Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-fifth report of the 44th Parliament

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Functions of the committee

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

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

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

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

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

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

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

Committee's analytical framework

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

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

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

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

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

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

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 22 to 24 February 2016, legislative instruments received from 22 January to 4 February 2016, 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 either do not raise human rights concerns; or they 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):

- Commonwealth Electoral Amendment Bill 2016; and
- Public Governance, Performance and Accountability Amendment (Procuring Australian Goods and Services) Bill 2016.

1.7 In relation to the Passenger Movement Charge Amendment (Norfolk Island) Bill 2016 and the Territories Legislation Amendment Bill 2016, these bills address concerns raised by the committee regarding the *Norfolk Island Amendment Act 2015* that may have a discriminatory effect by excluding some categories of Australian permanent residents from access to social security.[1] The committee

1 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 66-71.

thanks the Minister for Major Projects, Territories and Local Government for positively responding to the committee's advice, and notes that these bills will allow New Zealand citizens who hold an Australian permanent visa and reside on Norfolk Island access to social security payments, consistent with the arrangements for other Australian permanent visa holders. The committee therefore considers that these bills promote human rights.

Instruments not raising human rights concerns

1.8 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[2] Instruments raising human rights concerns are identified in this chapter.

1.9 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.

Previously considered measures

1.10 The committee refers to its previous comments in relation to the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, which includes measures previously considered by the committee.[3]

Deferred bills and instruments

1.11 The committee continues to defer its consideration of the following legislation:

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2016 (No. 1) [F2016L00047] (deferred 23 February 2016, pending a response from the Minister for Foreign Affairs regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*);[4]
- Child Care Benefit (Vaccination Schedules) (Education) Determination 2015 [F2015L02101] (deferred 23 February 2016, pending a response from

2 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.

3 This bill makes technical and mechanical changes to the *Migration Act 1958* which have the effect of expanding the operation of provisions considered by the committee in Schedule 2 of the Migration and Maritime Powers Amendment Bill (No. 1) 2015. See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 29-65.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 4.

the Minister for Social Services regarding the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015);[5] and

- Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).[6]

1.12 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.[7]

5 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 3.

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

7 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015); and Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 3-4.

Response required

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

Aviation Transport Security (Prohibited Cargo - Yemen) Instrument 2015 [F2015L02056]

Aviation Transport Security (Prohibited Cargo - Somalia) Instrument 2015 [F2015L02057]

Aviation Transport Security (Prohibited Cargo - Egypt) Instrument 2015 [F2015L02058]

Aviation Transport Security (Prohibited Cargo - Bangladesh) Instrument 2015 [F2015L02072]

Aviation Transport Security (Prohibited Cargo - Syria) Instrument 2015 [F2015L02073]

Portfolio: Infrastructure and Transport
Authorising legislation: Aviation Transport Security Act 2004
Last day to disallow: 11 May 2016 (Senate)

Purpose

1.14 The above instruments prohibit aviation industry participants from bringing cargo that has originated from, or that has transited through the listed countries into Australian territory.

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

Prohibitions in relation to specified countries

1.16 The instruments relating to Yemen, Somalia and Syria provide a blanket prohibition on bringing cargo into Australian territory that has originated from, or has transited through, these countries. The instruments relating to Egypt and Bangladesh provide a limited range of exceptions to the prohibition. The committee notes that the instruments apply to 'aviation industry participants'. However, by prohibiting all or most cargo from Yemen, Somalia, Bangladesh, Egypt and Syria from being brought into Australia, the instruments may have a disproportionate effect on people living in Australia who are originally from these countries as they will be unable to have goods sent to them from these countries.

1.17 The instruments therefore engage and limit the right to equality and non-discrimination.

Right to equality and non-discrimination

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

1.19 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.

1.20 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[1] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[2] 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.[3]

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

1.21 The statement of compatibility for each of the instruments states that the instruments do not engage any applicable rights or freedoms.

1.22 As outlined at paragraph [1.16] the committee considers that, by effectively precluding some people in Australia from accessing goods from their country of origin by air, the instruments engage and may limit the right to equality and non-discrimination as there may be a disproportionate impact on people based on their ethnicity.

1.23 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

1 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.

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

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

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.

1.24 **The committee's assessment of the prohibitions relating to cargo from specific countries against articles 2 and 26 of the International Covenant on Civil and Political Rights raises questions as to whether the instruments are compatible with the right to equality and non-discrimination.**

1.25 **As set out above, the instruments engage and limit the right to equality and non-discrimination. 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 Infrastructure and Regional Development as to:**

- **the objective to which the proposed changes are addressed, and why they address a pressing and substantial concern;**
- **the rational connection between the limitation on rights and that objective; and**
- **reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Further response required

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

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Portfolio: Environment
Introduced: House of Representatives, 20 August 2015

Purpose

1.27 The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the Environment Act) to remove section 487 of the Environment Act. Currently, section 487 expands the meaning of 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977*.

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

Background

1.29 The committee first commented on the bill in its *Twenty-seventh Report of the 44th Parliament* (previous report), and requested further information from the Minister for the Environment as to whether the bill was compatible with the right to health and a healthy environment.[1]

Removal of extended standing to seek judicial review of decisions or conduct under the Environment Act

1.30 Currently, section 487 of the Environment Act gives standing rights (the right to bring an action before the courts) to individuals and organisations who, at any time in the preceding two years, have engaged in a series of activities for the protection or conservation of, or research into, the Australian environment. This means that currently those individuals and organisations can bring an action to seek judicial review of actions taken, or not taken, under the Environment Act. The bill would remove the right of these individuals and organisations to bring judicial review in relation to decisions made (or failed to be made) under the Environment Act or conduct engaged under that Act (or regulations).

1.31 The objectives of the Environment Act include protecting the environment and ecosystems and promoting ecologically sustainable development, which includes principles of inter-generational equity; that the present generation should ensure the

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 4-7.

health, diversity and productivity of the environment for the benefit of future generations.[2]

1.32 The committee considered in its previous report that the removal of the existing right of a person who, or organisation which, is dedicated to protecting the environment from applying for judicial review of decisions taken (or not taken) or conduct engaged in under the Environment Act, could result in a failure to properly enforce the protections under the Environment Act, and as a result may engage and limit the right to health and a healthy environment.

Right to health and a healthy environment

1.33 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).

Compatibility of the measure with the right to health and a healthy environment

1.34 The statement of compatibility does not explore whether the right to health and a healthy environment is engaged by this measure.

1.35 While the text of the ICESCR does not explicitly recognise a human right to a healthy environment, the UN Committee on Economic, Social and Cultural Rights has recognised that the enjoyment of a broad range of economic, social and cultural rights depends on a healthy environment.[3] The UN Committee has recognised that environmental degradation and resource depletion can impede the full enjoyment of the right to health.[4]

1.36 The UN Committee has also drawn a direct connection between the pollution of the environment and the resulting negative effects on the right to health, explaining that the right to health is violated by 'the failure to enact or enforce laws

2 See section 3 of the *Environment Protection and Biodiversity Conservation Act 1999.*

3 See, e.g., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uzbekistan* (24 January 2006) U.N. Doc. E/C.12/UZB/CO/1, paragraph [9] ('the effects of the Aral Sea ecological catastrophe in the State party have posed obstacles to the enjoyment of economic, social and cultural rights by the population in the State party').

4 See Office of the United Nations High Commissioner for Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the International Covenant on Economic, Social and Cultural Rights, Report No. 1* (December 2013) 17.

to prevent the pollution of water, air and soil by extractive and manufacturing industries'.[5]

1.37 As such, the removal of a right of a person or bodies who are committed to environmental protection from seeking to enforce the protections in the Environment Act, may engage and limit the right to a healthy environment. This was not addressed in the statement of compatibility.

1.38 The committee therefore sought the advice of the Minister for the Environment as to whether the bill limits the right to a healthy environment and, if so, the legitimate objective, rational connection and proportionality of the measures.

Minister's response

> **1.28 The committee's assessment of the removal of extended standing for judicial review of decisions or conduct under the *Environment Protection and Biodiversity Conservation Act 1999* against article 12 of the International Covenant on Economic, Social and Cultural Rights (right to health and a healthy environment) raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable.**
>
> In my view, the removal of the extended standing provisions does not engage the right to health in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR). This is because removing the extended standing provisions does not change the extent of environment protection established by the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and people who have a legitimate interest in environmental approval decisions made under the EPBC Act will still be able to bring an action under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the *Judiciary Act 1903* (Judiciary Act) or to the High Court under s 75 of the Constitution.
>
> As already noted in the Statement of Compatibility with human rights in the explanatory memorandum, the definition of aggrieved persons in the ADJR Act will remain unchanged. The ADJR Act defines an aggrieved person as including a person whose interests are adversely affected by the decision, failure to make a decision or conduct related to the making of decisions. A person will have standing to seek judicial review under the Judiciary Act if the person has a private right or can establish that he or she has a 'special interest in the subject matter of an action' (being an interest over and above that of the general public). For these reasons, a range of persons will continue to have standing to seek judicial review of decisions made under the EPBC Act.

5 Statement of the Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development as the Preparatory Committee for the World Summit on Sustainable Development (Bali, Indonesia, 27 May-7 June 2002) (30 April 2003) U.N. Doc. E/C.12/2002/13, Annex VI, paragraph 3.

While ICESCR does not define 'health' for the purposes of Article 12, the Government notes the views of the UN Committee on Economic Social and Cultural Rights (CESCR) expressed in General Comment No 14, *The Right to the Highest Attainable Standard of Health* (2000), that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. These are considered by the CESCR to include the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including on sexual and reproductive health.

While environmental conditions may be important in guaranteeing the right to health and for a range of other purposes, the CESCR's statements do not have the effect of re-characterising the right to health as a right to health and a healthy environment. Furthermore, environmental conditions are no more significant than other underlying determinants of health outlined by the CESCR.

Australia has some of the most effective environmental laws in the world. In the Government's view, the amendments to the EPBC Act do not change the protection for matters of national environmental significance. The EPBC Act requires that persons who propose to take an action that has, may have or is likely to have a significant impact on a matter of national environment significance seek approval before taking the action. The proposed amendments do not change Australia's high environmental standards, or the process of considering and, if appropriate, granting approvals under the EPBC Act. There are also no changes to State and Territory environmental approval regimes which operate in conjunction with the EPBC Act.

In my view, given that the Bill does not change the extent of environment protection established by the EPBC Act and people who have a legitimate interest in environmental approval decisions will still be able to bring an action through other means, the right to health is not engaged by this Bill, and consequently, not limited.

1.29 As set out above, the measure may engage and limit the right to health and a healthy environment as the Bill removes extended standing for judicial review of decisions or conduct under the Environment Act. The statement of compatibility does not justify that possible limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for the Environment as to whether the Bill limits the right to a healthy environment and, if so:

- **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.**

I do not consider that the Bill limits the right to health, as described above.

In my view, the changes are aimed at achieving a legitimate objective, namely bringing the arrangements for standing to make a judicial review application under the EPBC Act, into line with standard arrangements for permitting judicial review challenges to the Commonwealth administrative decisions as provided for under the ADJR Act and the Judiciary Act.

The intent of judicial review is to ensure that the law is correctly applied. There is though an emerging risk of the extended standing provisions being used to deliberately disrupt and delay key projects and infrastructure developments. Such actions are not proportionate to the original purpose of the extended standing provisions. The Bill seeks to mitigate this risk while still allowing review of decisions through the ADJR Act and the Judiciary Act.

The repeal of section 487 of the EPBC Act applies in relation to applications for judicial review made under the ADJR Act after the Bill is enacted, regardless of when the decision to which the application relates was made. Therefore the repeal of section 487 does not affect any existing applications for judicial review.[6]

Committee response

1.39 **The committee thanks the Minister for the Environment for his response.**

1.40 The committee agrees that there is no standalone right to a healthy environment. The committee also agrees with the minister's statement that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life including access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including on sexual and reproductive health.

1.41 In its initial analysis, the committee noted that the UN Committee had drawn a link between pollution of the environment and the resulting negative effects on the right to health, explaining that the right to health is violated by 'the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.'[7]

6 See Appendix 1, Letter from the Hon Greg Hunt MP, Minister for the Environment, to the Hon Philip Ruddock MP (received 10 February 2016) 3-4.

7 Statement of the Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development as the Preparatory Committee for the World Summit on Sustainable Development (Bali, Indonesia, 27 May-7 June 2002), 30 April 2003, U.N. Doc. E/C.12/2002/13, Annex VI, paragraph 3.

1.42 The committee thanks the minister for the clarification that the bill does not alter the substantive environmental standards set out in the Environment Act. The committee agrees that judicial review is intended to ensure that the law is correctly applied. For this reason, the committee considers that the existing extended standing provisions may assist in the enforcement of environmental laws which are necessary to protect public health.

1.43 The minister states that there is an emerging risk of the extended standing provisions being used to deliberately disrupt and delay key project and infrastructure development. The committee considers that this may be a legitimate objective to justify the measure for the purposes of international human rights law. However, no evidence is provided in the minister's response as to the extent and nature of this emerging threat or its impact on development projects where there is no legitimate environmental concern.

1.44 **The committee therefore requests further advice from the Minister for the Environment as to whether the measure imposes a justified limitation on the right to health, including evidence as to the nature and extent of the emerging risk of the extended standing provisions being used to disrupt and delay key project and infrastructure development.**

Chapter 2

Concluded matters

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

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

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

Portfolio: Attorney-General
Introduced: Senate, 25 November 2015

Purpose

2.3 The Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (the bill) seeks to make a number of amendments to the *Family Law Act 1975* (FLA). In particular, the bill seeks to limit the jurisdiction of the Family Court to set aside financial agreements made at, or after, separation.

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

Background

2.5 The committee first commented on the bill in its *Thirty-third Report of the 44th Parliament*, and requested further information from the Attorney-General as to whether the bill was compatible with the obligation to consider the best interests of the child.[1]

Power of the Family Court to set aside financial agreements

2.6 A binding financial agreement ousts the jurisdiction of the Family Court (the court) to make an order under the property settlement or spousal maintenance provisions of the FLA about the financial matters to which the agreement applies.

2.7 The FLA sets out a number of circumstances under which a court may set aside a financial agreement between spouses. Currently, a court can make an order setting aside a financial agreement if satisfied that a material change in circumstances relating to the care, welfare and development of a child has occurred and, as a result of the change, the child, or a party to the agreement who has caring responsibility for the child, will suffer hardship.

2.8 Schedule 1 would amend the FLA so that binding financial agreements entered into at the time of or after a relationship breakdown may be set aside by a

1 Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016) 4-6.

court only in 'circumstances that are of an exceptional nature and relate to the care, welfare, and development of the child'.[2] The bill does not specify what is meant by 'exceptional' circumstances. However, the effect of the change in language from 'material change in circumstances' to 'exceptional' circumstances serves to narrow the court's power to set aside a financial agreement on the grounds that the child of the relationship will suffer hardship.

2.9 Financial agreements between separated parents involve considerations of the best interests of the child and judicial decisions must consider the best interests of a child as a primary consideration.[3]

Obligation to consider the best interests of the child

2.10 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.[4]

2.11 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.

2.12 This obligation is reflected in Part VII of the FLA. Under this Part, in deciding whether to make a particular parenting order, a court must regard the best interests of the child as the paramount consideration.[5] However, this requirement only applies to proceedings under Part VII. The amendments that this bill proposes modify Part VIIIA and Part VIIIAB. Neither of these Parts includes a reference to the best interests of the child. Therefore currently there is no express provision for the courts to have regard to the best interests of the child when considering whether to set aside a binding financial agreement.

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

2.13 The bill would limit to exceptional circumstances the court's discretion to set aside a binding financial agreement entered into by the parents at the time of or after separation. This would limit the court's ability to issue orders relating to the financial affairs of parents that are in the best interests of a child.

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2 See items 17 and 33 of Schedule 1 to the bill, proposed new subsections 90K(2A) and 90UM(4A).

3 See *Family Law Act 1975* (FLA), Part VII, Subdivision BA.

4 Article 3(1).

5 FLA, section 60CA.

2.14 The statement of compatibility does not acknowledge that amendments to the financial agreements regime engage the obligation to consider the best interests of the child.

2.15 The committee therefore sought the advice of the Attorney-General as to the legitimate objective, the rational connection, and the proportionality of the measure in relation to the obligation to consider the best interests of the child.

Minister's response

I thank the Committee for its considered response on the Bill and provide the following information in reply.

The Family Law Act contains a number of statutory grounds on which a financial agreement can be set aside. As noted by the Committee, the Bill would amend one of these grounds to provide that the court can only set aside an agreement where, if the court did not set aside the agreement, a child would suffer hardship for a specified reason:

- for agreements entered into before separation, the test for hardship would be a 'material change in circumstances that relate to the care, welfare and development of the child of the marriage' (this reflects the current provision), or
- for agreements entered into at the time of separation or after separation, the test for determining hardship would be 'circumstances of an "exceptional nature" that relate to the care, welfare and development of the child of the marriage'.

These changes would not apply retrospectively.

The amendment engages article 3(1) of the Convention of the Rights of the Child, which provides that in all actions concerning children (including by courts) the best interests of the child shall be a primary consideration.

The objective of the proposed amendment is to empower families to take responsibility for their own affairs, without resorting to the family law system, by giving them certainty that their financial agreements will be enforceable. Allowing consenting parties to make mutually agreed decisions about their own financial affairs enables them to avoid the financial and emotional costs and delays of legal proceedings and reduces the impact on the family law courts. The amendment would also improve consistency between when a property order made by the court (including consent orders) can be set aside on the basis of hardship, and when a post-separation financial agreement can be set aside on the basis of hardship.

The 'exceptional circumstances' test is a reasonable and proportionate measure for achieving this important objective for agreements made after relationship breakdown. As noted above, the test for hardship for agreements made pre-separation would not be amended by the Bill. This

recognises the different circumstances in which pre- and post-separation financial agreements are made.

For agreements made prior to separation, a substantial period of time may have lapsed and the circumstances of the couple may have changed in ways not contemplated by the original financial agreement. For example, while a couple may not have anticipated having children at the time an agreement was made, they may subsequently have one or more children whose needs may not be reflected in the agreement. The 'material change of circumstances' test is important to ensure that appropriate arrangements are made for children in these and similar circumstances.

For agreements made after separation, parties should be in a position [to] consider their full financial position, including key issues such as their earning capacity, caring obligations, and the future needs of their children. Post-separation agreements should therefore be substantially better placed to ensure appropriate protection for the interests of children. As reopening parental conflict is unlikely to be in the best interests of children, it is appropriate that agreements voluntarily entered into the parties should be binding. However, if circumstances relating to the care, welfare or development of the child do change substantially (for example, by a child developing a disability requiring a high degree of care), this may constitute an 'exceptional circumstance' and it would be open to the court to set aside the financial agreement.

There are safeguards in place to protect the interests of children when their parents' relationship breaks down. For a financial agreement to be binding, each party is required to obtain independent legal advice on the effect of the agreement on that party's rights under the Act. It can be expected that this advice would include how the agreement may affect any children of the relationship.

To the extent that the amendment engages article 3(1) of the Convention on the Rights of the Child, it is a reasonable and proportionate measure to achieve the objective of empowering parties to manage their own financial affairs.

I trust this information is of assistance to the committee. I note that we will amend the explanatory memorandum to the Bill to contain this important information.[6]

Committee response

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

2.17 The committee welcomes the Attorney-General's commitment to amending the explanatory memorandum to the bill so that it will include information clearly stating how the bill engages the obligation to consider the best interests of the child.

6 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 16 February 2016) 1-2.

2.18 The Attorney-General explains that the objective of this bill is to 'empower families to take responsibility for their own affairs, without resorting to the family law system'. In light of the costs and delays associated with court proceedings and the uncertainty that may arise, the committee accepts that this is a legitimate objective. Reducing the ability of the court to intervene in financial agreements struck by couples at the time of, or after, separation is clearly connected with this objective, as it would limit the ability of individuals to access the family law system.

2.19 In terms of the proportionality of the measure, the committee notes the distinction between agreements made pre-separation and agreements made at the time of, or post-separation. The committee agrees that for agreements made prior to separation a low standard should be applied, as circumstances not contemplated by the couple or the original financial agreement may exist. The committee notes that the bill will only raise the standard for agreements made at the time of, or after, separation.

2.20 The committee retains some concerns regarding the shift to the higher 'exceptional circumstances' standard. A submission from the Women's Legal Service Queensland to the Legal and Constitutional Affairs Legislation Committee's inquiry into this bill noted that binding financial agreements are 'particularly used against culturally and linguistically diverse women, who have limited or no English, little understanding of their legal rights, have limited support and no understanding of the Australian legal system or laws'.[7] In these cases, even an agreement struck at the time of or post-separation, may not adequately protect the interests of any children of the relationship.

2.21 However, the committee notes the existence of an important safeguard identified by the Attorney-General. The requirement that both parties obtain independent legal advice on the effect of their rights under a binding financial agreement will operate to ensure that particularly vulnerable women, and any children they may have from the relationship, will be protected, because a court will be able to determine whether any legal advice was obtained, and whether that legal advice was 'independent'.

2.22 Further, the committee welcomes the clarification in the explanatory memorandum to the bill that if circumstances relating to the care, welfare or development of the child do change substantially, this may constitute an exceptional circumstance under the amended legislation, allowing a court to set aside a financial agreement.

2.23 **Accordingly, the committee considers that the bill may be compatible with the obligation to consider the best interests of the child and has concluded its examination of the bill.**

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7 Women's Legal Service Queensland, Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, *Submission 3*, 2.

Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658]

Portfolio: Attorney-General
Authorising legislation: Telecommunications (Interception and Access) Act 1979
Last day to disallow: 22 February 2015 (Senate)

Purpose

2.24 The *Telecommunications (Interception and Access) Act 1979* (the Act) prohibits the Australian Security Intelligence Organisation (ASIO) or enforcement agencies from authorising access to telecommunications data relating to a journalist, or their employer where the purpose is to identify a journalist's source, unless a warrant has been obtained (a journalist information warrant).[1]

2.25 The Act requires that when considering an application for a journalist information warrant, the minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) is satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source. The Act provides that in making that assessment, the minister or issuing authority is to have regard to any submissions made by a 'Public Interest Advocate' (PIA).[2]

2.26 The Telecommunications (Interception and Access) Amendment (Public Interest Advocate and Other Matters) Regulation 2015 (the regulation) prescribes the process requirements for applying for a journalist information warrant and matters relating to the performance of the role of a PIA, including:

- providing that only the most senior members of the legal profession may be appointed as PIAs and prescribing levels of security clearance for certain PIAs;
- requiring that agencies provide a PIA with a copy of a proposed request or application for a journalist information warrant or notify a PIA prior to making an oral application; and
- enabling PIAs to receive further information (or a summary of further information) provided to the minister or issuing authority by agencies and to prepare new or updated submissions based on that information.

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

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1 See Division 4C of Part 4-1 of Chapter 4 of the *Telecommunications (Interception and Access) Act 1979.*

2 See subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v) of the *Telecommunications (Interception and Access) Act 1979*.

Background

2.28 The Act was amended by the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the bill) to introduce the journalist information warrant and PIA schemes. The committee commented on the bill in its *Fifteenth Report of the 44th Parliament*, its *Twentieth Report of the 44th Parliament* and its *Thirtieth Report of the 44th Parliament.*[3] Because the journalist information warrant and PIA schemes were introduced as amendments to the bill they did not form part of the committee's consideration.

2.29 The committee considers that the journalist information warrant and PIA schemes that were introduced as amendments to the bill improve the compatibility of the bill. Requiring a warrant before journalist's metadata can be accessed ensures that there is at least some assessment of both the law enforcement need for the metadata and the public interest in protecting journalists' sources *before* the metadata is accessed by law enforcement agencies.

2.30 The committee first commented on the regulation in its *Thirty-second Report of the 44th Parliament*, and requested further information from the Attorney-General as to whether the regulation was compatible with international human rights law.[4]

Role of Public Interest Advocate in journalist information warrant process

2.31 The regulation prescribes the process for a PIA to make a submission regarding an application for a journalist information warrant. However, the regulation does not make provision for the PIA to access or speak with the journalist or other person affected by an application for a journalist information warrant, nor does it guarantee that any submission or input from the PIA regarding such an application would, in fact, be considered prior to the issuance of a warrant. The regulation also provides the minister with a discretion to provide the PIA with only a summary of any further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications.

2.32 The committee considered in its previous report that the regulation, while seeking to better promote the protection of privacy and the right to freedom of expression by prescribing a warrant process for accessing journalists' metadata, also engages and may limit multiple rights.

3 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 10-22; Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74; and Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 133-139.

4 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 44-48.

Multiple rights

2.33 Accessing telecommunications data relating to a journalist, or their employer, where the purpose is to identify a journalist's source, together with the journalist information warrant and PIA scheme, engages and may limit multiple rights, including:

- right to an effective remedy;[5]
- right to a fair hearing;[6]
- right to privacy;[7] and
- right to freedom of expression.[8]

Compatibility of the measures with multiple rights

2.34 The statement of compatibility states that the regulation engages and promotes the rights to freedom of expression and privacy. However, it provides no assessment of any limitation on those rights or of the compatibility of the measures with the rights to an effective remedy or a fair hearing.

2.35 The committee considered that the journalist information warrant and PIA schemes seek to better promote the protection of privacy and the right to freedom of expression by prescribing a warrant process for accessing journalists' information, but that the regulation may lack sufficient safeguards to appropriately protect these rights, as well as the right to an effective remedy and a fair hearing. In particular:

- the regulation does not enable the PIA to seek instructions from any person affected by the journalist information warrant;
- the regulation grants the minister discretion to provide the PIA with only a summary of further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications, despite the intention of the regulation being to ensure PIAs are able to advocate in the public interest; and
- the regulation provides no procedural guarantees to ensure the PIA is able to make a submission on an application for a journalist information warrant prior to the issuance of a warrant.

2.36 The committee noted that the statement of compatibility refers to a range of procedural safeguards that apply to the journalist information warrant regime. In light of the features identified above, it is unclear whether the measures facilitate

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

6 Article 14, ICCPR.

7 Article 17, ICCPR.

8 Article 19, ICCPR.

the independent scrutiny of applications for journalist information warrants or ensure that PIAs are able to advocate in the public interest.

2.37 The committee therefore sought the advice of the Attorney-General as to whether the limitations on the rights listed above at [2.33] are proportionate to the stated objective, in particular, whether the limitations listed at [2.35] are reasonable and proportionate.

Minister's response

> By virtue of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, both ASIO and enforcement agencies must obtain a journalist information warrant prior to authorising the disclosure of telecommunications data relating to a journalist or their employer, where a purpose of the disclosure would be to identify a source. The Regulations further support the independent oversight of the journalist information warrant regime by prescribing important procedural safeguards and detailing matters relating to the performance of the role of Public Interest Advocate.
>
> The Government considers that taken together the Act and the Regulations appropriately protect human rights, including the right to effective remedy, fair hearing, privacy and freedom of expression, while addressing the need for access to data to assist in serious criminal and national security investigations. The Government considers that the limitations on human rights in the Regulations are reasonable, necessary and proportionate. Detailed responses to the Committee's specific queries are set out, below.
>
> *Notification to journalist of a proposed request or application*
>
> The Government believes that it is reasonable and proportionate to exclude an affected journalist from providing instructions to a Public Interest Advocate on the substance of an application. Applications for warrants authorising the use of covert investigative powers are ordinarily conducted on an *ex parte* basis. This reflects the public interest in avoiding the kinds of harm that may arise if a party is given advance knowledge of the application and in turn, the existence of an investigation. Such knowledge may, for example, enable and motivate a party or a related-party to flee a jurisdiction, dispose of physical evidence, or alter or cease certain activities, so as to frustrate the investigation.
>
> It is well-established that *ex parte* hearings depart from the adversarial model of justice. However, it is equally well-established that this departure is offset by the fact that *ex parte* hearings generally, and warrant applications in particular, are interim proceedings dealing with preliminary matters in the course of an investigation. Should an investigation proceed to a prosecution, with potentially greater rights impacts, parties will typically have the ability to contest evidence sought to be admitted by the prosecution, including the basis upon which the evidence was obtained.

The Act and Regulations nevertheless significantly bolster privacy safeguards by ensuring that issuing authorities are required to weigh the public interest in protecting the confidentiality of the identity of the journalist's source, having regard to: the extent to which the privacy of any person would be likely to be interfered with; whether attempts have been made to obtain the information by other means; the gravity of the matter; and submissions by a Public Interest Advocate. Warrant applications do not determine facts, and any evidence obtained pursuant to a warrant and given in evidence in open court, can be challenged during any subsequent proceedings.

The Act also includes robust oversight arrangements. Central to the oversight regime are the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. The Ombudsman has the power to inspect the records of enforcement agencies to ensure compliance with the Act. The Act includes extensive record-keeping obligations for agencies that will underpin Ombudsman inspections. The Inspector-General likewise has continued oversight of access to data by ASIO. Collectively, the Ombudsman and the Inspector-General of Security assure the public that journalists' information is being accessed lawfully, and in doing so enhance the transparency and public accountability of the journalist information warrant regime.

Summary of further information

The Regulations require the Minister or issuing authority to have regard to specified matters when deciding whether to require an agency to give the further information to the Public Interest Advocate, or a summary of that information (being further information that was originally given to the Minister or issuing authority orally). As outlined at paragraph 91 of the Explanatory Statement, this discretion applies only in where an applicant has given further information to the Minister or issuing authority *orally*, and where it may therefore be impractical for the applicant to ensure that the Advocate is provided that information *verbatim*.

Submissions by an Advocate

The Public Interest Advocate scheme forms an additional safeguard in connection with applications for Journalist Information Warrants. The scheme supplements the requirement that applications be considered and determined by an independent issuing authority, and be oversighted by the independent Commonwealth Ombudsman or Inspector-General of Intelligence and Security, as well as by the Parliamentary Joint Committee on Intelligence and Security. In combination, these safeguards go beyond the safeguards identified in other jurisdictions as being necessary to protect rights in connection with the use of covert investigative powers, including in relation to journalists.[9]

9 See, for example: *Klass and others v Federal Republic of Germany* (1978) ECHR 5029/71; *Kennedy v United Kingdom* [2010] ECHR 26839/05.

> I have considered very carefully concerns about warrants being issued absent a submission by a Public Interest Advocate. However, I am advised that it would be beyond the scope of the regulation-making powers in the Act to prevent warrants being made in the absence of a submission from a Public Interest Advocate. The legislation provides a discretion to the issuing authority as to whether to issue journalist information warrants. It is well-established that the Minister may not make delegated legislation that is contrary to the primary statute.
>
> However, the Regulations include an additional requirement that in circumstances where an Advocate indicates that he or she is unable to consider an application or request, the agency is required to give a copy to another Advocate. In effect, this requires an agency to continue to approach Advocates until it finds one who is available. The Regulations also put beyond doubt that the Minister or issuing authority may consider an Advocate's submission, or updated submission, even if provided outside the seven-day period for lodgement. Further, the Minister or issuing authority has the discretion to refuse an application without submission from an Advocate.[10]

Committee response

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

2.39 The committee acknowledges that the regulations introduce additional safeguards relating to the issuing of journalist information warrants under the Act and welcomes the commitment of the Attorney-General to fulfilling Australia's obligations under international human rights law.

2.40 The committee accepts that the PIA scheme forms an important safeguard in connection with applications for a journalist information warrant. However, the committee retains some concerns with the arrangement.

Notification to journalist of a proposed request or application

2.41 The Attorney-General notes that it is appropriate that a PIA is unable to seek instructions from any person affected by the journalist information warrant because applications for a warrant are interim proceedings, ordinarily conducted on an *ex parte* basis. This is correct. However, it is unclear how a PIA will be able to effectively represent the interests of a person subject to the warrant in these circumstances, or provide information that will relevantly weigh on the issuing authority's determination as to whether to grant a warrant.

2.42 The Attorney-General justifies this measure by noting that a party who is given advance knowledge of the application may flee a jurisdiction, dispose of physical evidence, or alter or cease certain activities, so as to frustrate the investigation. These are legitimate concerns. However, the regulation includes a

10 See Appendix 1, Letter from the Hon Scott Morrison MP, Treasurer, to the Hon Philip Ruddock MP (received 16 February 2016) 1-5.

blanket prohibition on the PIA contacting any person affected by the journalist information warrant. Accordingly, there is no ability for the court to weigh up the risks and determine whether, in the circumstances of the particular warrant, it is necessary and appropriate for the PIA not to have contact with any person affected in order to protect national security and community safety. Indeed, even were a court to consider it was necessary or desirable for the PIA to seek instructions in any regard from an affected person, the court is unable to order or allow that to occur.

Summary of further information

2.43 The regulation grants the minister discretion to provide the PIA with only a summary of further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications, despite the intention of the regulation being to ensure PIAs are able to advocate in the public interest. The Attorney-General explains that the explanatory statement provides that this discretion applies only where an application has given such further information orally, and it is thus impractical to ensure that the PIA is provided with that information verbatim.

2.44 The committee thanks the Attorney-General for his explanation. Nevertheless, the committee considers that this intention could be ensured by an amendment to the regulation providing as such, rather than leaving it to the explanatory statement.

Submissions by an advocate

2.45 In its original consideration of the regulation, the committee noted its concerns at the absence of procedural guarantees that ensure a PIA is able to make a submission on an application for a journalist information warrant prior to the issuance of a warrant.

2.46 The minister notes that it is beyond the scope of the regulation-making power in the Act to prevent warrants being made in the absence of a submission from a PIA, because the legislation provides discretion to the issuing authority as to whether to issue a journalist information warrant. While the committee agrees that a minister may not make delegated legislation that is contrary to the primary statute, the committee considers that this additional safeguard could be incorporated in an appropriately amended primary statute. No explanation is provided as to why the minister does not consider this appropriate.

2.47 In these circumstances, the additional safeguards identified by the minister, such as: requiring an agency to continue to approach PIAs until finding one available; requiring the minister or issuing authority to consider a PIA submission when provided outside the seven-day period for lodgement; and providing the minister or issuing authority with a discretion to refuse an application without a submission from a PIA, do not address the committee's concern, which is that a minister or issuing authority may still issue a journalist information warrant without any submission

from a PIA, thereby limiting the right to a fair hearing and an effective remedy, and, consequentially, the right to privacy and freedom of expression.

2.48 **The committee's assessment of the Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015, prescribing the process requirements for applying for a journalist information warrant and matters relating to the performance of the role of a Public Interest Advocate against articles 2, 14, 17 and 19 of the International Covenant on Civil and Political Rights (right to an effective remedy, right to a fair hearing, right to privacy, and right to freedom of expression) is that the measures, while introducing additional safeguards to the *Telecommunications (Interception and Access) Act 1979*, may, taken together with the primary legislation, remain incompatible with Australia's obligations under international human rights law.**

The Hon Philip Ruddock MP
Chair

Appendix 1

Correspondence

The Hon Greg Hunt MP

Minister for the Environment

MC15-035709

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

22 OCT 2015

Dear Mr Ruddock Phil

Thank you for your letter of 8 September 2015 in which you seek advice about the human rights compatibility of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.

My response to your request is attached.

I trust the information provided is helpful.

Yours sincerely

Greg Hunt

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7920 Greg.Hunt.MP@environment.gov.au

1.28 The committee's assessment of the removal of extended standing for judicial review of decisions or conduct under the *Environment Protection and Biodiversity Conservation Act 1999* against article 12 of the International Covenant on Economic, Social and Cultural Rights (right to health and a healthy environment) raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable.

In my view, the removal of the extended standing provisions does not engage the right to health in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR). This is because removing the extended standing provisions does not change the extent of environment protection established by the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and people who have a legitimate interest in environmental approval decisions made under the EPBC Act will still be able to bring an action under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the *Judiciary Act 1903* (Judiciary Act) or to the High Court under s 75 of the Constitution.

As already noted in the Statement of Compatibility with human rights in the explanatory memorandum, the definition of aggrieved persons in the ADJR Act will remain unchanged. The ADJR Act defines an aggrieved person as including a person whose interests are adversely affected by the decision, failure to make a decision or conduct related to the making of decisions. A person will have standing to seek judicial review under the Judiciary Act if the person has a private right or can establish that he or she has a 'special interest in the subject matter of an action' (being an interest over and above that of the general public). For these reasons, a range of persons will continue to have standing to seek judicial review of decisions made under the EPBC Act.

While ICESCR does not define 'health' for the purposes of Article 12, the Government notes the views of the UN Committee on Economic Social and Cultural Rights (CESCR) expressed in General Comment No 14, *The Right to the Highest Attainable Standard of Health* (2000), that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. These are considered by the CESCR to include the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including on sexual and reproductive health.

While environmental conditions may be important in guaranteeing the right to health and for a range of other purposes, the CESCR's statements do not have the effect of re-characterising the right to health as a right to health and a healthy environment. Furthermore, environmental conditions are no more significant than other underlying determinants of health outlined by the CESCR.

Australia has some of the most effective environmental laws in the world. In the Government's view, the amendments to the EPBC Act do not change the protection for matters of national environmental significance. The EPBC Act requires that persons who propose to take an action that has, may have or is likely to have a significant impact on a matter of national environment significance seek approval before taking the action. The proposed amendments do not change Australia's high environmental standards, or the process of considering and, if appropriate,

granting approvals under the EPBC Act. There are also no changes to State and Territory environmental approval regimes which operate in conjunction with the EPBC Act.

In my view, given that the Bill does not change the extent of environment protection established by the EPBC Act and people who have a legitimate interest in environmental approval decisions will still be able to bring an action through other means, the right to health is not engaged by this Bill, and consequently, not limited.

1.29 As set out above, the measure may engage and limit the right to health and a healthy environment as the Bill removes extended standing for judicial review of decisions or conduct under the Environment Act. The statement of compatibility does not justify that possible limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for the Environment as to whether the Bill limits the right to a healthy environment and, if so:

- **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.**

I do not consider that the Bill limits the right to health, as described above.

In my view, the changes are aimed at achieving a legitimate objective, namely bringing the arrangements for standing to make a judicial review application under the EPBC Act, into line with standard arrangements for permitting judicial review challenges to the Commonwealth administrative decisions as provided for under the ADJR Act and the Judiciary Act.

The intent of judicial review is to ensure that the law is correctly applied. There is though an emerging risk of the extended standing provisions being used to deliberately disrupt and delay key projects and infrastructure developments. Such actions are not proportionate to the original purpose of the extended standing provisions. The Bill seeks to mitigate this risk while still allowing review of decisions through the ADJR Act and the Judiciary Act.

The repeal of section 487 of the EPBC Act applies in relation to applications for judicial review made under the ADJR Act after the Bill is enacted, regardless of when the decision to which the application relates was made. Therefore the repeal of section 487 does not affect any existing applications for judicial review.

ATTORNEY-GENERAL

CANBERRA

MS16-000074

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S.1.11
Parliament House
CANBERRA ACT 2600

11 FEB 2016

Dear Mr Ruddock Philip

Thank you for your letter of 2 February 2016 seeking advice about the human rights compatibility of the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (the Bill), which was considered by the Parliamentary Joint Committee on Human Rights in its *Thirty-third report of the 44th Parliament*.

The Committee has sought my advice in relation to one of the statutory grounds on which a financial agreement can be set aside, included in the amendments. In particular, the Committee has sought advice as to:

- the objective to which the proposed changes are addressed, and why they address a pressing and substantial concern;
- the rational connection between the limitation and that objective; and
- reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.

I thank the Committee for its considered response on the Bill and provide the following information in reply.

The Family Law Act contains a number of statutory grounds on which a financial agreement can be set aside. As noted by the Committee, the Bill would amend one of these grounds to provide that the court can only set aside an agreement where, if the court did not set aside the agreement, a child would suffer hardship for a specified reason:

- for agreements entered into before separation, the test for hardship would be a 'material change in circumstances that relate to the care, welfare and development of the child of the marriage' (this reflects the current provision), or
- for agreements entered into at the time of separation or after separation, the test for determining hardship would be 'circumstances of an "exceptional nature" that relate to the care, welfare and development of the child of the marriage'.

These changes would not apply retrospectively.

The amendment engages article 3(1) of the Convention of the Rights of the Child, which provides that in all actions concerning children (including by courts) the best interests of the child shall be a primary consideration.

The objective of the proposed amendment is to empower families to take responsibility for their own affairs, without resorting to the family law system, by giving them certainty that their financial agreements will be enforceable. Allowing consenting parties to make mutually agreed decisions about their own financial affairs enables them to avoid the financial and emotional costs and delays of legal proceedings and reduces the impact on the family law courts. The amendment would also improve consistency between when a property order made by the court (including consent orders) can be set aside on the basis of hardship, and when a post-separation financial agreement can be set aside on the basis of hardship.

The 'exceptional circumstances' test is a reasonable and proportionate measure for achieving this important objective for agreements made after relationship breakdown. As noted above, the test for hardship for agreements made pre-separation would not be amended by the Bill. This recognises the different circumstances in which pre- and post-separation financial agreements are made.

For agreements made prior to separation, a substantial period of time may have lapsed and the circumstances of the couple may have changed in ways not contemplated by the original financial agreement. For example, while a couple may not have anticipated having children at the time an agreement was made, they may subsequently have one or more children whose needs may not be reflected in the agreement. The 'material change of circumstances' test is important to ensure that appropriate arrangements are made for children in these and similar circumstances.

For agreements made after separation, parties should be in a position consider their full financial position, including key issues such as their earning capacity, caring obligations, and the future needs of their children. Post-separation agreements should therefore be substantially better placed to ensure appropriate protection for the interests of children. As reopening parental conflict is unlikely to be in the best interests of children, it is appropriate that agreements voluntarily entered into the parties should be binding. However, if circumstances relating to the care, welfare or development of the child do change substantially (for example, by a child developing a disability requiring a high degree of care), this may constitute an 'exceptional circumstance' and it would be open to the court to set aside the financial agreement.

There are safeguards in place to protect the interests of children when their parents' relationship breaks down. For a financial agreement to be binding, each party is required to obtain independent legal advice on the effect of the agreement on that party's rights under the Act. It can be expected that this advice would include how the agreement may affect any children of the relationship.

To the extent that the amendment engages article 3(1) of the Convention on the Rights of the Child, it is a reasonable and proportionate measure to achieve the objective of empowering parties to manage their own financial affairs.

I trust this information is of assistance to the committee. I note that we will amend the explanatory memorandum to the Bill to contain this important information.

Yours faithfully

(George Brandis)

ATTORNEY-GENERAL

CANBERRA

MC15-009961

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

9 FEB 2016

Dear Chair Philip

Thank you for your letter of 1 December 2015 seeking advice about the human rights compatibility of the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015*.

By virtue of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, both ASIO and enforcement agencies must obtain a journalist information warrant prior to authorising the disclosure of telecommunications data relating to a journalist or their employer, where a purpose of the disclosure would be to identify a source. The Regulations further support the independent oversight of the journalist information warrant regime by prescribing important procedural safeguards and detailing matters relating to the performance of the role of Public Interest Advocate.

The Government considers that taken together the Act and the Regulations appropriately protect human rights, including the right to effective remedy, fair hearing, privacy and freedom of expression, while addressing the need for access to data to assist in serious criminal and national security investigations. The Government considers that the limitations on human rights in the Regulations are reasonable, necessary and proportionate. Detailed responses to the Committee's specific queries are set out, below.

Notification to journalist of a proposed request or application

The Government believes that it is reasonable and proportionate to exclude an affected journalist from providing instructions to a Public Interest Advocate on the substance of an application. Applications for warrants authorising the use of covert investigative powers are ordinarily conducted on an *ex parte* basis. This reflects the public interest in avoiding the kinds of harm that may arise if a party is given advance knowledge of the application and in turn, the existence of an investigation. Such knowledge may, for example, enable and motivate a party or a related-party to flee a jurisdiction, dispose of physical evidence, or alter or cease certain activities, so as to frustrate the investigation.

It is well-established that ex *parte* hearings depart from the adversarial model of justice. However, it is equally well-established that this departure is offset by the fact that *ex parte* hearings generally, and warrant applications in particular, are interim proceedings dealing with preliminary matters in the course of an investigation. Should an investigation proceed to

a prosecution, with potentially greater rights impacts, parties will typically have the ability to contest evidence sought to be admitted by the prosecution, including the basis upon which the evidence was obtained.

The Act and Regulations nevertheless significantly bolster privacy safeguards by ensuring that issuing authorities are required to weigh the public interest in protecting the confidentiality of the identity of the journalist's source, having regard to: the extent to which the privacy of any person would be likely to be interfered with; whether attempts have been made to obtain the information by other means; the gravity of the matter; and submissions by a Public Interest Advocate. Warrant applications do not determine facts, and any evidence obtained pursuant to a warrant and given in evidence in open court, can be challenged during any subsequent proceedings.

The Act also includes robust oversight arrangements. Central to the oversight regime are the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. The Ombudsman has the power to inspect the records of enforcement agencies to ensure compliance with the Act. The Act includes extensive record-keeping obligations for agencies that will underpin Ombudsman inspections. The Inspector-General likewise has continued oversight of access to data by ASIO. Collectively, the Ombudsman and the Inspector-General of Security assure the public that journalists' information is being accessed lawfully, and in doing so enhance the transparency and public accountability of the journalist information warrant regime.

Summary of further information

The Regulations require the Minister or issuing authority to have regard to specified matters when deciding whether to require an agency to give the further information to the Public Interest Advocate, or a summary of that information (being further information that was originally given to the Minister or issuing authority orally). As outlined at paragraph 91 of the Explanatory Statement, this discretion applies only in where an applicant has given further information to the Minister or issuing authority *orally*, and where it may therefore be impractical for the applicant to ensure that the Advocate is provided that information *verbatim*.

Submissions by an Advocate

The Public Interest Advocate scheme forms an additional safeguard in connection with applications for Journalist Information Warrants. The scheme supplements the requirement that applications be considered and determined by an independent issuing authority, and be oversighted by the independent Commonwealth Ombudsman or Inspector-General of Intelligence and Security, as well as by the Parliamentary Joint Committee on Intelligence and Security. In combination, these safeguards go beyond the safeguards identified in other jurisdictions as being necessary to protect rights in connection with the use of covert investigative powers, including in relation to journalists.[1]

I have considered very carefully concerns about warrants being issued absent a submission by a Public Interest Advocate. However, I am advised that it would be beyond the scope of the regulation-making powers in the Act to prevent warrants being made in the absence of a submission from a Public Interest Advocate. The legislation provides a discretion to the issuing authority as to whether to issue journalist information warrants. It is well-established that the Minister may not make delegated legislation that is contrary to the primary statute.

However, the Regulations include an additional requirement that in circumstances where an

[1] See, for example: *Klass and others v Federal Republic of Germany* (1978) ECHR 5029/71; *Kennedy v United Kingdom* [2010] ECHR 26839/05.

Advocate indicates that he or she is unable to consider an application or request, the agency is required to give a copy to another Advocate. In effect, this requires an agency to continue to approach Advocates until it finds one who is available. The Regulations also put beyond doubt that the Minister or issuing authority may consider an Advocate's submission, or updated submission, even if provided outside the seven-day period for lodgement. Further, the Minister or issuing authority has the discretion to refuse an application without submission from an Advocate.

I trust these clarifications address the concerns raised by the Committee.

Yours faithfully

(George Brandis)

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

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

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

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

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

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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

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

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

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

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

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

Strict liability and absolute liability offences

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

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

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

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

Mandatory minimum sentencing

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

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

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

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

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

Civil penalty provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When a civil penalty provision is 'criminal'

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

a) Classification of the penalty under domestic law

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

b) The nature of the penalty

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

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

c) The severity of the penalty

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

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

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

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

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

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

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

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

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

Criminal process rights and civil penalty provisions

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

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

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

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