the UN Human Rights Committee (UNHRC) has described the non-refoulement obligation under the ICCPR as being engaged only if a person faces a risk of harm in the whole of a country. In addition, commentary from the UN Committee Against Torture (UNCAT) has suggested that there must exist a risk [of harm] in the entire territory of the target State and that there must be no internal flight alternative, thus acknowledging the same approach should be applied in the consideration of complementary protection claims regarding torture, as is applied by the internal relocation principle in the consideration of Refugee Convention claims. As such, this amendment is compatible with human rights because it reflects Australia's non-refoulement obligations.[5]

1.102 There are divergent views as to whether or not under international human rights law an 'internal flight option' – the ability to find safety in one part of your home country – negates an individual's claim for protection against refoulement. The weight of evidence would suggest this is not the case.[6] What is clear from the jurisprudence is that such relocation must be reasonable and practicable.[7] In removing the requirement that the minister must be satisfied that it is reasonable for a person to relocate to an area of their home country the bill would result in a person being ineligible for protection even though it may not be reasonable for them

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

5 Explanatory Memorandum (EM), Statement of Compatibility (SoC), paragraph [21].

6 See *Alan v Switzerland*, Merits, Communication No 21/1995, UN Doc CAT/C/16/D/21/1995, UN Doc A/51/44, Annex V, 68, IHRL 3781 (UNCAT 1996), *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (1999) and Manfred Nowak (Former UN Special Rapporteur on Torture) *An Analysis of the various legal issues under Article 3 CAT* (available from http://www.hklawacademy.org/downloads/cat1/d2am/ProfessorManfredNowakAnAnalysisoftheVariousLegalIssuesundeArticle3.pdf). In contrast see *H.M.H.I. (name withheld) v. Australia,* Communication No. 177/2001, U.N. Doc. A/57/44 at 166 (2002).

7 See James C. Hathaway and Michelle Foster, *Global Consultations on international protection*, June 2003, available at: http://www.refworld.org/docid/470a33b70.html.

to relocate internally. This would leave such individuals subject to refoulement in breach of Australia's international legal obligations.

1.103 The statement of compatibility notes that:

> In considering whether a person can relocate to another area, a decision maker would still be required to take into account whether the person can safely and legally access an alternative flight option upon returning to the receiving country.[8]

1.104 However, there is no statutory requirement obliging a decision maker to consider such matters. While such matters may be considered as a matter of departmental policy, this is an insufficiently robust protection for the purpose of international human rights law. The committee has consistently stated that where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation under international human rights law.[9] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.105 **The committee's assessment of the proposed changes to the statutory framework for complementary protection against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.106 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations, in light of the committee's concerns raised above.**

Changes to the statutory framework for complementary protection—behaviour modification

1.107 The bill would also remove Australia's protection obligations in circumstances where an individual could avoid significant harm if the person could take reasonable steps to modify their behaviour. A person would not be required to modify their behaviour if to do so would conflict with a characteristic that is fundamental to the person's identity or conscience including their religion, race, disability status or sexual orientation.

1.108 This provision engages Australia's non-refoulement obligation as an individual, who would otherwise be granted protection in Australia, may be deemed

8 EM, SoC, paragraph [20].

9 See, for example, Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

ineligible if they could modify their behaviour in a way that was considered not to be in conflict with their fundamental identity.

Non-refoulement obligations

1.109 Australia non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measure with the right to non-refoulement

1.110 The statement of compatibility provides that:

> In the complementary protection context, a person may be able to modify their behaviour in a manner that would not conflict with their identity or belief system (for example, by refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation) and could thereby avoid the risk of significant harm. If this is the case, they should not necessarily be provided with protection, as their return would not itself engage *non-refoulement* obligations – the risk of harm would only arise if they chose to undertake certain actions. This amendment is therefore consistent with Australia's *non-refoulement* obligations.[10]

1.111 The jurisprudence does not support the position outlined in the statement of compatibility. The obligation to protect against refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors.[11] The courts have found that persecution does not cease to be persecution simply because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.[12] This principle applies equally in the refugee assessment space as it does in assessing complementary protection under the ICCPR and CAT.

1.112 The bill would require decision makers to assess whether or not a behaviour modification is reasonable and not in conflict with a characteristic that is fundamental to a person's identity or conscience. This measure imposes additional statutory hurdles as part of the assessment of protection status. It requires an assessment of not only whether a person could refrain from certain actions but also take positive actions to conceal aspects of their identity or conscience that are not assessed as fundamental.

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10 EM, SOC, paragraph [31].

11 See *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; *CJEU judgment* in C-199/12, C200/12 and C201/12, *X, Y and Z*, 7 November 2013; CJEU – C-71/11 and C-99/11 *Germany v Y and Z*, 5 September 2012; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [40]-[41] per McHugh and Kirby JJ.

12 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [40] per McHugh and Kirby JJ.

1.113 Under the bill, a person could be required to not attend or participate in any political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's conscience. Similarly, a person who has previously worked as a journalist in their home country could be required to cease work as a journalist if the content of their published work risked attracting persecution.

1.114 **The committee's assessment of the proposed changes to the statutory framework for complementary protection (behaviour modification) against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.115 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Excluded persons

1.116 Currently, section 502 of the Migration Act provides that the Minister for Immigration and Border Protection may declare a person to be an excluded person on character grounds. An excluded person may not seek merits review of a decision at the Administrative Appeals Tribunal to deny their protection visa application. This provision currently only applies to persons who have been denied a protection visa on refugee grounds and not those who have applied for a protection visa on the grounds of complementary protection. This bill would extend the application of section 502 to individuals seeking a protection visa on the grounds of complementary protection.

1.117 This amendment, in removing a person's ability to seek merits review of a decision to refuse a visa on character grounds, engages the protection against refoulement, including the right to an effective remedy. Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Non-refoulement obligations

1.118 Australia non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measure with the right to non-refoulement

1.119 The statement of compatibility explains that:

> While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT that it is required in the

> assessment of non-refoulement obligations. Anyone who is found through visa or Ministerial intervention processes to engage Australia's non refoulement obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by the Minister will remain able to access judicial review which satisfies the obligation in Article 13 [ICCPR] to have review by a competent authority.[13]

1.120 The committee agrees that there is no express requirement specifically for merits review in the articles of the relevant conventions or jurisprudence relating to obligations of non-refoulement. However, the committee notes its view that merits review of such decisions is required to comply with the obligation under international law, is based on a consistent analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context.

1.121 In formulating this view, the committee has followed its usual approach of drawing on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate.

1.122 In this regard, the committee notes that treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. For example, the UN Committee against Torture in *Agiza v. Sweden* found:

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[14]

1.123 Similarly, the UN Committee against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[15]

1.124 In relation to the ICCPR, in *Alzery v. Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

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13 EM, SoC, paragraph [57].

14 Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7].

15 *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000.

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[16]

1.125 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[17]

1.126 The case law quoted above therefore establishes the proposition that, while merits review is not expressly required, there is strict requirement for 'effective review' of non-refoulement decisions.

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

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

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16 Mohammed Alzery v. Sweden, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006)) [11.8].

17 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

1.129 In contrast, merits review allows a person or entity other than the primary decision maker to reconsider the facts, law and policy aspects of the original decision and to determine what is the correct or preferable decision.

1.130 In light of the above, the committee considers that, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met by the availability of judicial review, but may be fulfilled by merits review.

1.131 **The committee's assessment of the proposed extension of the Minister's power to exclude a person from merits review against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.132 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Migration and Maritime Powers Amendment Bill (No. 1) 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 16 September 2015

Purpose

1.133 The Migration and Maritime Powers Amendment Bill (No. 1) 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- provide that when an unlawful non-citizen is in the process of being removed to another country and if, before they enter that country, the person is returned to Australia, then that person has a lawful basis to return to Australia without a visa;
- provide that when that person is returned to Australia, bars on the person making a valid visa application for certain visas will continue to apply as if they had never left Australia;
- make further amendments arising out of the enactment of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*;
- confirm that a person who has previously been refused a protection visa application that was made on their behalf cannot make a further protection visa application;
- ensure that fast track applicants can apply to the Administrative Appeals Tribunal for review of certain decisions; and
- correct a referencing error in relation to maritime crew visas, and ensure that visa ceasing provisions operate as intended.

1.134 The bill also seeks to amend the *Maritime Powers Act 2013* to amend the powers that are able to be exercised in the course of passage through or above waters of another country in a manner consistent with the United Nations Convention on the Law of the Sea.

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

Extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia.

1.136 The amendments in Schedule 1 of the bill provide that when an unsuccessful attempt is made to remove a non-citizen from Australia, the non-citizen can be returned to Australia without a visa and will be taken to have been continuously in the migration zone.

1.137 The effect of this amendment is that the person would be ineligible to make further applications for a protection visa because they would be characterised as

being continuously in the migration zone, such that the refusal or cancellation of their visa continues to have effect despite their attempted removal.

1.138 Nevertheless, the fact that the person has been refused entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. The inability of individuals in such circumstances to make a new protection claim means that the person may be subject to indefinite immigration detention (raising the right to liberty) or subject to further attempts at deportation that may engage Australia's non-refoulement obligations.

1.139 These measures would also apply to children and so raise questions as to the compatibility of the measures with the obligation to consider the best interests of the child.

1.140 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Right to liberty

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

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

Compatibility of the measure with the right to liberty

1.143 The statement of compatibility explains that the measures in Schedule 1 engage the right to liberty. The statement of compatibility further explains that while the right to liberty is engaged, any limitation on the right is otherwise justified. In terms of the legitimate objective of the measures the statement of compatibility notes:

> While this Bill widens the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act, they present a reasonable response to achieving a legitimate purpose under the ICCPR, being the safety of the Australian community and integrity of the migration programme. Further, the re-detention of unlawful non-citizens who are brought back to the migration zone will also

> be for the legitimate purpose of completing their removal from Australia under section 198 of the Migration Act.[1]

1.144 The committee considers that ensuring the safety of Australians is a legitimate objective for the purpose of international human rights law. However, the statement of compatibility does not explicitly explain how the measures are rationally connected to that objective, nor how they are proportionate. In particular, it is unclear whether there are sufficient safeguards to ensure that the detention of persons after their return to Australia following an unsuccessful return to their home country will not lead to cases of arbitrary detention.

1.145 The statement of compatibility notes that:

> The Australian Government's position is that the detention of individuals is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, detention that is not "arbitrary" must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.[2]

1.146 However, the committee notes the UN Human Rights Committee (HRC) decision concerning the continued detention of 46 refugees subject to adverse ASIO security assessments. The HRC found that their indefinite detention on security grounds amounted to arbitrary detention and to cruel, inhuman or degrading treatment, contrary to articles 9(1), 9(4) and 7 of the ICCPR. The HRC considered the detention of the refugees to be in violation of the right to liberty in article 9 of the ICCPR because the government:

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.[3]

1 Explanatory Memorandum (EM), Attachment A [43].

2 EM, Attachment A [43].

3 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

1.147 Accordingly, it is the blanket and mandatory nature of detention for those who have been refused a visa but to whom Australia is unable to remove from Australia and so remain in indefinite immigration detention, that makes such detention arbitrary. In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that invokes the right to liberty in article 9 of the ICCPR.

1.148 The committee agrees that the safety of the Australian community, particularly in the current security environment, may be considered to be both a pressing and substantial concern and a legitimate objective. However, as mandatory detention applies to individuals regardless of whether they are a threat to national security, the measure does not appear to be rationally connected to achieve this objective and may not be proportionate because it is not the least rights restrictive approach to achieve the legitimate objective.

1.149 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measure is justifiable under international human rights law.**

1.150 **As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular, is it the least rights restrictive approach that could be taken in order to achieve the stated objective.**

Non-refoulement obligations

1.151 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[4] This means that Australia must not return any person to a

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[5]

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

1.153 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[6]

1.154 Australia gives effect to its non-refoulement obligations principally through the Migration Act.

Compatibility of the measure with the right to non-refoulement

1.155 The statement of compatibility notes that the amendments:

> may lead to an unlawful non-citizen being ineligible to make a further application for a protection visa, however, Australia's implementation of the below obligations are complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Migration Act to grant a visa.[7]

1.156 The statement of compatibility also notes that:

> My department recognises that these non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. However, the form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government.[8]

1.157 The committee's long-standing view is that the minister's non-compellable powers are an insufficient protection against non-refoulement and that international law is clear that administrative arrangements are insufficient to protect against unlawful refoulement.

1.158 The obligation of non-refoulement and the right to an effective remedy require an opportunity for effective, independent and impartial review of the

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

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

7 EM, Attachment A [43].

8 EM, Attachment A [44].

decision to expel or remove.[9] In this regard, the committee notes that there is no right to merits review of a decision that is made personally by the minister.

1.159 In relation to this, treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. For example, the UN Committee against Torture in *Agiza v. Sweden* found:

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[10]

1.160 Similarly, the UN Committee against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[11]

1.161 In relation to the ICCPR, in *Alzery v. Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel

9 See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

10 Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7].

11 *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000.

> in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[12]

1.162 As the committee has noted previously, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[13] The committee notes that review mechanisms are important in guarding against the irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

1.163 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.164 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Obligation to consider the best interests of the child

1.165 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[14]

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

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12 Mohammed Alzery v. Sweden, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006)) [11.8].

13 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament* (2 February 2015), paras 1.89 to 1.99. See also *Fourth Report of the 44th Parliament* (18 March 2014) paras 3.55 to 3.66 (both relating to the Migration Amendment (regaining Control Over Australia's Protection Obligations) Bill 2013).

14 Article 3(1).

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

1.167 As set out above, the measures in Schedule 1 of the bill have the effect of denying a person who has been unsuccessfully removed from Australia from making further applications for a protection visa. The fact that the person has been refused entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. These measures would also apply to children. Accordingly, it is necessary to consider how it would be in a child's best interests to be denied the right to make a new protection visa application where they had been refused entry by their home country. The engagement of the measures in Schedule 1 with the obligation to consider the best interests of the child is not considered in the statement of compatibility.

1.168 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,[15] 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'.[16] 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.

1.169 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with the rights of the child.**

1.170 **As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, limits the obligation to**

15 Appendix 2; 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.

16 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.

consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child and, particularly:

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

Expansion of visa cancellation powers

1.171 Schedule 2 of the bill includes amendments which the Explanatory Memorandum (EM) describes as 'technical and consequential amendments arising out of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (the Character Act).'[17] The Character Act introduced new powers to refuse or cancel visas on 'character' grounds. The Character Act has the effect of automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more, or was convicted of a sexually based offence involved a child. The Character Act also creates new personal ministerial powers to reverse decisions made by the Administrative Appeals Tribunal or an officer of the department. In addition, the Character Act significantly decreased the threshold under which a person would fail the 'character test' and increased the Minister's powers to cancel visas on the basis of incorrect information.

1.172 When considering the bill that became the Character Act, the committee considered that it engaged a number of human rights and related obligations.[18] Schedule 2 of the bill now makes a number of amendments to the new cancellation powers introduced by the Character Act which reduce procedural safeguards, including amendments that:

- do not require a person in detention to be informed that they have only two working days to apply for a visa after they have had their visa cancelled by the minister personally under section 501BA;[19]
- require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or if the visa decision is unlawful;[20]

17 EM 14.

18 See Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 13-28.

19 Item 8, Schedule 2.

- extends a ban on most further visa applications in cases where the minister has personally cancelled a visa;[21]
- automatically cancel or refuse any other visas in cases where the minister has personally set aside a decision by the Administrative Appeals Tribunal or a departmental officer;[22] and
- exclude a person for a prescribed time from entering Australia who has a visa refused or cancelled personally by the minister under sections 501B, or 501BA.[23]

1.173 The committee considers that the changes in Schedule 2 widen the circumstances in which a person may be subject to immigration detention, visa cancellation and potential refoulement. Accordingly, Schedule 2 engages the following rights and obligations:

- non-refoulement obligations;
- the right to liberty;
- the right to freedom of movement;
- the obligation to consider the best interests of the child; and
- the right to equality and non-discrimination.

1.174 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Right to liberty

1.175 The right to liberty is described above at paragraphs [1.141] to [1.142].

Compatibility of the measures with the right to liberty

1.176 The statement of compatibility explains that the measures in Schedule 2 engage but do not limit the right to liberty. The reasoning behind this conclusion is unclear in the statement of compatibility.

1.177 The statement of compatibility nevertheless goes on to explain why any limitation on the right to liberty is justified. In terms of the legitimate objective of the measures the statement of compatibility notes:

> While this Bill widens the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act, these amendments present a reasonable response to achieving a

20 Item 9, Schedule 2.

21 Item 18, Schedule 2.

22 Item 19, Schedule 2.

23 Item 20, Schedule 2.

> legitimate purpose under the ICCPR – the safety of the Australian community and integrity of the migration programme.[24]

1.178 The committee considers that ensuring the safety of Australians is a legitimate objective for the purpose of international human rights law. However, it is unclear whether these amendments are rationally connected to that objective. In terms of proportionality the statement of compatibility states that:

> questions of proportionality are resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a non-citizen's visa, or whether to revoke a mandatory cancellation decision.[25]

1.179 However, there is no discretion once a visa is cancelled or if it is cancelled automatically by operation of the provisions of the Migration Act. Moreover, a decision to revoke mandatory cancellation can only be made by the minister using his personal, non-compellable, discretionary powers.

1.180 The statement of compatibility notes that:

> The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law. The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[26]

1.181 However, none of these mechanisms entail a statutory requirement for periodic review of the necessity of immigration detention in each individual case. As noted above at paragraphs [1.146] to [1.147], it is the blanket and mandatory nature of detention for those who have been refused a visa but who remain in immigration detention that makes such detention arbitrary. In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that invokes the right to liberty in article 9 of the ICCPR.

1.182 The statement of compatibility also notes that:

> The United Nations Human Rights Committee has expressed a view that Article 9(2) of the ICCPR requires all persons deprived of their liberty to be informed of the reasons for their detention. This Bill proposes provisions to the effect that a non-citizen who has had a visa cancelled by the

24 EM, Attachment A [43].

25 EM, Attachment A [48].

26 EM, Attachment A [49].

> Minister personally under section 501BA does not need to be informed of sections 195 and 196 of the Migration Act, which provide that they may only apply for a visa within 2 working days and their detention will continue until they are removed, deported, or granted a visa. However, a non-citizen who has their visa cancelled under section 501BA will have previously had their visa cancelled under section 501, and so will have been detained under section 189 and informed of sections 195 and 196 at that point. Further, the Department complies with Article 9(2) through the Very Important Notice (Form 1423) that is given to all non-citizens on their detention under section 189 of the Migration Act. This form provides comprehensive information to detainees about their detention, visas they may apply for, their personal property and where to find more information.[27]

1.183 The committee notes that no specific explanation is provided for why the bill includes amendments that a non-citizen who has had a visa cancelled by the minister personally under section 501BA does not need to be informed that they may only apply for a visa within 2 working days. Moreover, given the time critical nature of a person's response to cancellation, no justification is provided as to how it is sufficient that such information will have been provided previously in a different context, particularly given the very serious consequences for the individual concerned and given their pre-existing vulnerability as a person in detention. It is unclear how this amendment is necessary or reasonable.

1.184 Returning to Schedule 2 as a whole, the committee accepts that the safety of the Australian community, particularly in the current security environment, may be considered to be both a pressing and substantial concern and a legitimate objective. However, as mandatory detention applies to individuals regardless of whether they are a threat to national security, the measure does not appear to be rationally connected to this objective and may not be proportionate as it is not likely to be the least rights restrictive approach to achieve the legitimate objective.

1.185 **The committee's assessment of the proposed expansion of visa cancellation powers against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measures are justifiable under international human rights law.**

1.186 **As set out above, the expansion of visa cancellation powers limits the right to liberty. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is a rational connection between the limitation and the stated objective; and**

27 EM, Attachment A [48].

- **whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective.**

Non-refoulement obligations and the right to an effective remedy

1.187 Australia's non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measures with Australia's non-refoulement obligations

1.188 The statement of compatibility notes that the amendments:

> may lead to an unlawful non-citizen being ineligible to make a further application for a protection visa, however, Australia's implementation of the below obligations are complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Migration Act to grant a visa.[28]

1.189 The statement of compatibility also notes that:

> My department recognises that these non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. Non-refoulement obligations are considered as part of a section 501 decision not to revoke cancellation of a visa under character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the cancellation consideration will not be removed in breach of those obligations. There are a number of personal non-compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government.[29]

1.190 As set out above in relation to Schedule 1 at paragraphs [1.157] to [1.162] the committee's view is that the minister's non-compellable powers are an insufficient protection against non-refoulement and that international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

1.191 Where the processes identified as a safeguard against refoulement involve purely administrative and discretionary mechanisms, these are insufficient, on their own, to comply with Australia's non-refoulement obligations.

1.192 **The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of**

28 EM, Attachment A [50].

29 EM, Attachment A [50].

the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.193 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Right to freedom of movement

1.194 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

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

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

Compatibility of the measures with the right to freedom of movement

1.197 The committee notes that the expanded visa cancellation powers, in widening the scope of people being considered for visa cancellation, may lead to more permanent residents having their visas cancelled and potentially being deported from Australia.

1.198 The statement of compatibility states that freedom of movement is engaged by the provisions but only considers this right in relation to the right to move freely around Australia (in the context of the immigration detention). The statement of compatibility considers that the limitation is justified in these contexts.

1.199 The statement of compatibility does not address the broader issue of whether using any of the expanded visa cancellation powers to cancel the visa of a permanent resident, who has lived for many years in Australia and has strong ties with Australia, and banning them from ever returning to Australia, is consistent with the right to freedom of movement.

1.200 The UN Human Rights Committee (HRC) has interpreted the right to freedom of movement under article 12(4) of the ICCPR as applying to non-citizens where they

had sufficient ties to a country, and indeed noted that 'close and enduring connections' with a country 'may be stronger than those of nationality'.[30]

1.201 The HRC's views are not binding on Australia as a matter of international law. Nevertheless, the HRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. Moreover, these statements of the HRC in relation to article 12(4) are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[31]

1.202 In addition, the words of article 12(4) do not make any reference to a requirement of 'citizenship' or 'nationality' but instead use the phrase 'own country'. In interpreting these words according to their 'ordinary meaning' as required by the VCLT, the phrase 'own country' clearly may be read as a broader concept than the terms 'citizenship' or 'national'.

1.203 Article 32 of the VCLT provides that in the interpretation of treaties recourse may be had to supplementary means of interpretation in circumstances where the meaning is ambiguous or unreasonable. Supplementary means of interpretation include the preparatory work of a treaty, such as the negotiating record or *travaux préparatoires*. The committee notes that the *travaux préparatoires* for article 12(4) show that the terms 'national' and 'right to return to a country of which he is a national' were expressly considered and rejected by states during the negotiation of the ICCPR.

1.204 The *travaux préparatoires* for article 12(4) also show that Australia expressed concern during the negotiations about a right of return for persons who were not nationals of a country but who had established their home in that country (such as permanent residents in the Australian context). Accordingly, the phrase 'own country' was proposed by Australia as a compromise, and the right to enter one's

30 Views: *Nystrom v. Australia* Communications No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('Nystrom'). This was subsequently affirmed by the HRC in *Warsame,* UN Doc CCPR/C/102/D/1959/2010.

31 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

'own country' rather than the right to return to a country of which one is a 'national' was agreed in the final text of the ICCPR.[32]

1.205 In this context, the right to return to one's 'own country' applies to persons who are not nationals, but have strong links with Australia. As such, the measures in the bill in expanding the visa cancellation powers and the power to ban people from returning to Australia engage and limit the right of a person to return to one's own country. This has not been justified in the statement of compatibility.

1.206 **The committee's assessment of the proposed expansion of visa cancellation powers, including barring a person from applying for other visas, against article 12(4) of the International Covenant on Civil and Political Rights (freedom of movement—right to enter one's own country) raises questions as to whether the measures are justifiable under international human rights law.**

1.207 **As set out above, the expansion of visa cancellation powers limits the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether 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.**

Best interests of the child

1.208 The obligation to consider the best interests of the child is described above at paragraph [1.165] to [1.166].

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

1.209 As set out above, the Character Act introduced provisions automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more. The bill makes a number of amendments to the new cancellation powers introduced by the Character Act which reduce procedural safeguards. The measures will apply to children who are convicted of an offence and imprisoned for a sentence of 12 months or more. The cancellation of a child's visa on the grounds of character raises questions as to how the obligation to consider the best interests of

32 See Right to enter one's country, Commission on Human Rights, 5th Session (1949), Commission on Human Rights, 6th Session (1950), on Human Rights, 8th Session (1952) 261 in Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987) 261.

the child is considered as part of the visa cancellation process, when the visa being cancelled is held by a child.

1.210 This obligation to consider the best interests of the child is discussed in the statement of compatibility, however, it is unclear whether this analysis is focused on the children of adults who have their visa cancelled on character grounds or children whose visas are directly cancelled on character grounds.

1.211 The procedure for automatic loss of a visa does not appear to provide for a consideration of the best interests of the child, as the provision applies automatically to those who have been convicted of an offence and sentenced to more than 12 months imprisonment. The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the conduct in accordance with normative standards of Australian law. It does not take into account whether the loss of their visa and right to stay in Australia would be in the best interests of the child given their particular circumstances.

1.212 As set out above, the committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.213 **The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.214 **As set out above, the expansion of visa cancellation powers limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the best interests of the child and, particularly:**

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

Right to equality and non-discrimination (rights of persons with disabilities)

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

1.216 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.

1.217 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[33] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[34] 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.[35]

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

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

1.220 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Compatibility of the measure with the right to equality and non-discrimination (rights of persons with disabilities)

1.221 Individuals with mental health concerns are significantly overrepresented in Australia's prison system.[36] Accordingly, the bill, in extending the automatic visa

33 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.

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

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

36 Australian Institute of Health and Welfare, *The mental health of prison entrants in Australia,* Bulletin 104, June 2012, available from http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198.

cancellation of individuals sentenced to 12 months or more in prison is likely to disproportionately affect individuals with mental health concerns. Mental health disorders are a disability for the purposes of the CRPD and thus a protected attribute for the purposes of the right to equality and non-discrimination.

1.222 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. 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. However, 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 persons with disabilities, and if so, if such a disproportionate effect is justifiable.

1.223 The statement of compatibility makes no reference to the rights of persons with disabilities. As stated above, 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 and is rationally connected to, and a proportionate way to achieve, its stated objective. In this regard, the committee notes that with appropriate health care and support, many individuals who commit offences while suffering mental health issues are less likely to reoffend. These individuals are therefore less likely to be a national security concern.

1.224 **The committee's assessment of the proposed expansion of visa cancellation powers against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights, and article 5 of the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.225 **As set out above, the expansion of visa cancellation powers may limit the right to equality and non-discrimination on the basis of disability. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the right to equality and non-discrimination and, particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

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

Bars on further applications by children and persons with a mental impairment

1.226 Section 48A of the Migration Act provides that a non-citizen who, while in the migration zone, has made an application for a protection visa that was refused, or who held a protection visa that was cancelled, may not make a further application for a protection visa. Section 48A was amended in 2014 by the *Migration Amendment Act 2014* (the MA Act) and the *Migration Legislation Amendment Act (No.1) 2014* (the MLA Act).

1.227 The MA Act prevented a further application even if the second application was based on different protection grounds. The MLA prevented a further application even if, at the time of the first application, the person was a child or unable to understand the application (for example, due to their mental health).

1.228 The effect of this bill would be to ensure that the bar on further applications applies even if the person is both a child (for example) and makes an application on different protection grounds.

1.229 The committee considered that the MLA engaged Australia's non-refoulement obligations, the obligation to consider the best interests of the child, the right of the child to be heard in judicial and administrative proceedings, the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity, and the right to equality and non-discrimination. The amendments in this bill ensure that the amendments in the MLA also apply in circumstances where the individual may wish to apply for a protection visa on a different substantive ground and, as such, the bill further restricts access to a protection visa. Accordingly, this bill also engages these rights.

1.230 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Non-refoulement obligations and the right to an effective remedy

1.231 Australia non-refoulement obligations are described above at paragraphs [1.97] to [1.100].

Compatibility of the measures with Australia's non-refoulement obligations

1.232 The statement of compatibility notes that while the amendments:

> …engages rights under the CAT and the ICCPR, the amendment does not remove the opportunity of persons to make claims for protection as against these rights or to have those claims assessed.[37]

1.233 The statement of compatibility also notes that:

37 EM, Attachment A [55].

> …where a person who has previously had a protection visa application refused (including where the application was made by another authorised person on their behalf) now raises protection claims relying on a different ground to the one(s) on which the previous application was based, the Minister has personal power under section 48B of the Migration Act to intervene to allow a further protection visa application to be made in the public interest. For example, if a person was a minor at the time the previous protection visa application was made on their behalf (i.e. by being included in their parent's protection visa application as a member of the same family unit of the parent), and now as an adult the person has protection claims of their own, the Minister may exercise his or her personal power under section 48B to enable the person to make a new protection visa application so that their personal claims, which were not raised or assessed previously, can be assessed.[38]

1.234 As set out above at paragraphs [1.157] to [1.162] in relation to Schedule 1, the minister's personal, non-compellable powers are an insufficient protection against non-refoulement and that international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

1.235 Where the processes identified as a safeguard against refoulement involve purely administrative and discretionary mechanisms, these are insufficient, on their own, to comply with Australia's non-refoulement obligations. The committee therefore considers that the amendments could increase the risk of Australia breaching its non-refoulement obligations.

1.236 **The committee's assessment of the proposed bar on further applications by children and persons with a mental impairment against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.237 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.**

Obligation to consider the best interests of the child

1.238 The obligation to consider the best interests of the child is described above at paragraphs [1.165] to [1.166].

38 EM, Attachment A [55].

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

1.239 As noted above, the bill would prevent a child from making a further protection visa application even in circumstances where allowing the visa application would likely be in their best interests (such as where they had a valid independent protection claim).

1.240 This obligation is not addressed in the statement of compatibility. The committee notes that when the provisions were first included in the MLA the committee concluded that the measures were likely to be incompatible with the obligation to consider the best interests of the child.

1.241 As set out above, 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 and is rationally connected to, and a proportionate way to achieve, that objective.

1.242 **The committee's assessment of the proposed bar on further applications by children and persons with a disability against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.243 **As set out above, extending the bar on further applications by children limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly:**

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

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

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

1.245 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either

directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Compatibility of the measures with the right of the child to be heard in judicial and administrative proceedings

1.246 The amendments in Schedule 3 further limit the ability of children to make a subsequent visa application on alternative protection grounds even where they did not contribute to or consent to the first application.

1.247 When the MLA was introduced the committee noted that the effect of the proposed amendments in Schedule 1 was to create an assumption, in cases involving a subsequent visa application by a child, that the previous visa application made on behalf of the child was valid. This assumption would apply without a consideration of the age of the child, their relationship with the person who made the application on their behalf, or an individual assessment of the extent to which the application was consistent with the wishes of the child. In the committee's view, to effectively deem the previous application as valid without considering these factors represented a limitation on the right of the child to contribute to, or be heard in, judicial and administrative proceedings. The measures in this bill further limit a child's ability to make a subsequent visa application and thus further restrict the rights of the child. This right is not addressed in the statement of compatibility.

1.248 **The committee's assessment of the proposed bar on further applications by children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.249 **As set out above, extending the bar on further applications by children and persons with a disability, limits the right of the child to be heard in judicial and administrative proceedings. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of the child to be heard in judicial and administrative proceedings and, particularly:**

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

Right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity

1.250 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires states to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Compatibility of the measures with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity

1.251 As set out above, the bill provides that the bar on further applications applies even if the person is both a person with a mental impairment and makes an application on different protection grounds. The right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity is not addressed in the statement of compatibility. The committee notes that it previously considered the MLA amendments which introduced these restrictions were likely to be incompatible with the rights of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

1.252 Persons with intellectual and mental impairment may be particularly at risk as asylum-seekers. Article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. The UN Committee on the Rights of Persons with Disabilities has considered the basis on which a person is often denied legal capacity, which includes where a person's decision-making skills are considered to be deficient (known as the functional approach). It has described this approach as flawed:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[39]

39 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 15.

1.253 If a person with an intellectual or mental impairment is not provided with the support required to make an informed decision about lodging a visa application and is then barred from making a subsequent visa application because an application had been lodged 'on their behalf' but without the participation of the person in that decision-making process (and on different protection grounds), this limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. This was not addressed in the statement of compatibility.

1.254 **The committee's assessment of the proposed bar on further applications by persons with a mental impairment against article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) (right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.**

1.255 **As set out above, extending the bar on further applications by persons with a mental impairment limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity and, particularly:**

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

Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 21 October 2015

Purpose

1.256 The Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to:

- increase family tax benefit (FTB) Part A fortnightly rates by $10.08 for each FTB child in the family up to 19 years of age;
- restructure FTB Part B by increasing the standard rate by $1000.10 per year for families with a youngest child aged under one; introducing a reduced rate of $1000.10 per year for single parent families with a youngest child aged 13 to 16 years of age and extending the rate to couple grandparents with an FTB child in this age range; and removing the benefit for couple families (other than grandparents) with a youngest child 13 years of age or over; and
- phase out the FTB Part A and Part B supplements.

1.257 The bill also seeks to amend the *Social Security Act 1991* to increase certain youth allowance and disability support pension fortnightly rates by approximately $10.44 for recipients under 18 years of age.

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

Background

1.259 Similar amendments to the FTB Part B reforms in the bill were previously introduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014, which the committee considered in its *Ninth Report of the 44th Parliament* and *Twelfth Report of the 44th Parliament*.[1]

Reduced rate of Family Tax Benefit Part B

1.260 Schedule 2 of the bill would reduce the rate payable of FTB Part B for single parent families with a youngest child aged 13 to 16 to $1,000.10 per year (currently $2,737.50) and would remove FTB Part B for couple families (other than grandparents) with a youngest child aged 13 or over.

1.261 The committee considers that these changes to FTB Part B engages and limits the right to social security and right to an adequate standard of living.

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83-99; and Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67-83.

Right to social security

1.262 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.

1.263 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).

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

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

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

Compatibility of the measure with the right to social security

1.266 The statement of compatibility explains that the measures engage the right to social security. The statement of compatibility states that:

> The objective of the family payment reform measures is to ensure that the family payments system remains sustainable in the long term. The United Nations Committee on Economic, Cultural and Social Rights recognises that a social security scheme should be sustainable, and that the conditions for benefits must be reasonable and proportionate.[2]

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

1.267 While ensuring the sustainability of the social security scheme is likely to be a legitimate objective for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. 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. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme.

1.268 In terms of the proportionality of the measure, the statement of compatibility states that:

> For families with older children, family tax benefit Part B will be better targeted, encouraging parents to participate in the workforce when care requirements are reduced. Single parents and couple grandparents will continue to access a rate of Part B until the end of the calendar year in which their youngest child turns 16, recognising that these families may have fewer resources to meet living costs.[5]

1.269 No information is provided as to the impact of these changes on families and how those families will meet their living expenses with the reduced rates of FTB Part B or how the measures have been targeted to avoid undue economic hardship. No information is provided as to why the changes to FTB Part B are structured around the age of the child and not the income of the family. Accordingly, no information is provided as to how the measure is the least rights restrictive way of achieving a legitimate objective.

1.270 **The committee's assessment of the reduced rate of family tax benefit Part B for single income families against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the measure is a justifiable limitation on that right.**

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3 Appendix 2; 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.

5 EM, SoC, 4.

1.271 **As set out above, the reduced rate of family tax benefit Part B for single income families engages and limits the right to social security. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Service as to:**

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

Right to an adequate standard of living

1.272 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.

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

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

1.274 For some low income families receipt of FTB Part B may be important in realising an adequate standard of living. The measure, in reducing (or removing) FTB Part B for families with the youngest child aged 13 to 16, may engage and limit the right to an adequate standard of living.

1.275 The statement of compatibility does not specifically address how the measures are compatible with the right to an adequate standard of living, though notes that:

> Families with low incomes will also continue to receive ongoing assistance through various Australian Government payments, which will assist them in maintaining an adequate standard of living.[6]

1.276 However, family tax payments are an integral part of Australia's social welfare scheme and critical for many families to provide an adequate standard of living.[7]

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6 EM, SoC, 4.

7 ABS, *Household Income and Wealth, Australia, 2013-14,* 4 September 2015, available from http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6523.0Explanatory%20Notes12013-14?opendocument&tabname=Notes&prodno=6523.0&issue=2013-14&num=&view=

1.277 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,[8] 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'.[9] 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.

1.278 **The committee's assessment of the reduced rate of family tax benefit Part B for single income families against article 11(1) of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living) raises questions as to whether the measure is compatible with human rights.**

1.279 **As set out above, the reduced rate of family tax benefit Part B for single income families engages and may limit the 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 Minister for Social Service 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.**

Removal of family tax benefit supplements

1.280 Schedule 3 of the bill would phase out the FTB Part A supplement by reducing it to $602.25 a year from 1 July 2016 and to $302.95 a year from 1 July

8 Appendix 2; 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.

9 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.

2017, before withdrawing it entirely from 1 July 2018. The FTB Part B supplement will be reduced to $302.95 a year from 1 July 2016 and to $153.30 a year from 1 July 2017, before also being withdrawn from 1 July 2018.

1.281 The FTB Part A and B supplements are components of the rate of family tax benefit, and are added into the rate after the end of the relevant income year when certain conditions are satisfied.

1.282 The committee considers that the removal of family tax benefit supplements engages and limits the right to social security and right to an adequate standard of living.

Right to social security

1.283 The right to social security is contained within article 9 of the ICESCR. More information is set out above at paragraphs [1.262] to [1.265].

Compatibility of the measure with the right to social security

1.284 The statement of compatibility notes that the measure engages the right to social security and explains that the measures are nevertheless justified.

1.285 In terms of the legitimate objective of the measures, the statement of compatibility notes that:

> The United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable and that the conditions for benefits must be reasonable, proportionate and transparent. This right is engaged by the reduction and eventual removal of the end-of-year supplements for family tax benefit Part A and family tax benefit Part B. However, this limitation is necessary and proportionate to the legitimate aim of ensuring that family tax benefit as a social security scheme continues to be sustainable.[10]

1.286 However, as noted above in relation to Schedule 2 of the bill, while ensuring the sustainability of the social security scheme is likely to be a legitimate objective for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme.

1.287 In terms of proportionality the statement of compatibility notes that:

> Families affected by this measure are still eligible to receive fortnightly payments of family tax benefit to assist with the costs of raising children.

10 EM, SoC 5.

1.288 While the continued availability of family tax benefit will be important for many families, this does not explain why removing the family tax benefit supplement for all families (regardless of income) is proportionate.

1.289 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.290 **The committee's assessment of the removal of family tax benefit supplements against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the measure is compatible with human rights.**

1.291 **As set out above, the removal of family tax benefit supplements engages and limits the right to social security. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Service as to:**

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

Right to an adequate standard of living

1.292 The right to an adequate standard of living is contained within article 11(1) of the ICESCR. More information is set out above at paragraphs [1.272] to [1.265].

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

1.293 The statement of compatibility explains that the measure engages the right to an adequate standard living. However, the statement of compatibility does not specifically address how the measure is compatible with the right to an adequate standard of living, though it notes that:

> Families affected by this measure are still eligible to receive fortnightly payments of family tax benefit to assist with the costs of raising children. The purpose of these fortnightly payments is to ensure an adequate standard of living for Australian children.[11]

11 EM, SoC 5.

1.294 As noted above in relation to the right to social security, while the continued availability of family tax benefit will be important for many families, this does not explain why removing the family tax benefit supplement for all families is proportionate.

1.295 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.296 **The committee's assessment of the removal of family tax benefit supplements against article 11(1) of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living) raises questions as to whether the measure is compatible with human rights.**

1.297 **As set out above, the removal of family tax benefit supplements 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 Minister for Social Services as to:**

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

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]

Portfolio: Employment
Authorising legislation: Fair Work (Building Industry) Act 2012
Last day to disallow: 3 December 2015 (Senate)

Purpose

1.298 The Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the instrument) amends the Building Code 2013 (the Code). The amendments require building contractors or building industry participants to show the ways in which they are managing drug and alcohol issues in the workplace in their work health safety and rehabilitation (WHS&R) management systems. For certain types of building work, to which the Commonwealth is making a significant contribution, building contractors and industry participants must also include a fitness for work policy to manage alcohol and other drugs in the workplace in their management plan for WHS&R.

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

Alcohol and drug testing of construction workers

1.300 Schedule 3 of the instrument sets out requirements relating to drug and alcohol testing that a fitness for work policy must address.

1.301 The committee considers that establishing a policy framework for testing workers for drugs and alcohol engages and limits the right to privacy.

1.302 The committee also considers the instrument engages the rights of persons with disabilities under the Convention on the Rights of Persons with Disabilities, as drug and alcohol dependency is a disability under international human rights law. However, the committee considers that any limitation on such rights is likely to be justifiable.

Right to privacy

1.303 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and

- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measure with the right to privacy

1.304 The statement of compatibility acknowledges that drug and alcohol testing implemented under the instrument engages the right to privacy. The statement of compatibility states that drug and alcohol testing is 'legitimate to seek to eliminate the risk that employees might come to work impaired by alcohol or drugs such that they could pose a risk to health and safety'[1] and that:

> To the extent that drug and alcohol testing implemented in accordance with the amending instrument may limit a person's right to privacy, the limitation is reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the right to safe and healthy working conditions for all workers.[2]

1.305 The committee considers that drug and alcohol-free workplaces are important in a building and construction context and the measures are likely to be considered as pursuing a legitimate objective for the purposes of international human rights law.

1.306 The committee also considers that the measures are rationally connected to that objective, in that drug and alcohol testing policies may encourage compliance with the prohibition on drugs and alcohol in the workplace.

1.307 However, it is unclear whether the policy framework for drug and alcohol policies is proportionate to achieving that objective as, under the policy, there does not appear to be any safeguards required to be put in place to protect the privacy of individuals who are subject to testing.

1.308 The fitness for work policy set out in the instrument does not include any requirements relating to how drug and alcohol tests are to be conducted, whether any blood, hair or saliva samples might be taken in order to conduct the test, the procedure for managing test results, and how long samples or records of the testing will be retained.

1.309 Additionally, the policy framework does not include requirements that the testing has to be done in the least personally intrusive manner or that the records be destroyed after a certain period of time.

1.310 The taking and retention of bodily samples for testing purposes can contain very personal information. The international jurisprudence has noted that genetic information contains 'much sensitive information about an individual' and given the nature and amount of personal information contained in cellular samples 'their

1 Explanatory Statement (ES) 3.

2 ES 3.

retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned'.[3]

1.311 The instrument is silent as to whether such samples will be retained and the committee is unaware whether there is other existing legislation that would govern the retention and destruction of samples taken in accordance with drug and alcohol policies as required by the instrument.

1.312 This issue was not addressed in the statement of compatibility. 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, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.313 **The committee's assessment of the policy framework for the drug and alcohol testing for construction workers against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether there are effective safeguards in place to protect the privacy of individuals who are subject to drug and alcohol testing in accordance with the policies required by the instrument.**

1.314 **As set out above, the instrument engages and limits the right to privacy. 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 Employment as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether there are sufficient safeguards in place to protect the right to privacy.**

3 *S and Marper v UK*, ECtHR, 4 December 2008, paras 72 and 73.

Fair Work (State Declarations — employer not to be national system employer) Endorsement 2015 (No. 1) [F2015L01420]

Portfolio: Employment
Authorising legislation: Fair Work Act 2009
Last day to disallow: This instrument is exempt from disallowance (see subsection 14(5) of the Fair Work Act 2009)

Purpose

1.315 This instrument endorses a declaration by the New South Wales (NSW) government that Insurance and Care NSW is not a national system employer for the purposes of section 14(2) of the *Fair Work Act 2009* (Fair Work Act).

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

Background

1.317 Section 14(1) of the Fair Work Act provides that a national system employer means any of the following in its capacity as an employer of an individual:

- a constitutional corporation;
- the Commonwealth or a Commonwealth authority;
- a person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce;
- a body corporate incorporated in a territory; or
- a person who carries on an activity in a territory and employs a person in connection with the activity.

1.318 A national system employee is an individual employed by a national system employer (section 13 of the Fair Work Act).

1.319 The Parliaments of Victoria, South Australia, Tasmania, Queensland and New South Wales referred power to the Commonwealth Parliament to extend the Fair Work Act to employers and their employees in these states that are not already covered by sections 13 and 14. Division 2A and Division 2B of Part 1-3 of the Fair Work Act give effect to state workplace relations references by extending the meaning of national system employee and national system employer (sections 30C, 30D, 30M and 30N of the Fair Work Act).

1.320 Section 14(2) of the Fair Work Act allows states and territories to declare (subject to endorsement by the Commonwealth Minister) that certain employers over which the Commonwealth would otherwise have jurisdiction are not national system employers.

1.321 The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant state or territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave and which apply to employers and employees nationally, will continue to apply.

1.322 This instrument endorses a declaration made under the *Industrial Relations Act 1996* (NSW) that Insurance and Care NSW is not a national system employer, commencing 9 September 2015.

Alteration of persons' workplace relations arrangements

1.323 The instrument, in removing Insurance and Care NSW as a national system employer generally subject to the Fair Work Act, will instead see employees of Insurance and Care NSW subject to the workplace relations arrangements prescribed by NSW, and so engages and may limit the right to just and favourable conditions of work.

Right to just and favourable conditions of work

1.324 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1]

1.325 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;

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

- 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.

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

Compatibility of the measure with the right to just and favourable conditions of work

1.328 The instrument is not accompanied by a statement of compatibility as the instrument is not specifically required to have such a statement under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). However, the committee's role under section 7 of the Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

1.329 The explanatory statement to the instrument states:

> The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant State or Territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave and which apply to employers and employees nationally, will continue to apply.[2]

1.330 The committee notes that to the extent that the NSW workplace relations arrangements could be less generous than the arrangements under the Fair Work Act, the measure in the instrument may be regarded as a retrogressive measure.

1.331 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to just and favourable conditions of work. A lessening in workplace relations arrangements available to an employee may therefore be a retrogressive measure for human rights purposes. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified. That is, it addresses a legitimate objective, it is rationally connected to that objective and it is a proportionate means of achieving that objective.

1.332 **The committee's assessment of the instrument against the International Covenant on Economic, Social and Cultural Rights (ICESCR) raises questions as to**

2 Explanatory Statement (ES) 2.

whether the instrument promotes or limits the right to just and favourable conditions of work.

1.333 **The committee therefore seeks the advice of the Minister for Employment as to the existence of any differences between the workplace relations arrangements under the *Fair Work Act 2009* and those under NSW law and whether the instrument promotes or limits the right to just and favourable conditions of work.**

Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 3 December 2015 (Senate)

Purpose

1.334 The Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 (the regulation) amends the Migration Regulations 1994 to confirm that the effect of regulation 2.08F is to provide that any application made by certain visa applicants for a Permanent Protection Visa (PPV) will be converted into an application for a Temporary Protection Visa (TPV).

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

Background

1.336 The instrument concerns the operation of regulation 2.08F of the Migration Regulations 1994. This regulation was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act), which commenced on 16 December 2014.

1.337 The committee considered the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the 44th Parliament*.[1]

Conversion of permanent protection visa applications into temporary protection visa applications

1.338 The regulation amends regulation 2.08F of the Migration Regulations 2004, which provides that certain applications for a PPV made before 16 December 2014 are to be converted to applications for a TPV. The amendment will affect persons whose application for a PPV was made before 16 December 2014 and:

- has been the subject of a court order requiring the minister to reconsider the application;
- has been remitted to the minister for reconsideration by the Administrative Appeals Tribunal; or
- had not been decided by the minister before 16 December 2014 (due to, for example, a remittal from the Administrative Appeals Tribunal or a court).

1.339 The effect of the conversion is that people covered by the amendment who have applied for a PPV will be considered to have never applied for a PPV and will be

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

taken to have applied for a TPV, and will only be granted temporary protection in Australia if found to engage Australia's protection obligations.

1.340 The regulation, in converting PPV applications to TPV applications, engages a number of human rights, including non-refoulement obligations; the right to health; the right to protection of the family; the obligation to consider the best interests of the child and the right to freedom of movement. These rights are considered in detail below.

Non-refoulement obligations

1.341 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[2] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

1.343 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[4]

1.344 Australia gives effect to its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa.

Compatibility of the measure with non-refoulement obligations

1.345 The changes under the regulation provide for the conversion of existing applications for PPVs into applications for TPVs.

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2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

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

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

1.346 TPVs are granted for a period of up to three years at one time, rather than being permanent as is the case with PPVs.[5] The statement of compatibility acknowledges that TPVs engage Australia's non-refoulement obligations, but states that the amendments:

> … will not result in the return or removal of persons found to engage Australia's protection obligations in contravention of its non-refoulement obligations. The position of the Government has always been that grant of a protection visa is not the only way of giving protection to persons who engage Australia's protection obligations, and that grant of a temporary visa is a viable alternative.[6]

1.347 However, TPVs require refugees to prove afresh their claims for protection every three years. The international legal framework does provide for the cessation of refugee status or protection obligations where, for example, the conditions in the person's country of origin have materially altered such that the reasons for a person becoming a refugee have ceased to exist. However, as noted by the the United Nations High Commissioner for Refugees, the international protection regime 'does not envisage a potential loss of status triggered by the expiration of domestic visa arrangements,'[7] which is to say the expiry of a visa should not, of itself, affect a person's refugee status.

1.348 The statement of compatibility has not addressed whether there will be sufficient safeguards in place to ensure that any reapplication process takes account of the risk of refoulement if the person is denied continuing protection. In addition, while the statement of compatibility states that the grant of a visa is not the only way of giving protection to persons, the committee reiterates its long-standing view that administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[8]

1.349 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment**

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5 EM, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act), Attachment A 9.

6 ES 6.

7 UNHCR, 'UNHCR concerned about confirmation of TPV system by High Court' (20 November 2006) http://www.unhcr.org.au/pdfs/TPVHighCourt.pdf (accessed 14 October 2014).

8 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament* (2 February 2015) paras 1.89 to 1.99. See also *Fourth Report of the 44th Parliament*(18 March 2014) paras 3.55 to 3.66 (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.350 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how, in light of the committee's concerns raised above, the changes are compatible with Australia's absolute non-refoulement obligations.**

Right to health

1.351 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

1.352 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to the right to health. 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.

1.353 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Compatibility of the measure with the right to health

1.354 As noted above, the changes made by the regulation confirm the conversion of existing applications for PPVs into applications for TPVs.

1.355 The right to health was not addressed in the statement of compatibility for the regulation, and instead the statement of compatibility refers to the discussion of these issues in the statement of compatibility for the RALC bill. The statement of

compatibility for the RALC bill noted that, under the new arrangements, people who were found to engage Australia's non-refoulement obligations would be granted a TPV for a period of up to three years at one time (rather than a permanent protection visa).[9] The statement of compatibility noted that the right to health was engaged by the amendments, and that TPV holders are entitled to access Medicare and the Australian public health system.[10]

1.356 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, 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'. 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.

1.357 The practical operation and consequences of TPVs may have significant adverse consequences for the health of TPV holders. TPVs require refugees to prove afresh their claims for protection every three years. Research shows that TPVs lead to insecurity and uncertainty for refugees which, in turn, may cause or exacerbate existing mental health problems, or cause anxiety and psychological suffering. Such research indicates that restrictions on family reunion places further stress on TPV holders which may lead to mental health problems.[11] This regulation expands the class of people who would become TPV holders, rather than holders of a PPV, and as such, engages and limits the right to health, which includes mental health. The committee also notes that while access to Medicare is clearly an important aspect of protecting the right to health, it does not fully mitigate against the health-related harm (particularly psychological harm) that may be caused to individuals through the issuing of TPVs rather than providing permanent protection. These issues were not addressed in the statements of compatibility for either the RALC bill or this regulation.

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9 EM RALC Act, Attachment A 9.

10 EM RALC Act, Attachment A 17.

11 See, for example, Greg Marston, *Temporary Protection Permanent Uncertainty* (RMIT University 2003) 3. http://dpl/Books/2003/RMIT_TemporaryProtection.pdf (accessed 14 October 2014); Australia Human Rights Commission, *A last resort? - Summary Guide: Temporary Protection Visas,* https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas (accessed 14 October 2014).

1.358 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12(1) of the International Covenant on Economic, Social and Cultural Rights raises questions as to whether the changes are compatible with the right to health.**

1.359 **As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to health. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

Right to protection of the family

1.360 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the ICESCR. Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

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

Obligation to consider the best interests of the child

1.362 Under the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[12]

1.363 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and

12 Article 3(1).

institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[13]

1.364 The committee notes that, while there is no universal right to family reunification, article 10 of the CRC nevertheless obliges Australia to deal with applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family, and require family unity to be protected by society and the state.

Compatibility of the measure with the right to protection of the family and the obligation to consider the best interests of the child

1.365 The statement of compatibility for the RALC bill explained that:

> The temporary protection regime provides that refugees granted temporary protection visas are not eligible to sponsor family members.[14]

1.366 This has the consequence that a person holding a TPV cannot access family reunion and, if separated from their close family members, will remain so separated while holding a TPV. Converting all PPV applications into TPV applications will mean that those grant a TPV will be unable to access family reunion, regardless of whether this would result in permanent family separation and whether this is in the best interests of the child.

1.367 The committee notes that the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration may only be limited if the measure is reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.368 The statements of compatibility for both the RALC bill and this regulation do not address these issues. As set out above, committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.369 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights (right to protection**

13 UN Committee on the Rights of Children, General Comment 14 on the right of the child to have his or her best interest taken as primary consideration, CRC/C/GC/14 (2013).

14 EM RALC Bill, Attachment A 12.

of the family) and the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the measures are justifiable under international human rights law.

1.370 **As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to protection of the family and the obligation to consider the best interests of the child. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

Right to freedom of movement

1.371 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

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

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

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

Compatibility of the measure with the right to freedom of movement

1.375 A TPV only allows a visa holder to travel in compassionate and compelling circumstances, as approved by the minister in writing, and to places other than the country in respect of which protection was sought.[15]

1.376 The right to leave a country is a right both to legally leave the country as well as practically leave the country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad. States are required to provide necessary travel documents to ensure this right can be realised.[16] A person who has been recognised as a refugee but does not have the necessary travel documents that would allow them to travel (and return to Australia at the conclusion of their travel) is not able to practically realise their right to leave the country. This right applies to every person lawfully within Australia, including those who have been recognised as refugees. The committee therefore considers that the right to freedom of movement is engaged and limited by the measure.

1.377 This right was not addressed in the statement of compatibility. As set out above, the committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.378 **The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12 of the International Covenant on Civil and Political Rights raises questions as to whether the measures are justifiable under international human rights law.**

1.379 **As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to freedom of movement. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

15 See Subclass 785-Temporary Protection visa, which as a result of 785.611 is subject to condition 8570, see Schedules 2 and 8 to the Migration Regulations 1994.

16 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999), paras [8] to [10].

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

Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441]

Portfolio: Communications
Authorising legislation: Radiocommunications Act 1992
Last day to disallow: 2 December 2015 (Senate)

Purpose

1.380 The Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 (27 MHz Class Licence) revokes and replaces the Radiocommunications (27 MHz Handphone Stations) Class Licence 2002 (2002 Class Licence).

1.381 The use of handphone stations on specified carrier frequencies in the 27 MHZ band is subject to the regulatory arrangements set out in the 27 MHz Class Licence. The 27 MHz Class Licence also sets out the conditions for operating 27 MHz handphone stations. 27 MHz handphone stations are typically used by bushwalkers or in the conduct of sporting events and other group activities.

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

Conditions of 27 MHz Class Licence not to seriously alarm or affront a person

1.383 The 27 MHz Class Licence sets out the general conditions which apply to a person operating a 27 MHz headphone station, 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 purposes of harassing a person.

1.384 A person who operates the station in a way that causes a reasonable person to be 'seriously alarmed or seriously affronted' may be liable to imprisonment for up to two years.[1]

1.385 The committee considers that this condition limits the right to freedom of expression.

Right to freedom of expression

1.386 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

1 See section 46 of the *Radiocommunications Act 1992* which provides that a person must not operate a radiocommunications device other than as authorised by a class licence. There are then penalties for breach of the class licence, including, if the device is a radiocommunications transmitter, imprisonment for up to two years or 1,500 penalty units, and if it is not a transmitter, 20 penalty units.

communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.387 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.[2]

Compatibility of the measure with the right to freedom of expression

1.388 The statement of compatibility acknowledges that the relevant condition of the class licence engages and limits the right to freedom of expression but argues that this limitation is justifiable.[3] The statement of compatibility provides:

> The ACMA believes it is prudent to limit freedom of expression when granting the right to use a 27 MHz handphone station in order to meet the legitimate objectives of protecting public order and public morality…
>
> People using the devices may be communicating with people they know or do not know and can use the device to transmit and receive on publicly available frequencies. In this circumstance, it is possible that a person may use the device to incite crime, violence or mass panic, and thereby cause a reasonable person, justifiably in all circumstances, to be seriously alarmed or affronted. Thus, in part, the limitation on freedom of expression is necessary and appropriate to ensure public order…
>
> The protection of individuals from harassment through unsolicited communication is a legitimate objective and the ACMA considers that it is reasonable and appropriate to limit the right granted to use such devices [27 MHz handphone stations] to deter harassing speech.[4]

1.389 The committee agrees that if the objective behind the measure is to protect public order, this objective may be regarded as a legitimate objective for the purposes of international human rights law. However, protecting individuals from unsolicited communication may not necessarily meet the test for a legitimate objective as the statement of compatibility does not explain how this is a pressing and substantial concern.

1.390 The proposed conditions may be rationally connected to the stated objective as the licence condition would appear capable of discouraging individuals using a 27 MHz handphone station to harass or alarm others. However, a condition prohibiting speech that could cause a person to be seriously alarmed or affronted

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

3 Explanatory Statement (ES), Statement of Compatibility (SoC) 6-7.

4 ES, SoC 6.

goes much further than is necessary to maintain public order. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought, including whether there are less restrictive ways to achieve the same aim.

1.391 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. In this context, the committee notes the statement of compatibility provides that the instrument's limitation on freedom of expression is necessary and appropriate to ensure public order.[5] However, speech which may incite crime, violence or mass panic are already criminalised under existing law. Indeed, the statement of compatibility itself refers to the prohibition in section 474.17 of the *Criminal Code Act 1995*, stating that these conditions are consistent with this provision. That section makes it an offence for a person to use a carriage service in a way that a reasonable person would regard as being menacing, harassing or offensive. A 'carriage service' would include the operation of a 27 MHz headphone station.[6] As there is already a broad offence in the Criminal Code there appears no need to include the provision as a condition of the licence (breach of which becomes a criminal offence).

1.392 While the statement of compatibility refers only to seeking to prevent incitement of crime, violence or mass panic, the condition itself, not to seriously 'alarm or affront' a person, is much broader. It would prohibit speech that might be simply offensive to a person, such that they feel seriously affronted, but which has no link to crime, violence or the causation of mass panic. 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]

1.393 In order to limit the right to freedom of expression it must be demonstrated that there is a specific threat that requires action which limits freedom of speech, and it must be demonstrated that there is a direct and immediate connection

5 ES, SoC 7.

6 See definition of 'carriage service' in section 7 of the *Telecommunications Act 1997*.

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.

between the expression and the threat.[9] The broad nature of the wording of the condition would not appear to meet this criteria.

1.394 The committee considers that the statement of compatibility has not demonstrated that the conditions in 27 MHz Class Licence not to seriously alarm or affront a person impose a necessary or proportionate limitation on the right to freedom of expression.

1.395 **The committee's assessment against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) of the conditions in 27 MHz 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 expression.**

1.396 **The committee considers that the conditions in 27 MHz Class Licences not to seriously alarm or affront a person engage and limit the right to freedom of expression. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Communications as to whether the conditions are a proportionate means to achieving the stated objective.**

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

Further response required

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

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Portfolio: Attorney-General
Introduced: Senate, 24 September 2014

Purpose

1.398 The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) sought to make amendments to a number of Acts, primarily the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Australian Security Intelligence Organisation Act 1979*, the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979*, the *Australian Passports Act 2005*, the *Foreign Passports (Law Enforcement and Security) Act 2005*, the *Terrorism Insurance Act 2003*, the *Customs Act 1901*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Migration Act 1958*, the *Foreign Evidence Act 1994*, the *A New Tax System (Family Assistance) Act 1999*, the *Paid Parental Leave Act 2010*, the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*.

1.399 The bill also seeks to make consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977*, the *Sea Installations Act 1987*, the *National Health Security Act 2007*, the *Proceeds of Crime Act 2001* and the *AusCheck Act 2007*.

1.400 Key amendments in the bill are set out below.

1.401 Schedule 1 of the bill sought to:

- amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to expand Australian Transaction Reports and Analysis Centre's (AUSTRAC) ability to share information;
- amend the *Australian Passports Act 2005* (Passports Act) to introduce a power to suspend a person's Australian travel documents for 14 days and introduce a mechanism to provide that a person is not required to be notified of a passport refusal or cancellation decision by the Minister for Foreign Affairs;
- amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) in relation to the power to use force in the execution of a questioning warrant, and provide for the continuation of the questioning and questioning and detention warrant regime for a further 10 years;
- amend the *Crimes Act 1914* (Crimes Act) to:

- introduce a delayed notification search warrant scheme for terrorism offences;
- extend the operation of the powers in relation to terrorist acts and terrorism offences for a further 10 years;
- lower the legal threshold for arrest of a person without a warrant for terrorism offences and the new advocating terrorism offence;

- amend the *Criminal Code Act 1995* (Criminal Code Act) to:
  - limit the defence of humanitarian aid for the offence of treason to instances where the person did the act for the sole purpose of providing humanitarian aid;
  - create a new offence of 'advocating terrorism';
  - make various amendments to the terrorist organisation listing provisions;
  - amend the terrorist organisation training offences;
  - extend the control order regime for a further 10 years and make additional amendments to the regime;
  - extend the preventative detention order (PDO) regime for a further 10 years and make additional amendments to the regime;
- make various amendments to the Crimes (Foreign Incursions and Recruitment) Act 1978;
- amend the Foreign Evidence Act 1994 to increase the court's authority to admit material obtained from overseas in terrorism-related proceedings; and
- amend the Foreign Passports (Law Enforcement and Security) Act 2005 to introduce a 14-day foreign travel document seizure mechanism.

1.402 Schedule 2 of the bill sought to amend the *A New Tax System (Family Assistance) Act 1999*, *Paid Parental Leave Act 2010* and the *Social Security Act 1991* to provide for the cancellation of a number of social welfare payments for individuals on security grounds.

1.403 Schedule 3 of the bill sought to amend the *Customs Act 1901* to expand the detention power of customs officials.

1.404 Schedule 4 of the bill sought to amend the *Migration Act 1958* to include an emergency visa cancellation power.

1.405 Schedule 5 sought to amend the *Migration Act 1958* to enable automated border processing control systems, such as SmartGate or eGates, to obtain personal identifiers (specifically an image of a person's face and shoulders) from all persons who use those systems.

1.406 Schedule 6 sought to amend the *Migration Act 1958* to extend the Advance Passenger Processing (APP) arrangement, which currently applies to arriving air and maritime travellers, to departing air and maritime travellers.

1.407 Schedule 7 sought to amend the *Migration Act 1958* to grant the Department of Immigration and Border Protection (DIBP) the power to retain documents presented that it suspects are bogus.

Background

1.408 The committee recognises the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of all Australians. Moreover, the committee recognises the specific importance of protecting Australians from terrorism.

1.409 The committee notes that international human rights law allows for reasonable limits to be placed on most rights and freedoms, although some absolute rights cannot be limited.[1] All other rights may be limited as long as the limitation is reasonable, necessary and proportionate to the achievement of a legitimate objective. This is the analytical framework the committee applies when exercising it statutory function of examining bills for compatibility with human rights.

1.410 The committee reported on the bill in its *Fourteenth Report of the 44th Parliament*.[2] The bill passed both Houses of Parliament and received Royal Assent on 3 November 2014.

1.411 The committee then considered the Attorney-General's response in its *Nineteenth Report of the 44th Parliament*, and concluded its examination of a number of measures in the bill.[3] The committee requested further information from the Attorney-General in relation to certain measures in Schedule 1 and Schedule 2.

National security laws and indirect discrimination

Right to equality and non-discrimination

1.412 The committee previously requested the advice of the Attorney-General as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination.

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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; and the right to recognition as a person before the law.

2 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

3 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

1.413 The committee noted that the UN Committee on the Elimination of Racial Discrimination has previously raised concerns that counter-terrorism legislation in Australia may disproportionately affect Arab and Muslim Australians.[4] In its most recent concluding observation on Australia, that committee emphasised Australia's obligation 'to ensure that measures directed at combating terrorism do not discriminate in purpose *or effect* on grounds of race, colour, descent, or national or ethnic origin'[5] (emphasis added).

1.414 The committee noted that the Attorney-General's response identified the cultural awareness training that law enforcement officers receive as supporting the non-discriminatory application of the law. However, no information was provided as to the specific nature or content of the training, or its effectiveness.

1.415 The committee considered that more information was required to explain how Australia's counter-terrorism laws are enforced in a non-discriminatory manner. Specifically, information as to how the government is addressing the UN concerns that measures directed at combating terrorism do not indirectly discriminate would assist the committee in its assessment of the bill.

1.416 The committee therefore requested the further advice of the Attorney-General as to whether the operation of the counter-terrorism laws would, in practice, be compatible with the rights to equality and non-discrimination. In particular, the committee requested information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded and amended powers.

Attorney-General's response

National security law and indirect discrimination

Right to equality and non-discrimination

The Committee has requested further advice as to whether the operation of the counterterrorism laws will, in practice, be compatible with the rights to equality and non-discrimination. In particular, the Committee has requested information regarding specific policy and administrative arrangements, and any relevant training or guidance, that applies to law enforcement officers in exercising the expanded or amended powers.

As noted in my response to the Committee of 17 February 2015, the enforcement of counter-terrorism laws is subject to the operations of a

4 UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/14 (14 April 2005); Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/15-17 (13 September 2010).

5 UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/15-17 (13 September 2010).

number of government agencies, principally the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP) and the Australian Border Force (ABF) (previously known as the Australian Customs and Border Protection Service (ACBPS)).

With regards to ASIO special powers relating to terrorism offences, section 34C(1) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) requires the Director-General to prepare a written statement of procedures to be followed in the exercise of ASIO's questioning and questioning and detention warrants under Division 3 Part III of the ASIO Act.

The current statement of procedures, which is a legislative instrument, was approved by the former Attorney-General Philip Ruddock in 2006 and is publicly available on the Federal Register of Legislative Instruments. A copy of the statement of procedures is at **Annexure A**.

In addition to the statement of procedures, ASIO has drafted and complies with extensive internal policies and procedures relating to the implementation of questioning and questioning and detention warrants. ASIO also has administrative arrangements in place with the AFP in relation to the exercise of powers conferred by ASIO's questioning and questioning and detention warrants.

ASIO are also subject to the Attorney-General's guidelines issued pursuant to section 8A of the ASIO Act, which must be observed by ASIO in the performance of its functions. A copy of the guidelines is at **Annexure B**. Paragraph 10.4 of the guidelines requires ASIO to, wherever possible, collect information using the least intrusive techniques and to undertake inquiries and investigations with due regard to cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.

ASIO staff members are required to comply with ASIO's Professional Conduct and and Behaviour Strategy which takes a multifaceted approach to addressing all forms of inappropriate behaviour including discrimination and harassment. Staff members are able to undertake a range of training courses relating to cultural awareness and understanding.

The AFP's approach to equality and non-discrimination begins with its people. A strong focus of recruitment in recent years has been attracting people from diverse cultural and linguistic backgrounds so that the AFP workforce best reflects the diverse community that it serves.

Beyond this and irrespective of background or rank, all AFP appointees are subject to the AFP Integrity Framework which encompasses four pillars: prevention, detection, investigation/response and continuous learning. Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act) sets the professional standards of the AFP and establishes procedures by which AFP conduct and practice issues may be raised and dealt with, including

holding AFP appointees to account for any action that may amount to discrimination.

The AFP's Commissioner's Order on Professional Standards (C02) sets out the standards expected of AFP appointees both in the performance of their duties and off-duty conduct. The AFP Core Values and the AFP Code of Conduct require all AFP appointees to exercise their powers and conduct themselves in accordance with legal obligations and the professional standards expected by the AFP, the Government and the broader community, including acting in a non-discriminatory manner. The AFP Code of Conduct provides that an AFP appointee must act with fairness, reasonableness, courtesy and respect, and without discrimination or harassment, in the course of AFP duties. Every member exercising police powers makes an oath of office in which the member affirms that they will faithfully and diligently exercise and perform all powers and duties as a sworn member without 'fear or favour' and 'affection or ill will.'

The AFP employment character guideline also defines the minimum AFP character standards for potential applicants across all AFP roles and responsibilities. Applicants are assessed per subsection 24(2) of the AFP Act in relation to their character and his/her ability to comply with the AFP's professional standards both in an official and private capacity.

The AFP College, via Learning & Development, develops and conducts cultural and language programs, including the Islamic Awareness Workshop. These workshops address Islamic beliefs, culture, doctrine, history and current issues as well as incorporating presentations on Muslim communities. These workshops are delivered across Australia and focus on the non-discriminatory application of the law through cultural understanding and respecting the Muslim community in order to achieve mutual goals through fairness and collaboration.

The AFP conducts training for its appointees as an ongoing priority in relation to any significant body of legislative change and this has recently included the new powers and offences as a result of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act).

There is mandatory online legislation training (regarding the above Act) for members of the Counter-Terrorism Portfolio and the new legislation and associated powers/offences have been integrated into the AFP's Counter-Terrorism Investigators Workshop (CTIW) and Advanced Counter-Terrorism Investigator Program (ACTIP). AFP Learning & Development Portfolio conducts these programs.

For example, the CTIW has been delivered once in 2015 with an additional four planned for the 2015-16 financial year. Two ACTIPs are planned to be delivered in Sydney and Melbourne in 2015 and one in Brisbane in the first half of 2016.

AFP's Counter Terrorism Portfolio in conjunction with AFP Legal have also delivered 'CT roadshows' across Australia to each Joint Counter-Terrorism Team (JCTT members include AFP, state police and intelligence partners) as well as other AFP appointees in general regarding powers and offences under the Foreign Fighters Act.

Since the enactment of the Foreign Fighters Act, the AFP has developed an extensive range of supporting governance, advisory documents and training tools to address powers afforded to the AFP under the Act, including:

- delayed notification search warrants
- new arrest thresholds and offences
- preventative detention orders
- control orders, and
- stop search and seize powers.

The AFP Investigator's Toolkit (the toolkit) is the central resource for AFP appointees to access information, templates, forms and guides relating to AFP investigations. The toolkit has a specific page dedicated to counter-terrorism investigations providing up-to-date and continuously revised information, inclusive of the provisions of the Foreign Fighters Act and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*. For example, within the toolkit the following resources can be found:

- AFP National Guideline on delayed notification search warrants
- AFP National Guideline on control orders
- AFP Commissioner delegations for the purposes of Part 1AAA *Crimes Act 1914*
- AFP Operational Summary of the Foreign Fighters Act, and
- The AFP Pocketbook Guide for Counter-Terrorism Investigations.

In April 2015 the AFP's Pocketbook Guide for Counter-Terrorism Investigations (V5) was updated to set out key Commonwealth powers available to police under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth), as well as other powers and offences that may be applicable in Australian-based counter terrorism operations. This Pocketbook Guide has been widely distributed within the AFP. The AFP also advises that AFP National Guidelines are currently in the process of being amended by AFP's Counter-Terrorism Portfolio in response to the acquisition of new legislative tools, including delayed notification search warrants and stop, search and seize powers. This includes the National Guidelines on Preventative Detention Orders and Control Orders.

On 1 July 2015 the Australian Customs and Border Protection Service (ACBPS) and the Department of Immigration and Border Protection (DIBP) was consolidated into the single Department of Immigration and Border

Protection. The Australian Border Force (ABF), a single frontline operational border agency, has been established as the new frontline agency within the Department to protect Australia's border and manage the movement of people and goods across it.

The Foreign Fighters Act amended the *Customs Act 1901* (Cth) (Customs Act) to:

- permit detention of an individual where an officer has reasonable grounds to suspect that the person has committed, is committing or intends to commit a serious Commonwealth offence (an offence punishable on conviction by imprisonment for 12 months or more)
- permit detention of a person who is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country, and
- extend the time period within which an officer is obliged to inform a detained person's family or another person has been increased from 45 minutes to two hours.

The detention powers are not new to ABF officers. The amendments made by the Foreign Fighters Act to the Customs Act expanded on existing powers to provide for detention on national security grounds. Officers exercising these powers will have undergone substantial six month entry level training consisting of both class room and on the-job instruction (National Trainee Training or NTT). That training includes a focus on statutory powers exercised by officers under the Customs Act and other legislation, and includes training in the exercise of detention powers.

The NTT course curriculum includes:

- APS Values and Code of Conduct
- cultural awareness, equity and diversity
- counter-terrorism awareness
- powers of officers
- elements of offences
- Part 1C, *Crimes Act 1914*
- general search techniques
- on the job training - consolidation and practice of legislation and powers
- questioning techniques
- travel document information and indicators, and
- detection and search.

As part of the NTT, officers are provided with detailed written materials and procedures relevant to the exercise of their statutory powers,

including their detention powers. These written materials are also available to officers at any time through the DIBP intranet.

These written materials include:

- Operational Training and Development Practice Statement
- Detention and Search of Travellers Instruction and Guideline - outlining recording requirements, detainee rights, roles of officers and registrations and powers
- Powers of Officers in the Passenger Environment Instruction and Guideline, and
- Powers of Officers in the Seaports and Maritime Environment Instruction and Guideline.

The materials reflect that officers need to be able to search travellers in a range of circumstances in order to maintain the integrity of border controls but are required to do so in a way that reflects community expectations for the preservation of civil liberties and privacy of all persons.

Additionally, divisions responsible for operational activities issue notifications to communicate policy or procedural changes and urgent operational advice to operational personnel. The Strategic Border Command (SBC), which is responsible for a large range of ABF's operational activities before, at and after the border, issues operational notifications to advise officers of changes to procedure and practice. For example, SBC issued an operational notification regarding the expanded detention powers when the legislative amendments came into effect.

Officers who are authorised to carry firearms undergo specific, additional training. Once authorised, each officer must be successfully re-certified every 12 months to continue that authorisation. Many officers working in maritime command areas, as well as the Counter Terrorism Unit (CTU) teams at the eight major international airports, are use of force trained.

The use of force curriculum includes the following elements:

- Legislation and Powers
  - Authority to carry arms and power to use force
  - Power to detain
  - Power to physically restrain
  - Power of arrest
  - Powers in the Maritime Environment
  - Use of force under various legislation
  - Power to enter and remain on coasts
  - Executing a search or seizure warrant

- Power to remove persons from a restricted area
- Power to remove vehicles
- Implications of misuse of power

- Officer response, communication and de-escalation, and
- Defensive tactics and the use of personal defensive equipment.

Over the past several years the ACBPS, now the ABF, has made significant investment in reforming its workplace culture and in strengthening the integrity and professionalism of its workforce. This has included a number of both legislative and administrative measures applying specifically to ABF personnel. In addition, all ABF officers are engaged under the *Public Service Act 1999* (Cth) (Public Service Act) and, as such, are required to abide by the Australian Public Service (APS) Values and Code of Conduct.

The *Australian Border Force Act 2015* (Cth) replaced the Customs Administration Act on 1 July 2015. The new Act retains provisions that allow the Secretary and the Commissioner to make directions with respect to Immigration and Border Protection employees, including in respect of professional standards. A proven failure to comply with these directions is a breach of the Code of Conduct and may result in the imposition of a sanction under the Public Service Act.

One new feature of the ABF, provided for by the legislation, is that the ABF Commissioner is able to require officers of the ABF to take an oath or affirmation. The intention of this new power is to further support a professional and ethical culture and provide a clear up-front marker about the standards of conduct and professionalism expected. An ABF officer who has subscribed to an oath or affirmation must not engage in conduct that is inconsistent with the oath or affirmation. Proven instances of inconsistent conduct will amount to breaches of the Code of Conduct and may give rise to disciplinary action in accordance with Public Service Act.

The ABF requires its officers to undertake annual mandatory training covering officer integrity, conduct and professional standards. This includes training regarding the standards of conduct and behaviour expected of officers both as APS employees and as officers of the ABF. An officer who exercises his or her powers in a manner that is discriminatory on grounds of race, ethnicity, religion or any other unlawful ground under anti-discrimination legislation will have acted both in breach of the directions and the code of conduct and may face disciplinary action.

Given the extensive training, guidance and administrative arrangements that the relevant government agencies have in place in relation to the expanded and amended powers, I consider that operation of the counter-

terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination.[6]

Committee response

1.417 **The committee thanks the Attorney-General for his detailed response.** The committee notes the Attorney-General's advice as to the agencies involved in counter-terrorism efforts and the training and safeguards in place to prevent discriminatory conduct, including relevant awareness workshops at the Australian Federal Police (AFP) College.

1.418 However the committee notes that the Attorney-General's response does not address the specific concern raised by the committee in its initial analysis, that the UN Committee on the Elimination of Racial Discrimination has previously raised concerns that counter-terrorism legislation in Australia may disproportionately affect Arab and Muslim Australians. The committee notes that the Attorney-General's response only mentions the AFP as having specific training targeted towards countering this, and that the response contained no indication as to the effectiveness of such training.

1.419 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. While the committee is satisfied that the measure pursues a legitimate objective and is rationally connected to that objective, the Attorney-General has not explained how the measure's limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. In lieu of that explanation, the Attorney-General has offered an assurance that officers are trained to be impartial and non-discriminatory. The committee notes that the conduct of officers is also subject to the *Racial Discrimination Act 1975*.

1.420 **The committee considers that the operation of counter-terrorism laws engage and may limit the right to equality and non-discrimination, particularly in relation to profiling and targeting of individuals. However, the committee notes the Attorney-General's assurance that such powers are used by officers trained to be impartial and non-discriminatory. Accordingly, on the basis of such an assurance, the committee considers that the powers may be justified.**

6 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 1-6.

Schedule 1 – AUSTRAC amendments

Expanding the power of AUSTRAC to disclose information

Right to privacy

1.421 The committee previously sought the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share financial information with the Attorney-General's Department (AGD) is compatible with the right to privacy, and particularly:

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

1.422 The committee noted that no response was received from the Attorney-General in relation to this particular request for further information. The committee noted that the committee's initial examination of the bill gave rise to a significant number of inquiries, and that these issues may have been overlooked in the response provided by the Attorney-General. The committee therefore reiterated its request for further information on these issues.

Attorney-General's response

AUSTRAC amendments

I apologise for the oversight and not providing a response to the Committee's request for further information about the proposed AUSTRAC amendments in response to the Committee's *Fourteenth Report of the 4lh Parliament*.

Expanding the power of AUSTRAC to disclose information - right to privacy

The amendments to section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) permit AUSTRAC to share financial data with the Attorney-General's Department (AGD) as a 'designated agency' for the purposes of the Act.

I consider these amendments to be aimed at achieving a legitimate objective as they recognise and support the role of AGD as Australia's lead policy agency for AML/CTF. Specifically, they will enable AGD to receive broad statistical information to support the development of a comprehensive and evidence-based AML/CTF regime.

There is a rational connection between the amendments and the objective outlined above, as the amendments rectify a deficiency which inhibited AGD's ability to properly fulfil its role in administering the AML/CTF Act. Previously, as a non-designated agency under the AML/CTF Act, the Act's disclosure regime limited:

- the circumstances under which AGD could access information
- the type of information that AGD could access
- AGD's ability to forward documents containing AUSTRAC information to agencies who were otherwise entitled to access (e.g. AFP, Australian Crime Commission, the Department of Foreign Affairs and Trade), and
- the ability of partner agencies to share AUSTRAC information considered relevant to the development of policy with AGD.

This regime imposed significant constraints on the ability of AGD to efficiently and effectively develop policy in response to emerging money laundering and terrorism financing typologies. The amendments will enable AGD to develop more effective and targeted AML/CTF policy. For example:

- when developing targeted countermeasures against high risk jurisdictions, it is useful for AGD to consider statistical information on how much money is flowing to that jurisdiction, through which entities, and average amounts
- when considering AML/CTF policy responses to overseas corruption, to consider jurisdictions of interest, the quantum and method of fund flows and potentially the range of actors involved, or
- when considering terrorism financing policy responses, to consider the latest trend analysis and intelligence reports produced by AUSTRAC to assess where and how funds are moving.

AUSTRAC supported the proposal to list AGD as a designated agency, noting that providing the Department with designated agency status assisted both AUSTRAC and the AUSTRAC CEO in performing their functions under the AML/CTF Act. In its review of the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Parliamentary Joint Committee on Intelligence and Security also recognised the legitimate need for AGD to access AUSTRAC information to formulate whole-of-government policy.

I consider the amendments to be reasonable and proportionate in the achievement of their stated objective, while remaining compatible with the right to privacy. Although the amendments will result in the disclosure of AUSTRAC information to a wider class of persons, Part 11 of the AML/CTF Act will continue to provide strict limitations on the use and disclosure of AUSTRAC information. In essence, the AML/CTF Act prohibits the disclosure of AUSTRAC information, regardless of the type or format, unless a specified exception applies.

As a Commonwealth agency subject to the Australian Privacy Principles, AGD has a statutory obligation to properly protect the privacy and security of any personal information it may receive. It has extensive experience in

dealing with sensitive information, and has appropriate controls in place to ensure that the integrity of such information is maintained.

AGD has also indicated that certain additional safeguards will be implemented over and above those present in the AML/CTF Act and the *Privacy Act 1988* (Cth). For instance, AGD only intends to seek access to the minimum amount of information necessary to support its policy functions. In general terms, this will be aggregated and de-identified data which will assist in the policy-making process. AGD will also not seek direct access to the AUSTRAC database through a dedicated computer terminal, but will request relevant information through AUSTRAC.

AGD is currently negotiating a formal agreement with AUSTRAC that will specify the terms of AGD's access to information held by AUSTRAC.[7]

Committee response

1.423 **The committee thanks the Attorney-General for his response.** The committee notes the Attorney-General's advice as to the objective of the measures, which is to enable AGD to support the development of a comprehensive and evidence-based anti-money laundering and counter-terrorism financing regime. This may be considered a legitimate objective for the purposes of international human rights law. The committee notes that the Attorney-General response explains that AGD 'intends to seek access to the minimum amount of information necessary to support its policy functions' and that this will generally be 'aggregated and de-identified data'.

1.424 However, regarding the proportionality of the measures, no information has been provided as to why AGD, as a policy agency and not a law enforcement agency, needs access to identifiable data nor why de-identified information is not sufficient for AGD to 'efficiently and effectively develop policy in response to emerging money laundering and terrorism financial typologies.' It would appear that more information than is strictly necessary may be shared as a result of these amendments and the amendments do not represent the least rights restrictive approach as required by international human rights law.

1.425 While the response indicates policies will be developed to guide AGD's access to AUSTRAC information, these policies are not equivalent to statutory safeguards and as such are insufficient for the purposes of international human rights law.

1.426 **The committee's assessment of the proposed expansion of AUSTRAC's power to disclose information against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether the changes are justifiable under international human rights law. As set out above, the Attorney-General's response has not demonstrated that the limitation on the right**

7 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 7-9.

to privacy is the least rights restrictive approach (in that de-identified information could be made available instead of identifiable information) and accordingly, the committee seeks further information from the Attorney-General as to why it is necessary for AGD to receive identifiable data from AUSTRAC.

Expanding the information that AUSTRAC may disclose to partner organisations

Right to privacy

1.427 The committee sought the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share information obtained under section 49 of the AML/CTF Act with partner agencies is compatible with the right to privacy, and particularly, whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the measure and that objective; and whether the proposed amendments are reasonable and proportionate to the achievement of that objective.

1.428 The committee noted that no response was received from the Attorney-General in relation to this particular request for further information. The committee noted that the committee's initial examination of the bill gave rise to a significant number of inquiries, and that these issues may have been overlooked in the response provided by the Attorney-General. The committee therefore reiterated its request for further information on these issues.

Attorney-General's response

> *Expanding the information that AUSTRAC may disclose to partner organisations - right to privacy*
>
> The amendments to Part 11 of the AML/CTF Act remove certain restrictions on AUSTRAC's ability to share information collected under section 49 of the Act with partner agencies.
>
> I consider these changes to be aimed at achieving a legitimate objective as they provide AUSTRAC's partner agencies with greater access to AUSTRAC information – improving their ability to cross-reference it against their own intelligence holdings. This enhanced information-sharing will greatly increase the utility of information gathered by AUSTRAC under section 49, particularly where information is gathered in a systematic way to address particular threats such as foreign fighters. The amendments will also better enable AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime.
>
> There is a rational connection between the measures and the objective outlined above, as they address an identified deficiency in Part 11 of the AML/CTF Act. Section 49 of the Act allows a select group of agencies (AUSTRAC, AFP, ACC, Australian Taxation Office and DIBP) to collect additional information from reporting entities on reports provided to

AUSTRAC. Previously, however, all information collected under section 49 was subject to a restrictive access regime, which goes beyond the restrictions placed on other AUSTRAC information under Part 11 of the AML/CTF Act.

The initial rationale for the restricted access was to minimise the risk that the subject of a section 49 request became aware that they are of interest to an investigating agency, and to prevent investigations from being prejudiced by the disclosure of the fact that a section 49 information request is in existence. However, since the AML/CTF Act has been in operation, it has been found that these statutory protections have had the unintended consequence of hampering the sharing of information among AUSTRAC's partner agencies. The amendments to Part 11 will now allow AUSTRAC to share valuable information it gathers with partner agencies.

I consider the amendments to be reasonable and proportionate to the achievement of the objectives outlined above, while remaining compatible with the right to privacy – particularly given that the additional restrictions relating to the distribution of section 49 information will remain in place for all other relevant agencies, aside from AUSTRAC. As Australia's AML/CTF regulator and Financial Intelligence Unit, AUSTRAC is best placed to determine the most appropriate method for distributing section 49 information to partner agencies.

In addition, all section 49 information accessed by AUSTRAC's partner agencies will continue to be subject to the same secrecy and access regime in Part 11 of the AML/CTF Act as other AUSTRAC information. These provisions put in place significant safeguards to protect AUSTRAC information and limit its access and disclosure.

Any personal information collected under section 49 remains subject to the provisions of the *Privacy Act* and the Australian Privacy Principles. AUSTRAC continues to ensure that all employees are aware of their obligations under the *Privacy Act*.[8]

Committee response

1.429 **The committee thanks the Attorney-General for his response. The committee considers that the response demonstrates that the amendments are aimed at the legitimate objective of combating the threat of foreign fighters by improving the ability of agencies to share relevant financial intelligence and that the measures are rationally connected to that objective and proportionate. Accordingly, the committee considers that the powers are compatible with the right to privacy.**

8 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 9-10.

Schedule 2 – Stopping welfare payments

Cancellation of welfare payments to certain individuals

Right to social security and an adequate standard of living

1.430 The committee previously sought the advice of the Attorney-General as to the compatibility of Schedule 2 with the right to social security and the right to an adequate standard of living, and particularly whether the measure may be regarded as proportionate for the purposes of international human rights law.

1.431 The committee noted that the Attorney-General's initial response did not address these concerns, and that this specific aspect of the request may have been overlooked by the Attorney-General given the significant number of inquiries raised.

Attorney-General's response

Cancellation of welfare payments

I apologise for the oversight and not providing a response to part of the Committee's request for information about the cancellation of welfare amendments in response to the Committee's Fourteenth Report of the 44th Parliament.

Right to social security and the right to an adequate standard of living

Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises that the State may subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

The welfare cancellation measures may limit the rights of affected persons to social security under Article 9 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. I consider that this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments, are not able to be made available to support terrorist acts, terrorists or terrorist organisations.

The powers are only available when an individual has been subject to a passport refusal or passport or visa cancellation on national security grounds. When deciding whether to issue a Security Notice to the Minister for Social Services seeking the cancellation of social security payments, the Attorney-General must have regard to whether welfare payments are being, or may be used for a purpose that might prejudice the security of Australia or a foreign country. Accordingly, there is a rational connection between the exercise of the power and the legitimate objective, being the prevention of funding of terrorism-related activities.

> Similarly, the measures may limit the rights of affected persons to an adequate standard of living under Article 11 of the ICESCR by providing the Attorney-General with the power to make individuals ineligible for social security benefits where they have been the subject of a passport refusal or a passport or visa cancellation on security grounds. Where an individual has been the subject of an adverse security assessment and security agencies have identified a link between their receipt of social security and conduct of security concern it is appropriate that access to social security is restricted. Individuals who choose to use their social security payments to support terrorist acts, terrorists or terrorist organisations should not continue to receive social security. If that funding is being used to support terrorism-related activities then it is not being used for the purposes of providing an adequate standard of living. Individuals who are the subject of a Security Notice and become ineligible for social security can still seek employment to support an adequate standard of living. I consider this power is rationally connected and is reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that funds, specifically social security payments are not able to be made available to support terrorist acts, terrorists or terrorist organisations.
>
> The power to cancel welfare is therefore compatible with the right to social security and the right to an adequate standard of living.[9]

Committee response

1.432 **The committee thanks the Attorney-General for his response.** The committee notes that the prevention of the use of social security to fund terrorism related activities is a legitimate objective for the purposes of international human rights law.

1.433 However, in terms of proportionality, the committee notes that the decision to cancel a person's social welfare payment is entirely discretionary once the threshold of passport refusal or cancelation has been reached and that there is no specific criteria used to guide ministerial decision-making. Accordingly, there is no statutory requirement that the power to cancel welfare payments is used strictly in the manner set out in the response.

1.434 Moreover, there is not a necessary link between the cancellation of a passport and the use of social security to fund terrorism. The basis on which this will be determined remains unclear in the response.

1.435 As noted in the committee's initial analysis, the availability of review of decisions to cancel welfare payments is relevant to the question of whether the measure is reasonable and proportionate. However, the ability to effectively seek review under the *Administrative Decisions Judicial Review Act 1977* (ADJR Act) is likely to be limited given there is no requirement to provide reasons for any such

9 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 10-11.

decision (with review under the Judiciary Act also being limited in terms of the available grounds and remedies). In addition, no information is given as to how a person who has had their social security benefits cancelled is able to support themselves if they are unable to gain employment, and therefore, maintain an adequate standard of living.

1.436 **The committee's assessment of the proposed powers to cancel welfare payments against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and an adequate standard of living) raises questions as to whether the changes are justifiable under international human rights law.**

1.437 **As set out above, the committee agrees that preventing the use of social security to fund terrorism related activities is a legitimate objective for the purposes of international human rights law. The committee recommends that the Attorney-General adopt regulations and guidelines that provide objective criteria and safeguards for the cancellation of welfare payments including that there must be a link between the social security payment and the funding of terrorism.**

Right to equality and non-discrimination

1.438 The committee previously requested the advice of the Attorney-General as to whether the operation of powers to cancel welfare payments will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination.

1.439 The committee noted that the Attorney-General's initial response did not address these concerns, and that this specific aspect of the request may have been overlooked by the Attorney-General given the significant number of inquiries raised.

Attorney-General's response

Right to equality and non-discrimination

As noted above, the power to prevent the use of funds, including social security, to fund terrorism-related activities is a legitimate objective.

While Australia has a range of obligations to ensure equality and non-discrimination, including Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of ICES CR most relevantly requires States Parties to ensure that all of the rights under that Covenant, including to social security, are provided without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, not all distinctions in treatment will constitute discrimination if the justification for the differentiation is reasonable and objective. In order for differential treatment to be permissible, the aim and effects of the measures must be legitimate, compatible with the nature of the Covenant rights, solely for the purpose of promoting the general welfare in a democratic society and

> there must be a reasonable and proportionate relationship between the aim to be realised and the measures.
>
> I consider the power to cancel social security benefits is consistent with Australia's obligations in relation to rights to equality and non-discrimination as the measures do not attach to a particular category of person. They apply equally to anyone who is refused an Australian passport or is the subject of a passport or visa cancellation on security grounds regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> The measures therefore do not discriminate and are consistent with these obligations.[10]

Committee response

1.440 **The committee thanks the Attorney-General for his response.** The response states that the measure would:

> apply equally to anyone who is refused an Australian passport or is the subject of a passport or visa cancellation on security grounds regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.441 However, the cancellation of welfare does not happen automatically as a result of those circumstances, instead welfare cancellation only happens as a result of a discretion exercised by the minister.

1.442 In its initial analysis, the committee noted that this measure does not have as its purpose discrimination against any person. However, the committee was concerned that the wide executive discretion to cancel welfare payments, in practice, could be indirectly discriminatory. The Attorney-General's response does not explain how the discretion will be appropriately circumscribed in a manner that ensures that any disproportionate impact on the grounds of race or religion is not arbitrary.

1.443 **The committee's assessment of the proposed powers to cancel welfare payments against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the changes are justifiable under international human rights law.**

1.444 **As set out above, the committee agrees that preventing the use of social security to fund terrorism related activities is a legitimate objective for the purposes of international human rights law. The committee recommends that the Attorney-General adopt regulations and guidelines that provide objective criteria and safeguards for the cancellation of welfare payments that ensure that the measure is compatible with Australia's human rights obligations.**

10 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 11.

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]

Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015) [F2015L01099]

Portfolio: Treasury
Authorising legislation: Federal Financial Relations Act 2009
Last day to disallow: 16 September 2015 (Senate) (but only in relation to Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877] and Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878]

Purpose

1.445 The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 (Determination 1) specifies the amounts payable for the schools, skills and workforce development, and housing National Specific Purpose Payments (National SPPs) for 2013-14. The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 (Determination 2) specifies the amount payable for the Disability National SPP for 2013-14.

1.446 The remaining instruments[1] specify the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms. Schedule 1 to these instruments sets out the amounts of payments by reference to certain outcomes, including healthcare, education, community services and affordable housing.

1.447 Together these instruments are referred to as 'the Determinations'.

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

Background

1.449 The committee commented on the Determinations in its *Twenty-eighth Report of the 44th Parliament*, and requested further information from the Treasurer as to whether the Determinations were compatible with Australia's human rights obligations.[2]

Payments to the states and territories for the provision of health, education, employment, housing and disability services—National Specific Purpose Payments

1.450 Under the Intergovernmental Agreement on Federal Financial Relations (the IGA), the Commonwealth provides National SPPs to the states and territories as a financial contribution to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

1.451 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each National SPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories. The Determinations have been made in accordance with these provisions.

1.452 Payments under the Determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the Determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of

1 Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014); Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015); Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015); Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015); Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015); Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015); Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015).

2 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 10-14.

the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

1.453 The committee has previously noted, in its assessment of appropriations bills, that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

Multiple rights

1.454 The committee considered in its previous analysis that the Determinations engage and may promote or limit the following human rights:

- right to equality and non-discrimination (particularly in relation to persons with disabilities);[4]
- rights of children;[5]
- right to work;[6]
- right to social security;[7]
- right to an adequate standard of living;[8]
- right to health;[9] and
- right to education.[10]

Compatibility of the Determinations with multiple rights

1.455 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 and the Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 each simply state that the instruments do not engage human rights.[11]

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3 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

4 Article 26 of the ICCPR and the Convention on the Rights of Persons with Disabilities.

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

6 Articles 6, 7 and 8 of the ICESCR.

7 Article 9 of the ICESCR.

8 Article 11 of the ICESCR.

9 Article 12 of the ICESCR.

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

11 Determination 1, EM 2 and Determination 2, EM 2.

1.456 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure. The obligations under international human rights law are on Australia as a nation state - it is therefore incumbent on the Commonwealth to ensure that sufficient funding is provided to the states and territories to ensure that Australia's international human rights obligations are met.

1.457 Where the Commonwealth seeks to reduce the amount of funding pursuant to National SPPs, such reductions in expenditure may amount to retrogression or limitations on rights.

1.458 The committee therefore sought the advice of the Treasurer as to whether the Determinations are compatible with Australia's human rights obligations, and particularly, whether the Determinations are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; whether a failure to adopt these Determinations would have a regressive impact on other economic, social and cultural rights; whether any reduction in the allocation of funding (if applicable) is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

Treasurer's response

All of the instruments in question fall into one of two categories: annual Determinations for National Specific Purpose Payments (NSPPs) for 2013-14; and monthly Determinations for National Partnership payments (NPs) made over the period December 2014 to June 2015.

2013-14 National Specific Purpose Payments

NSPPs are payments made by the Commonwealth to the states and territories that are to be used in specifically agreed sectors, in accordance with the *Federal Financial Relations Act 2009* (the FFR Act). The FFR Act requires the Treasurer to determine the total payment amounts for each NSPP in 2013-14 by applying a relevant indexation factor to the total payment amounts from 2012-13.

The determination and payment of NSPPs assist in the realisation of a number of human rights:

- Both the NSPP for schools and the NSPP for skills and workforce development promote the right to education (art 13, International Covenant on Economic Social and Cultural Rights (ICESCR); art 28, Convention of the Rights of the Child (CRC) and art 24, Convention on the Rights of Persons with Disabilities (CRPD)), and the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).

- The NSPP for housing services promotes the right to an adequate standard of living (specifically in relation to housing) (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- The NSPP for disability services promotes:

  - the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);

  - rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);

  - rights concerning the personal mobility of persons with disabilities (art 20, CRPD);

  - rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and

  - the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NSPPs has a detrimental impact on any human rights.[12]

Committee response

1.459 **The committee thanks the Treasurer for his detailed response.**

1.460 The Treasurer has explained the various rights that the instruments engage and promote. However, the response does not explain whether the payments have changed over time (if there is any reduction in payments this could limit or have a retrogressive impact on human rights). As noted in the previous report, information that provides a detailed comparison for the amounts provided in the Determinations with the amounts provided in previous years would assist the committee in assessing the instruments' compatibility with human rights.

1.461 **The committee therefore requests further information from the Treasurer as to whether the Determinations are compatible with Australia's international human rights obligations, in particular whether there has been any reduction in the allocation of funding, and if so, whether this is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights.**

Payments to the states and territories for the provision of health, education, employment, housing and disability services—National Partnership payments

1.462 Under the the IGA, the Commonwealth provides National SPPs to the states and territories as a financial contribution to support state and territory service delivery. The *Federal Financial Relations Act 2009* provides for the minister, by

12 Appendix 1, Letter from the Hon Scott Morrison MP, Treasurer, to the Hon Philip Ruddock MP (dated 14 October 2015) 1-2.

legislative instrument, to determine the total amounts payable in respect of each National SPP.

1.463 As noted above at [1.452], the Determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

1.464 The committee has previously considered that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the ICCPR and the ICESCR.[13]

Multiple rights

1.465 The committee considered in its previous analysis that the Determinations engage and may promote or limit a number of rights as set out above at [1.454].

Compatibility of the Determinations with multiple rights

1.466 The National Partnership payments instruments are not accompanied by statements of compatibility as the instruments are not specifically required to have such statements under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, the committee's role under section 7 of that Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

1.467 As noted at [1.456], Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure.

1.468 Where the Commonwealth seeks to reduce the amount of funding pursuant to National SPPs, such reductions in expenditure may amount to retrogression or limitations on rights.

1.469 The committee therefore sought the advice of the Treasurer as to whether the Determinations are compatible with Australia's human rights obligations, and particularly, whether the Determinations are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; whether a failure to adopt these Determinations would have a regressive impact on other economic, social and cultural rights; whether any reduction in the allocation of funding (if applicable) is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social

13 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

and cultural rights; and whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

Treasurer's response

National Partnership Payments (December 2014 - June 2015)

NPs are payments made by the Commonwealth to the states and territories to support the delivery of specified outputs or projects, facilitate reforms, and to reward them for undertaking nationally significant reforms. The FFR Act requires the Treasurer to determine NP amounts to be paid to each state and territory. As these payments are generally made on the 7th day of each month, the Treasurer usually makes an NP determination at least once a month.

NP amounts are generally only determined, and then paid, once a state or territory achieves pre-determined milestones or performance benchmarks as set out in the relevant National Partnership Agreement. As shown in the table below, the Commonwealth provided NP funding to the states and territories across a variety of sectors during 2014-15. Further information on the various National Partnership Agreements that make up these totals can be found in the 2014-15 Final Budget Outcome.

Sector	Total value of NPs in 2014-15 ($m)
Health	1,338
Education	750
Skills and workforce development	395
Community services	902
Affordable housing	638
Infrastructure	4,874
Environment	531
Contingent liabilities	522
Other purposes	3,732
Total	**13,681**

It is difficult to assess the human rights compatibility of the determination and payment of NP amounts. The amounts paid to each state and territory vary each month; this reflects the fact that payments are made as individual states and territories meet varying milestones or benchmarks, as stipulated in the various National Partnership Agreements.

However, in general, the provision of NPs could be said to assist the advancement of:

- the right to education (art 13, ICESCR; art 28, CRC and art 24, CRPD),
- the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).
- the right to an adequate standard of living (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- the right to the highest attainable standard of physical and mental health (art 12(1), ICESCR; art 24, CRC and art 25, CRPD).
- the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
- rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
- rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
- rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
- the right to take part in cultural life (art 30, CRPD).

I do not consider that either the determination or payment of NPs has a detrimental impact on any human rights.[14]

Committee response

1.470 **The committee thanks the Treasurer for his response. The committee notes the Treasurer's advice that determining the human rights compatibility of the National Partnership Payments instruments set out at [1.446] above is difficult due to a constant fluctuation in payment amounts from month to month. The committee therefore agrees that a human rights analysis for National Partnership Payments may not be amenable in a meaningful way, and has concluded its examination of these instruments.**

14 Appendix 1, Letter from the Hon Scott Morrison MP, Treasurer, to the Hon Philip Ruddock MP (dated 14 October 2015) 2-3.

Advice only

1.471 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.

Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015

Sponsor: Senator Wang
Introduced: Senate, 13 October 2015

Purpose

1.472 The Commonwealth Grants Commission Amendment (GST Distribution) Bill 2015 (the bill) seeks to amend the *Commonwealth Grants Commission Act 1973* to require that the Commonwealth Grants Commission (CGC), when considering the capacity of a state or territory to raise mining revenue in preparing its annual recommendation on the distribution of goods and services tax (GST) revenue, only takes into account the most recent financial year for which mining revenue data is available.

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

Service delivery dependent on taxation revenue

1.474 The statement of compatibility states that the bill does not engage any rights or freedoms.

1.475 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on taxation revenue and the subsequent allocation of that revenue through budget expenditure. The states and territories have limited revenue capacity and rely heavily on distribution of GST revenue payments. This revenue enables the provision of a range of government services which facilitate and support the implementation of multiple human rights.

1.476 The obligations under international human rights law are on Australia as a nation state - it is therefore incumbent on the Commonwealth to ensure that there is a fair and equitable allocation of GST tax revenue between the states and territories to ensure that Australia's international human rights obligations are met.

1.477 Accordingly, the committee considers that there is a sufficiently close connection between the distribution of GST revenue and the implementation of new legislation, policy or programs, or the discontinuation or reduction in support of a particular policy or program that may engage human rights. As a result, the statement of compatibility for this bill should provide an assessment of any limitation or promotion of human rights that may arise from that engagement. This would include information that provides a detailed comparison of how the bill

would impact on the distribution of GST revenue to states and territories and the consequential ability to provide services.[1]

1.478 The committee notes that it would be very difficult for a private senator, without the resources of the Department of Finance and Department of Treasury, to undertake such a comprehensive analysis.

1.479 **The committee considers that the bill engages multiple human rights as there is a sufficiently close connection between the distribution of goods and services tax revenue and the implementation of legislation, policy or programs that may engage human rights.**

1.480 **Accordingly, the committee encourages the legislation proponent to consult the committee's Guidance Note 1 which provides more information as to the role of the committee in scrutinising legislation for compatibility with Australia's international human rights obligations and guidance on how statements of compatibility may be prepared.**

1 See, for example, the committee's analysis of annual appropriation bills, such as in Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 5-9.

Marriage Legislation Amendment Bill 2015

Sponsors: Hon Warren Entsch MP; Hon Teresa Gambaro MP; Ms Terri Butler MP; Mr Laurie Ferguson MP; Mr Adam Bandt MP; Ms Cathy McGowan MP; Mr Andrew Wilkie MP

Introduced: House of Representatives, 17 August 2015

Purpose

1.481 The Marriage Legislation Amendment Bill 2015 (the bill) seeks to amend the *Marriage Act 1961* (the Marriage Act) to:

- define marriage as a union of two people;
- clarify that ministers of religion or chaplains are not bound to solemnise marriage by any other law; and
- remove the prohibition of the recognition of same-sex marriages solemnised in a foreign country.

1.482 The bill also seeks to amend the *Sex Discrimination Act 1984* to make consequential amendments.

1.483 Measures engaging human rights are set out below.

Changes to the Marriage Act to permit same-sex marriage

1.484 The bill seeks to make a number of changes to the Marriage Act in order to permit same-sex couples to marry.

1.485 It is important to note that the bill seeks to remove the existing domestic law prohibition on same-sex couples marrying. To date, the available international jurisprudence has focused primarily on whether a prohibition on same-sex couples marrying is compatible with human rights. The task of the committee, in examining the bill for compatibility with human rights, is not to consider whether there is a right under international human rights law to same-sex marriage, but to consider whether the removal of the prohibition on same-sex marriage is compatible with Australia's human rights obligations.

1.486 In this regard, the bill engages the right to equality and non-discrimination; the right to freedom of thought, conscience and religion or belief; the right to respect for the family; and the rights of the child.

1.487 The right of minority groups and the right to freedom of expression are not engaged by the bill.[1] This is because the bill does not prevent religious minority groups from professing and practising their own religion, or prevent any person from exercising their right to freedom of expression. The following analysis therefore does not examine these rights.

1 See articles 27 and 19 of the ICCPR.

Right to equality and non-discrimination

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

1.489 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.

1.490 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[2] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[3] 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.[4]

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

1.491 The statement of compatibility acknowledges that the bill engages the right to equality and non-discrimination 'because it extends the right to marry to any two people regardless of sex, sexual orientation, gender identity or intersex status'. On this basis the statement concludes that the bill promotes those rights.

1.492 Under article 26 of the ICCPR, states are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which includes sex and 'any other status'. While sexual orientation is not specifically listed as a protected ground the treaty otherwise prohibits discrimination on 'any ground', and the UN Human Rights Committee has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[5]

1.493 On this basis, by restricting marriage to between a man and a woman the current Marriage Act appears to directly discriminate against same-sex couples on the basis of sexual orientation.

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2 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.

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

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

5 See UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992) and UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003).

1.494 In *Joslin v New Zealand* (2002) the United Nations Human Rights Committee (the UN Committee) determined that the right to marry under the ICCPR is confined to a right of opposite-sex couples to marry, and that in light of this a refusal to provide for same-sex marriage does not breach the right to equality and non-discrimination.[6] However, the UN Committee provided no reasoning as to whether the prohibition on same-sex marriage discriminated against same-sex couples. Rather, it said that in light of its findings as to the right to marry it could not find that a *mere refusal* to legislate for same-sex marriage violated the right to equality and non-discrimination. If it had examined this question, the UN Committee would have had to assess whether the differential treatment of same-sex couples is reasonably and objectively justifiable.[7] It is important to note that the committee is not required to determine this question, because the bill does not propose to treat same-sex couples differently.

1.495 While not relevant to the analysis of the bill, it should be noted that since *Joslin v New Zealand* (2002) was decided there has been a significant evolution of social attitudes towards same-sex couples. Many countries have afforded legal recognition to same-sex couples and international jurisprudence has recognised that same-sex couples are just as capable as opposite-sex couples of entering into stable, committed relationships and are in need of legal recognition and protection of their relationship, be it marriage or legally recognised civil partnerships.[8] This change in views is relevant in considering whether there is objective and reasonable justification for treating same-sex couples differently.

1.496 As noted above, the bill would remove the current prohibition on same-sex couples marrying. The committee therefore must consider whether extending the legal recognition of marriage to same-sex couples limits or promotes the right to equality and non-discrimination. Given that discrimination on the grounds of sexual orientation is recognised as a ground on which states are required to guarantee all persons equal and effective protection against, it seems clear that extending the definition of marriage to include a union between two people (rather than only for opposite-sex couples) promotes the right to equality and non-discrimination.

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6 See *Joslin v New Zealand*, UN Human Rights Committee, Communication No. 902/1999 (2002) at paragraph 8.3: 'In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant'.

7 See UN Human Rights Committee, General Comment No. 18: Non-discrimination (1989), paragraph 13.

8 See European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) paragraphs [99]; European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015), paragraph [165]; see also *Obergefell v Hodges, Director, Ohio Department of Health*, Supreme Court of the United States 576 US (2015).

1.497 It should be noted that the view that extending the legal definition of marriage promotes the right to equality and non-discrimination does not suggest that extending marriage more broadly would promote human rights. International human rights jurisprudence has established that in order for a measure to engage the rights of equality and non-discrimination there must be a difference in the treatment of persons in *relevantly similar situations*.[9] While it has been held that same-sex couples 'are just as capable as different-sex couples of entering into stable, committed relationships',[10] it has not been established that other relationships would be classified as a relevantly similar situation. For example, the case law establishes that the relationship between two cohabitating siblings is 'qualitatively of a different nature to that between married couples'.[11]

1.498 **The committee has assessed the bill against article 26 of the International Covenant on Civil and Political Rights (the right to equality and non-discrimination) and is of the view that the bill, in expanding the definition of marriage, promotes the right to equality and non-discrimination.**

Right to freedom of religion

1.499 Article 18 of the ICCPR protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching. The right includes the right to have no religion or to have non-religious beliefs protected.

1.500 The right to freedom of religion not only requires that the state should not, through legislative or other measures, impair a person's freedom of religion, but that the state should also take steps to prevent others from coercing persons into having, or changing, religion.

1.501 The right to hold a religious or other belief or opinion is an absolute right. However, the right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is necessary to protect public safety, order, health or morals or the rights of others. The right to non-discrimination often intersects with the right to freedom of religion and each right must be balanced against one another.

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9 See European Court of Human Rights, *D.H. and Others v the Czech Republic*, Application No. 57325/00, paragraph [175] (emphasis added).

10 See European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015), paragraph [165].

11 European Court of Human Rights, *Burden v the United Kingdom*, Application No. 13378/05 (2008), paragraph [62].

Compatibility of the measure with the right to freedom of religion

1.502 The Marriage Act currently grants a minister of religion of a recognised denomination the discretion whether to solemnise a marriage.[12]

1.503 The bill would amend the Marriage Act to extend this discretion to ensure that nothing in the Marriage Act 'or in any other law' imposes an obligation on a minister of religion to solemnise any marriage. Accordingly, ministers of religion would be free not to solemnise a same-sex marriage for any reason, including if this was contrary to their religious beliefs.

1.504 Importantly, provided that a minister of religion is authorised by their religion to solemnise marriages, they retain absolute discretion under the law as to whether or not they wish to solemnise a particular marriage. This discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.

1.505 In contrast, under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws. The amendments in the bill would mean that civil celebrants (who are not ministers of religion) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. This would apply even if the civil celebrant had a religious objection to the marriage of same-sex couples. This engages and limits the right to freedom of religion under article 18 of the ICCPR.

1.506 To the extent that this limits a civil celebrant's right to freedom of religion, it is necessary to consider whether this limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.507 The statement of compatibility states that the objective of the bill is to allow any two people to marry and thereby recognise the right of all people to equality before the law. Ensuring that persons are not discriminated against on the basis of a prohibited ground is a legitimate objective for the purposes of human rights law; and the measure is clearly rationally connected to this objective (that is, would be effective to achieve that objective).The central question is whether, by not providing

12 *Marriage Act 1961*, section 47(b). The Marriage Act defines a 'minister of religion' as 'a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation'. Once a religious body recognises a person as having authority to solemnise marriages in accordance with their rights and customs, section 47 of that Act gives the minister of religion a right not to solemnise any marriage, on any basis, without the need to give reasons. As a matter of statutory interpretation it is not relevant whether the religious body or organisation to which the minister of religion is attached allows for same-sex marriage, because the exception in the Marriage Act applies to the minister of religion personally. Of course, if the religious body or organisation does not recognise that person to have authority to solemnise marriages they would not be considered to be a minister of religion – in which case they would need to be registered as a civil celebrant in order to legally solemnise a marriage.

an exemption for civil celebrants to solemnise marriage where to do so may be contrary to their religious beliefs, the bill is proportionate to the objective of promoting equality and non-discrimination. On the scope of the exemption the statement of compatibility states:

> It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow discrimination on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with characteristics that are protected under discrimination legislation differently from other groups of people with characteristics that are also protected.[13]

1.508 Article 18(3) of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The UN Committee has explained:

> In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26 [equality and non-discrimination]. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18…Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[14]

1.509 The UN Committee has thus concluded that the right to exercise one's freedom of religion may be limited to protect equality and non-discrimination. As set out above, the right to equality and non-discrimination has been extended to sexual orientation. It is therefore permissible to limit the right to exercise one's freedom of religion in order to protect the equal and non-discriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.

1.510 This point has been addressed by the South African Constitutional Court in *Fourie*;[15] and by the British Columbia Court of Appeal (Canada) in *Halpern*,[16] in which

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13 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 2.

14 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, (1993) paragraph [8].

15 *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19 [97].

the court concluded that marriage as a legal institution, does not interfere with each religion determining what marriage is for the purposes of that religious institution.[17]

1.511 In *Eweida and Ors v United Kingdom*,[18] the European Court of Human Rights dismissed Ms Ladele's complaint that she was dismissed by a UK local authority (the Islington Council) from her job as a register of births, death and marriages, because she refused on religious grounds to have civil partnership duties of same-sex couples assigned to her. The court upheld the finding of the UK courts that the right to freedom of religion (under article 9 of the European Human Rights Convention) did not require that Ms Ladele's desire to have her religious views respected should 'override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community.'[19]

1.512 On the question of proportionality, the bill appears to take the least rights restrictive approach to the limit placed on the right to freedom of religion, because it maintains the exception for ministers of religion to refuse to solemnise a marriage on any basis. While it does not provide an exception for civil celebrants this is in line with existing laws and, as explained above, seeks to balance the competing rights of same-sex couples to be treated equally by civil celebrants once the law is in force. Accordingly, the fact that civil celebrants may be required to officiate at same-sex weddings, regardless of their religious views, is not a disproportionate limit on the right to freedom of religion.

1.513 It should be noted in the Australian context that civil celebrants, acting under the Marriage Act, are performing the role of the state in solemnising marriages. It is irrelevant to this analysis that civil celebrants are not directly employed by the state. Further, nothing in the bill affects the body of existing anti-discrimination law provisions which prohibit persons who provide goods or services to the public from discriminating against persons on the basis of their sexual orientation.

1.514 **The committee has assessed the bill against article 18, read in conjunction with articles 2 and 26 of the International Covenant on Civil and Political Rights (the right to freedom of religion and the right to equality and non-discrimination) and a number of committee members are of the view that the bill is compatible with the right to freedom of religion, as any limitation on the right to freedom of religion is proportionate to the objective of promoting equality and non-discrimination.**

1.515 **However, the committee was divided on the issue of the limitation which the bill places on the right to freedom of religion. A number of committee members considered that this limitation is not justified as the bill does not provide**

16 *Barbeau v British Columbia (A-G*) 2003 BCCA 251.

17 *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA) [53].

18 *Eweida & Ors v United Kingdom* [2013] ECHR 37.

19 *London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] ICR 532.

civil celebrants with the option to refuse to solemnise marriages that are contrary to their religious beliefs.

Right to respect for the family

1.516 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection. Article 23 of the ICCPR recognises the right of men and women of marriageable age to marry and found a family.

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

Compatibility of the measure with the right to respect for the family

1.518 By allowing same-sex couples to marry the bill would not impose any limitation on the right to respect for the family. This is because it would not reduce in any way the existing protections afforded to married couples and their families.

1.519 To the extent that the bill would expand the protections afforded to married couples under Australian domestic law to same-sex couples, it may engage the right to respect for the family. The statement of compatibility states that it supports families 'by extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents'.[20]

1.520 The right to respect for the family under international human rights law applies to all families, including same-sex couples, and the bill is consistent with this expanded view of the family under international human rights law.

1.521 For example, recognising the diversity of family structures worldwide, the UN Committee has adopted a broad conception of what constitutes a family, noting that families 'may differ in some respects from State to State…and it is therefore not possible to give the concept a standard definition'.[21] Consistent with this approach, the European Court of Human Rights noted in 2010 that same-sex couples without

20 EM, SoC 2.

21 UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security* (2008).

children fall within the notion of family, 'just as the relationship of a different-sex couple in the same situation would'.[22]

1.522 Similarly, the UN Committee on the Rights of the Child noted in 1994 that the concept of family includes diverse family structures 'arising from various cultural patterns and emerging familial relationships', and stated:

> …[the Convention on the Rights of the Child (CRC)] is relevant to 'the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family'.[23]

1.523 This statement on family diversity, along with the UN Committee's more recent inclusion of sexual orientation as a prohibited ground of discrimination against a child and a child's parents, is consistent with the view that the Convention on the Rights of the Child (CRC) extends protection of the family to same-sex families.[24] Further, the UN Committee has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.[25]

1.524 It is relevant to note that views on what constitutes marriage under international human rights law are changing, and have changed since the time when the ICCPR was drafted. The ICCPR is a living document and is to be interpreted in accordance with contemporary understanding. The UN Committee has emphasised that the ICCPR should be 'applied in context and in the light of present-day conditions'.[26]

1.525 In addition, state practice is an important element of international law, both as a key component of customary international law and as a crucial tool for

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22 European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) paragraphs [93]–[94].

23 UN Committee on the Rights of the Child, *Report on the Fifth Session*, 5th sess, UN Doc CRC/C/24 (8 March 1994) Annex 5 ('Role of the Family in the Promotion of the Rights of the Child'). See also UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003).

24 UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003). Privacy, family life and home life are protected by art 16 of the CRC, as well as by art 17(1) of the ICCPR, which states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

25 UN Committee on the Rights of the Child, *Report on the Twenty-eighth Session*, 28th sess, UN Doc CRC/C/111 (28 November 2001) [558].

26 UN Human Rights Committee, *Roger Judge v Canada*, Communication No 829/1998 (5 August 2002) paragraph [10.3]. See also European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015).

interpreting treaties. The definitions of marriage and family in the ICCPR should therefore be interpreted in accordance with current state practice.

1.526 Currently, a large number of countries recognise same-sex partnerships to some degree (through civil unions, registries and same-sex marriage), and there is a clear trend towards further recognition. Interpreting the ICCPR consistent with emerging state practice thus requires an expansive view of marriage and family.[27]

1.527 **The committee has assessed the bill against articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights (right to respect for the family) and is of the view that the bill promotes the right to respect for the family by extending the availability of marriage to same-sex couples.**

Rights of the child

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

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

1.529 Under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[28]

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

Compatibility of the measure with the rights of the child

1.531 The statement of compatibility states that the bill promotes the best interests of children by:

> …extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents.[29]

27 Jens M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' *The Equal Rights Review,* 10 (2013), 83.

28 Article 3(1) of the Convention on the Rights of the Child (CRC).

1.532 It also states that the bill does not affect the status quo regarding the parentage of children and therefore does not 'adversely affect the rights of children'.[30]

1.533 It is noted that the bill proposes to make one amendment which would engage the rights of the child, namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child.

1.534 However, as the bill relates strictly to marriage it does not directly engage the rights of the child. The regulation of marriage provides legal recognition for a relationship between two people, which in and of itself has no impact on whether the persons in that relationship have children—there are many married couples who do not have children and many unmarried couples that do have children.

1.535 Further, the bill would not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children. Such laws therefore fall outside the scope of the committee's examination of the bill for compatibility with human rights.

1.536 In addition, whether or not a child's parents or guardians are married has no legal effect on the child. In compliance with the requirements of international human rights law, there are no laws in Australia that discriminate against someone on the basis of their parents' marital status.[31] Therefore, amending the definition of marriage in the Marriage Act will not affect the legal status of the children of married or unmarried couples.

1.537 It is noted that the CRC refers to 'parents' and 'legal guardians' interchangeably and refers to 'family' without referencing mothers or fathers.[32] The preamble notes that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[33] There is no reference to marriage in the Convention. Provisions in the CRC relating to a child's right to know

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29 EM, SoC 3.

30 EM, SoC 3.

31 See article 2 of the CRC which states that all rights should be ensured to children without discrimination of any kind, irrespective of the child's or parent's social origin or birth. See also article 26 of the International Covenant on Civil and Political Rights which requires state parties to guarantee equal protection against discrimination on any ground, including social origin, birth or other status.

32 Fathers are not mentioned in the Convention and mothers are only referred to in the context of pre and postnatal care.

33 See the Preamble to the CRC.

its parents and a right to remain with its parents,[34] are not engaged by the bill, which is limited to the legal recognition of relationships.

1.538 There is an obligation in the CRC to take into account the best interests of the child 'in all actions concerning children', and this legal duty applies to all decisions and actions that directly or indirectly affect children. The UN Committee on the Rights of the Child has said that this obligation applies to 'measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure'.[35] This applies to the legislature in enacting or maintaining existing laws, and the UN Committee has given the following guidance as to when a child's interests may be affected:

> Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.[36]

1.539 In this regard, it is questionable whether the legal recognition of a parent's relationship would have a major impact on a child.

1.540 However, assuming it would, it is necessary to assess whether legislating to allow same-sex marriage would promote or limit the rights of the child to have his or her best interests assessed and taken into account as a primary consideration. There is no evidence to demonstrate that legal recognition of same-sex parents' relationships would be contrary to the best interests of the children of those couples.

1.541 In contrast, there is some evidence suggesting that children living with cohabiting, but unmarried, parents may do less well than those with married parents.[37] There is also some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married.[38]

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34 See articles 7 and 9 of the CRC.

35 UN Committee on the Rights of the Child*, General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* (2013) paragraph [19].

36 UN Committee on the Rights of the Child, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, (2013) paragraph [20].

37 See Lixia Qu and Ruth Weston, Australian Institute of Family Studies, *Occasional Paper No. 46: Parental marital status and children's wellbeing*, 2012.

38 Christopher Ramos, Naomi G Goldberg and M V Lee Badgett, The Effects of Marriage Equality in Massachusetts: A Survey of the Experience and Impact of Marriage on Same-sex Couples (Williams Institute) 10.

1.542 Further, to the extent that any existing laws provide greater protection for married couples compared to non-married couples, extending the protection of marriage to same-sex couples may indirectly promote the best interests of the child.

1.543 Therefore, there is nothing to demonstrate that extending the legal recognition of marriage to same-sex couples would constitute a limitation on the best interests of the child; rather, it may promote the best interests of the child.[39]

1.544 **The committee has assessed the bill against the rights in the Convention on the Rights of the Child. As the bill is limited to the legal recognition of a relationship between two people, and does not regulate procreation or adoption, the committee is of the view that the rights of the child are not engaged by the bill. In relation to the obligation to consider the best interests of the child, to the extent that the bill engages this right, the committee is of the view that the bill does not limit, and may promote, the obligation to consider the best interests of the child.**

39 Note that studies or evidence relating to children's wellbeing in same-sex parented families are not relevant in this instance as the bill relates to the legal recognition of marriage, and not to the ability of same-sex couples to be parents.