

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 9 to 12 November 2015, legislative instruments received from 2 to 29 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):

- Amending Acts 1990 to 1999 Repeal Bill 2015;
- Automotive Transformation Scheme Amendment (Securing the Automotive Component Industry) Bill 2015;
- Export Control Amendment (Quotas) Bill 2015;
- Migration Legislation Amendment (Cessation of Visa Labels) Bill 2015;
- Statute Law Revision Bill (No. 3) 2015; and
- Tax Laws Amendment (Gifts) 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):

- Australian Institute of Aboriginal and Torres Strait Islander Studies Amendment Bill 2015;
- Treasury Legislation Amendment (Repeal Day 2015) Bill 2015; and
- Veterans' Entitlements Amendment (Expanded Gold Card Access) 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.

1.11 The committee has also concluded its examination of the previously deferred Military Superannuation and Benefits (Eligible Members) Declaration 2015 [F2015L01527] and makes no comment on the instrument.²

Deferred bills and instruments

1.12 The committee has deferred its consideration of the following bills and instruments:

- Counter-Terrorism Legislation Amendment Bill (No. 1) 2015; and
- Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658].

1.13 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).³

1.14 The committee also continues to defer the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422]

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, *Thirtieth Report of the 44th Parliament* (10 November 2015) 2.

3 See Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 2.

pending a response from the Minister for Foreign Affairs regarding a number of related instruments.⁴

1.15 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.⁵

4 See the entry 'Instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*' in Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38. The instrument was deferred by the committee in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 2.

5 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

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

Omnibus Repeal Day (Spring 2015) Bill 2015

Portfolio: Prime Minister

Introduced: House of Representatives, 12 November 2015

Purpose

1.17 The Omnibus Repeal Day (Spring 2015) Bill 2015 (the bill) seeks to make a number of amendments to a variety of Acts. The bill seeks to repeal redundant or spent provisions as well as make a number of amendments designed to reduce regulation.

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

Background

1.19 The Omnibus Repeal Day (Spring 2014) Bill 2014 (the 2014 bill) sought to make a number of the amendments that are contained in this bill. The 2014 bill is currently before the House of Representatives.

1.20 The committee commented on the 2014 bill in its *Nineteenth Report of the 44th Parliament*¹ and its *Twenty-second Report of the 44th Parliament*.²

Removal of consultation requirement when changing disability standards

1.21 Part 2 of Schedule 3 of the bill seeks to repeal a number of provisions in various Acts relating to consultation requirements, including repealing subsections 382(1) and (3) of the *Telecommunications Act 1997* (the Telecommunications Act).

1.22 Currently, the Australian Communications and Media Authority (ACMA) can make a 'disability standard' in relation to equipment used in connection with a standard telephone service where features of the equipment are designed to cater for the special needs of persons with disabilities (for example, an induction loop designed to assist with a hearing aid).³ Before making a disability standard, ACMA must try to ensure that interested persons have an adequate opportunity (of at least

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 29-38.

2 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 174-182.

3 Section 380 of the *Telecommunications Act 1997* (the Telecommunications Act).

60 days) to make representations about the proposed standard, and give due consideration to any representations made.⁴

1.23 By removing these requirements, the committee considers that the measure engages the right to equality and non-discrimination and the rights of persons with disabilities.

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

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

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

1.26 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),⁵ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.⁶ 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.⁷

1.27 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.

1.28 Article 4 of the CRPD requires that when legislation and policies are being developed and implemented that relates to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

1.29 Article 9 of the CRPD requires state parties to take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems.

4 Section 382 of the Telecommunications Act.

5 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.

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

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

1.30 Article 21 of the CRPD requires state parties to take all appropriate measures to ensure persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others.

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

1.31 The committee notes that the CRPD describes the specific elements that state parties are required to take into account to ensure the right to equality and non-discrimination. In particular, article 4(3) of the CRPD requires that when legislation and policies are being developed and implemented that relate to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

1.32 In addition, article 9 of the CRPD requires that state parties take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems. The United Nations Committee on the Rights of Persons with Disabilities has noted that access to information and communications technology (including telephones) is a requirement of the obligation to adopt and monitor national accessibility standards, and has noted that it 'is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (art. 4, para. 3), as well as all other relevant stakeholders'.⁸

1.33 The obligation to respect the right to equality and non-discrimination in relation to persons with disabilities includes an obligation to closely consult when reviewing any regulations that affect accessibility, such as national disability standards administered by ACMA under the Telecommunications Act. As the bill seeks to repeal consultation requirements under the Telecommunications Act, it is necessary to demonstrate that existing legislation provides for as much, if not more, requirements to consult when any changes are made to disability standards.

1.34 The statement of compatibility states that the existing provisions of the *Legislative Instruments Act 2003* (LI Act) provide a statutory mechanism for people to comment on those standards, and that the differences between the standards in the LI Act and those repealed by this bill are not significant as they are both framed in terms of 'practicable' consultation.

1.35 However, as the committee noted in its consideration of this matter in relation to the 2014 bill, the LI Act does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In

8 Committee on the Rights of Persons with Disabilities, *General Comment No. 2: Article 9: Accessibility* (2014) para 28.

the event that a rule-maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, there are no equivalent process requirements to those contained in the Telecommunications Act, which provides for at least 60 days for people to make comments on a proposed standard. In addition, the LI Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.

1.36 As the committee previously noted in relation to the 2014 bill, the consultation requirements under the LI Act are not equivalent to the current consultation requirements in the Telecommunications Act. Therefore, the repeal of the consultation requirements in relation to disability standards limits the right to equality and non-discrimination, in particular, the obligation to consult under the CRPD.

1.37 A limitation on a right can be justified if the measure seeks to achieve a legitimate objective and the limitation is rationally connected to, and is a proportionate way to achieve, its legitimate objective.

1.38 The statement of compatibility does not explain the specific purpose of this amendment, other than the general statement that the purpose of the bill as a whole is to 'reduce regulatory burden for business, individuals and the community sector'.⁹

1.39 The committee notes that to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The committee considers that broadly reducing regulatory burden may not be considered to meet a pressing or substantial concern, such that it would warrant limiting the obligation to closely consult with, and actively involve, persons with disabilities when adopting and monitoring national accessibility standards.

1.40 The statement of compatibility also provides no assessment of the proportionality of the measure, other than to say that the requirements under the LI Act will ensure that the views of persons with disabilities continue to be appropriately considered.

1.41 The committee's assessment of the repeal of consultation requirements in relation to disability standards against article 26 of the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination and rights of persons with disabilities) raises questions as to whether the repeal of these requirements is consistent with these rights.

9 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 88.

1.42 As set out above, the repeal of consultation requirements engages and limits the right to equality and non-discrimination and the rights of persons with disabilities. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Productivity 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 requirement for independent reviews of Stronger Futures measures

1.43 Items 10 to 16 of part 3 of Schedule 11 of the bill seek to repeal several provisions in the *Stronger Futures in the Northern Territory Act 2012* (SF Act) that currently require certain reviews to be undertaken. Some of these requirements are now redundant as the reports of the review have now been tabled. However, the bill also repeals a requirement that there be an independent review of the first three years of operation of the SF Act, with the report of the review to be tabled in Parliament. Currently the review process in section 117 of the SF Act requires an assessment of the effectiveness of the special measures provided for by the Act and consideration of any other matter specified by the minister. This review is currently due to be completed before 16 July 2016.

1.44 As the committee previously noted in relation to similar measures in the 2014 bill, removing the legislated requirement for review of the measures in the SF Act engages and may limit a number of human rights, including the following rights:

- right to equality and non-discrimination;¹⁰
- right to social security;¹¹
- right to an adequate standard of living;¹² and
- right to a private life.¹³

10 Article 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR); article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

11 Article 9 of the ICESCR.

12 Article 11 of the ICESCR.

13 Article 17 of the ICCPR.

Compatibility of the measure with multiple rights

1.45 The statement of compatibility states that the repeal places no limits on human rights and so is compatible with human rights:

The Australian Government, with the Northern Territory Government, is currently negotiating a new National Partnership Agreement as a result of the formal revision of the Stronger Futures NPA. The new National Partnership Agreement will continue measures underpinned by the SF Act, and will also include specific review points of the operation of those measures with an equivalent level of scrutiny. This makes the provisions under section 117 in the SF Act redundant.

Repeal of the review and reporting provisions under section 117 of the SF Act will provide clarity by removing duplicative requirements from the Commonwealth statute book. It is compatible with human rights, as to the extent that the SF Act engages human rights the repeal does not place any limitations on those rights.¹⁴

1.46 It is not clear to the committee that a legislated review of the Stronger Futures measures is redundant or duplicative, given the National Partnership Agreement (NPA) is not yet finalised and will not contain a legislative requirement to review the measures contained in the SF Act. The committee does not consider that the proposed review process arising from the Stronger Futures NPA provides an equivalent review process to the review currently prescribed by the SF Act. The review provisions in the SF Act specify that the review must be independent, provides a timeframe in which the review must be completed, provides frameworks for what must be reviewed and requires reports of the reviews be tabled in Parliament. In contrast, the potential review as part of the NPA process is likely to lack any legislated requirement that the review actually take place or that it will be independent and transparent. It is also likely to take place at a much later date than the current deadline of July 2016.

1.47 As previously noted in relation to the 2014 bill, the committee has previously examined the Stronger Futures measures and considered whether the limitations imposed on rights were justifiable.¹⁵ The committee is currently conducting a further inquiry into these measures and intends to report shortly. As part of its initial examination the committee took into account the provisions requiring a legislated independent review process. For example, the committee examined the measures in the SF Act to address alcohol abuse. It considered that these measures engage and limit a number of rights, particularly the right to privacy and the right to non-discrimination. In making its conclusion on the proportionality of the measures, the committee relied on the then minister's analysis that the measures would not be

14 EM, SoC 95.

15 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013).

continued after their objective had been achieved and there was to be an independent review of the operation of the legislation after three years.¹⁶ The committee noted the importance of continuing close evaluation of such measures.

1.48 The committee also noted that effective and meaningful consultation with affected Indigenous communities is an important and necessary requirement for safeguarding human rights, particularly the right to self-determination.¹⁷ The committee concluded that this requires involving affected communities in decisions about whether to adopt measures and in implementing such measures, and also in their monitoring and evaluation.¹⁸

1.49 The committee notes that the government has previously stated that the measures in the SF Act are 'special measures' for the purposes of international law.¹⁹ Under international law, if measures are 'special measures' there must be a process for a full evaluation of whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage.²⁰

1.50 The committee considers that the existence of a legislative requirement for independent review and evaluation of the Stronger Futures measures is important to questions about justifying limitations on rights, particularly considering the proportionality of any such limitations. As the committee has concluded that the SF Act introduces a number of measures that limit multiple human rights, the committee considers that removing the requirement for independent review of these measures may affect the proportionality of the Stronger Futures measures.

1.51 The committee considers that the removal of a legislated requirement for independent review of the Stronger Futures measures may mean these measures may not be appropriately evaluated. The committee considers that repealing the legislated requirement for an independent review of the Stronger Futures

16 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 38-39.

17 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 34.

18 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 75.

19 Though note that the committee has previously concluded that it does not consider that these measures can properly be characterised as 'special measures' for the purposes of international human rights law. See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (26 June 2013) 21-28.

20 Note the Committee on Economic, Social and Cultural Rights, General Comment No. 16, para 36: 'States parties are encouraged to adopt temporary special measures to accelerate the achievement of equality between men and women in the enjoyment of the rights under the Covenant...The results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved'. Note also the comments of Bell J in *Maloney v R* [2013] HCA 28 at [252].

measures may affect the proportionality of any limitations on rights posed by the Stronger Futures measures and impact on whether such measures can be considered to justifiably limit human rights.

1.52 The committee notes that it is currently conducting its *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and will consider the effect of the removal of the review requirements as part of that inquiry.

Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464]

Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673]

Portfolio: Foreign Affairs

Authorising legislation: Charter of the United Nations Act 1945

Last day to disallow: 3 December 2015 (Senate) (or 22 February 2016 (Senate) for the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673])

Purpose

1.53 The Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 and the Charter of the United Nations (Sanctions—Syria) Regulation 2015 (together the cultural sanctions regulations) seek to give effect to a resolution of the United Nations Security Council in relation to the protection of Iraqi and Syrian cultural property.

1.54 The Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) (the UN Sanction Enforcement Law regulation) amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008, to include contravention of aspects of the cultural sanctions regulations relating to Syria as a 'UN sanction enforcement law'. The effect of this is to make breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the Act).

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

Australia's obligations under the United Nations Charter

1.56 In February 2015, the UN Security Council passed resolution 2199 that provides:

all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people...¹

1 United Nations Security Council, Resolution 2199 (2015), paragraph 17, 7379th meeting.

1.57 Under international law, Australia is bound by the Charter of the United Nations 1945 (UN Charter) to implement UN Security Council decisions.² In addition, Australia's obligations under the UN Charter may expressly override Australia's obligations under international human rights law.³

1.58 However, the terms of UN Security Council resolution 2199 give countries discretion as to what 'appropriate steps' are to be taken to prevent the trade in such items. On this basis, the committee considers that UN Security Council resolution 2199 requires Australia to implement appropriate steps to prevent the trade in Iraqi and Syrian cultural property that are consistent with Australia's international obligations including human rights obligations. Accordingly, the committee is required to assess whether these regulations, in implementing Australia's obligations under resolution 2199, are consistent with Australia's international human rights obligations.

Offences of dealing with 'illegally removed cultural property'

1.59 The cultural sanctions regulations provide that anyone who suspects an item is illegally removed cultural property from Iraq or Syria must notify either the Secretary of the Department of Foreign Affairs and Trade (DFAT) or of the Department of Communications and the Arts or a member of the police. If the Secretary of DFAT reasonably believes that a person has possession or control of an item that might be illegally removed cultural property, the Secretary may direct the person to comply with arrangements for storage of the item as specified by the Secretary.

1.60 An item is defined as 'illegally removed cultural property' if it is Syrian or Iraqi cultural property, or has archaeological, historical, cultural, rare scientific, or religious importance, and has been illegally removed from Syria on or after 15 March 2011 or from Iraq on or after 6 August 1990.

1.61 The cultural sanctions regulations do not specify what happens to an item once the Secretary of DFAT directs an item to be placed in storage. However, a legislative note states that the department and police will work together to determine whether the item is illegally removed cultural property and, if satisfied that it is, the department will arrange for its eventual return to Syria or Iraq. None of this detail is substantively set out in the legislative instruments.

1.62 A person commits an offence of strict liability if they fail to comply with arrangements specified by the Secretary, liable to up to 50 penalty units. In addition, as breach of such provisions in relation to Syria have been designated as a UN

2 See article 2(2) and article 41 of the Charter of the United Nations 1945.

3 See section 103 of the UN Charter which provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

sanction enforcement law, a person commits an offence under the Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions. This is then punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units (or \$450 000).⁴ In contrast, in relation to property removed from Iraq, only the strict liability penalty of 50 units applies to failing to comply with arrangements specified by the Secretary.

1.63 However, for both property from Iraq and Syria, there is an additional offence (specified as a UN sanction enforcement law) for persons who give, trade in or transfer the title of illegally removed cultural property, otherwise than in accordance with a direction of the Secretary.⁵ This is also punishable by up to ten years imprisonment and/or a fine of up to \$450 000.

1.64 The committee considers these measures engage and may limit the prohibition against arbitrary detention, as the offences which could lead to up to ten years imprisonment, may not have a clear legal basis as they are very vaguely drafted and imprecise.

Right to liberty (prohibition against arbitrary detention)

1.65 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. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.66 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.

4 See the combined effect of the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673], which designates regulation 5 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as a UN Sanction Enforcement Law under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

5 See Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2), specifying regulation 10 of the Charter of the United Nations (Sanctions—Iraq) Regulation 2008 and regulation 6 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as UN sanction enforcement laws under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

1.67 The right to liberty applies to all forms of deprivations of liberty, including detention in criminal cases, immigration detention, forced detention in hospital (such as involuntary admission for psychiatric treatment), detention for military discipline and detention to control the spread of contagious diseases.

Compatibility of the measure with the right to liberty (prohibition against arbitrary detention)

1.68 The statements of compatibility for the cultural sanctions regulations state that the regulations advance the protection of human rights in Syria and Iraq as they assist with international efforts to deprive terrorist organisations from funding human rights violations in Syria and Iraq by trading in illegally removed cultural property. The statement of compatibility for the UN Sanction Enforcement Law regulation states that the regulation does not engage any human rights. There is no further discussion in any of the statements about any rights that may be limited by the regulations, including the right not to be arbitrarily detained.

1.69 In assessing whether the regulations engage and may limit the right not to be arbitrarily detained, the committee notes that arbitrary detention under international human rights law is much broader than unlawful detention. Detention that is lawful under Australian law may nevertheless be arbitrary and thus in breach of Australia's obligations under article 9 of the ICCPR. The UN Human Rights Committee has explained:

The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.⁶

1.70 In addition, the UN Human Rights Committee has noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.⁷

1.71 This is consistent with the committee's approach to limitations on rights more generally. As set out in the committee's Guidance Note 1, any limitation on a right must be prescribed by law. This requires not only that the measure limiting the right be set out in legislation, but that the law must be precise enough so that people know the legal consequences of their actions or the circumstance under which authorities may restrict the exercise of their rights.

1.72 The provisions of the cultural sanctions regulations set out above at paragraphs [1.59] to [1.63] appear in a number of respects to lack the required legal clarity for the purposes of international human rights law. In particular:

6 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) paragraph 12.

7 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) paragraph 22.

- The definition of what constitutes 'illegally removed cultural property' is defined as an item of property that 'has been illegally removed' from Syria or Iraq after certain dates. It is unclear what constitutes illegal removal. For example, it could mean illegal under Iraqi or Syrian law at the time of removal (including, therefore, under laws in force in Iraq during the regime of Saddam Hussein or in Syria under the Assad regime), or it could mean illegal under international law or Australian domestic law.
- It is also unclear if an item would be considered to be 'illegally' removed if the person removing it did so without direct authority but for the purposes of safe-keeping or with the intent of ensuring the items were not lost or plundered in the context of a civil war (including in circumstances where there is no direction in force, or where they are unaware of any such direction).
- In addition, there is no definition as to what may be considered to be 'cultural property' or what may be considered an item of 'archaeological, historical, cultural, rare scientific, or religious importance'. For example, what is considered of historical importance may differ between countries and within countries.
- A person is required to comply with written directions from the Secretary 'for storage of the item'. No further detail is specified as to what these directions may be, nor is there a requirement that the arrangements be reasonable. Further, no timeframe is provided as to when a person must comply with such arrangements. It is unclear what would constitute a failure to comply with arrangements (does partial compliance constitute a failure, for example).
- Any person who gives, trades in or transfers the title of illegally removed cultural property, unless it is in accordance with a direction of the Secretary, is guilty of an offence. This offence has extended geographical jurisdiction so that the offence can be committed in other countries where there is a link to Australia; for example that the person is an Australian citizen.
- There is no requirement that a direction is in force in relation to the property before the offence could apply. It is also not clear what fault element would apply in this instance. The default fault element under the *Criminal Code Act 1995* is intention for conduct (such as intentionally giving the property) but is recklessness in other instances. It appears a person could be subject to up to ten years imprisonment for giving property to another person, and they are reckless as to whether it was illegally removed cultural property, and regardless of their reasons for so doing.

1.73 Accordingly, there are significant questions as to whether the limitation on the right to arbitrary detention imposed by the regulations is sufficiently precise for the purposes of international human rights law.

1.74 If it were considered that the limitation was sufficiently precise it would be necessary to consider whether the regulations pursue a legitimate objective. Seeking to deprive terrorist organisations of funding by restricting the sale of Syrian and Iraqi cultural artefacts is clearly a legitimate objective for the purposes of human rights law, and is in fact likely to advance the protection of human rights internationally. The penalties in the regulations are rationally connected to that legitimate objective as a substantial prison term may deter individuals in trading in Syrian and Iraqi cultural artefacts which may fund terrorist activities.

1.75 In terms of proportionality, the questions raised above in relation to legal precision also go to whether the regulation is the least rights restrictive method of achieving the stated objective. As set out above, the regulations could apply to individuals who have no involvement in funding terrorism directly or indirectly and who in fact seek to protect cultural artefacts from loss or plunder. Accordingly, it has not been demonstrated that the measures impose a proportionate limitation on the right not to be arbitrarily detained.

1.76 The committee's assessment of the offences of dealing with illegally removed cultural property against article 9 of the International Covenant on Civil and Political Rights (prohibition on arbitrary detention) raises questions as to whether the offences as drafted are sufficiently prescribed and justifiable.

1.77 As set out above, the offences of dealing with illegally removed cultural property engage and limit the prohibition on arbitrary detention. 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 Foreign Affairs as to:

- **whether the offence provisions are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including that there are sufficient safeguards in place and the measure is no more rights restrictive than necessary to achieve that objective.**

Strict liability offence

1.78 The cultural sanctions regulations both provide that strict liability applies if a person is directed by the Secretary to comply with specified arrangements for storage of the item, and the person fails to comply with the arrangement. The regulations state that a penalty of 50 penalty unit applies. However, in relation to Syria, read together with the UN Sanction Law Enforcement regulation, any act contravening this provision is also punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units.

1.79 The effect of applying strict liability to an element of an offence means that no fault element needs to be proven by the prosecution but the defence of mistake of fact is available to the defendant.

1.80 The imposition of strict liability engages and limits the right to a fair trial, in particular the right to be presumed innocent.

Right to a fair trial (presumption of innocence)

1.81 Article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.82 Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. However, strict 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)

1.83 Strict liability in this instance means that the prosecution does not have to prove any fault element in a person failing to comply with arrangements as directed. This is despite there being no detail in legislation as to what those arrangements might be, how the person might be directed or what the timeframe is for a failure to comply. The Attorney-General's Department's own *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability should only be applied to all elements of an offence if the offence is not punishable by imprisonment and there are legitimate grounds for penalising persons lacking fault.⁸ It is not clear why it is considered appropriate to impose strict liability in this instance, and no justification was provided in the statement of compatibility or other explanatory materials. It is particularly concerning that contravention of this provision in relation to Syria is deemed to be a UN sanction enforcement law and subject to up to ten years imprisonment.

1.84 As stated above at paragraph [1.72], the committee agrees that seeking to deprive terrorist organisations from funding human rights violations in Syria and Iraq is a legitimate objective for the purposes of international human rights law. However, it is unclear how making the offence of failing to comply with directions one of strict liability is rationally connected to that objective, and whether it is a reasonable and proportionate limitation on the right to the presumption of innocence.

8 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) 23.

1.85 The committee's assessment of the strict liability offence against article 14 of the International Covenant on Civil and Political Rights (presumption of innocence) raises questions as to whether the strict liability offence is justifiable.

1.86 As set out above, the strict liability offence engages and limits the 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 Minister for Foreign Affairs as to:

- whether there is a rational connection between the limitation and the stated objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective.

