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.
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> 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.
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> *Notification to journalist of a proposed request or application*
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> 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