

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 Job, 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.