Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-sixth report of the 44th Parliament

16 March 2016

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

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This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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 25 February to 3 March 2016, legislative instruments received from 5 February to 3 March 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):

- Biological Control Amendment Bill 2016;
- Broadcasting Legislation Amendment (Media Reform) Bill 2016;
- Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2016;
- Ethical Cosmetics Bill 2016;
- Law and Justice Legislation Amendment (Northern Territory Local Court) Bill 2016;
- Migration Amendment (Free the Children) Bill 2016;
- Primary Industries Levies and Charges Collection Amendment Bill 2016;
- Registration of Deaths Abroad Amendment Bill 2016;

- Regulatory Powers (Standardisation Reform) Bill 2016;
- Restoring Territory Rights (Dying with Dignity) Bill 2016;
- Social Security Amendment (Diabetes Support) Bill 2016;
- Social Services Legislation Amendment (Interest Charge) Bill 2016; and
- Tax Laws Amendment (Tougher Penalties for Country-by-Country Reporting) Bill 2016.

Instruments not raising human rights concerns

1.7 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[1] Instruments raising human rights concerns are identified in this chapter.

1.8 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

1.9 The following instruments implement measures which the committee has previously considered and the committee refers to its previous comments:

- Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542];[2]
- My Health Records (Opt-out Trials) Rule 2016 [F2016L00094];[3] and
- My Health Records Rule 2016 [F2016L00095].[4]

Deferred bills and instruments

1.10 The committee has deferred its consideration of the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 2) [F2016L00117], pending a response from the Minister for Foreign Affairs

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

2 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 29.

3 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 64.

4 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 64.

regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.

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*);[5] and
- Child Care Benefit (Vaccination Schedules) (Education) Determination 2015 [F2015L02101] (deferred 23 February 2016, pending a response from the Minister for Social Services regarding the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015).[6]

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

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

Response required

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

Flags Amendment (Protecting Australian Flags) Bill 2016

Sponsor: Mr Christensen MP
Introduced: House of Representatives, 29 February 2016

Purpose

1.13 The Flags Amendment (Protecting Australian Flags) Bill 2016 (the bill) seeks to amend the *Flags Act 1953* (the Flags Act) to make a number of acts a criminal offence under the *Criminal Code Act 1995*. These acts include:

- burning, or otherwise damaging or destroying, an Australian flag; or
- defacing, defiling, mutilating, trampling upon, or otherwise desecrating or dishonouring, an Australian flag.

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

Creation of new criminal offence in relation to destructive acts to Australian flags

1.15 The bill would inset a new section 7A into the Flags Act to make it a criminal offence to perform a number of destructive acts in relation to an Australian flag, including burning, trampling upon or dishonouring the flag, while reckless as to:

- the possibility of death or violence to a person in a public place;
- the damage or destruction to property in a public place;
- the creation of public disorder; or the possibility of another person; or
- persons being offended, insulted or humiliated by the act.

1.16 The committee considers that the criminalisation of certain acts in relation to the Australian flag engages and limits the right to freedom of opinion and expression.

Right to freedom of opinion and expression

1.17 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.18 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public

order (*ordre public*),[1] or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.[2]

Compatibility of the measure with the right to freedom of opinion and expression

1.19 The committee recognises the significance of the Australian flag as a symbol of the nation and its value. It also recognises that many Australians find repugnant the conduct which the bill seeks to criminalise. Nevertheless, the committee is required to scrutinise the bill for compatibility with Australia's human rights obligations.

1.20 The statement of compatibility sets out the intent of the bill is to criminalise conduct in relation to recent events which 'it must reasonably be assumed…were undertaken to dishonour the flag in front of Australians who consider such desecration of their foremost national symbol as highly offensive.'[3]

1.21 The statement of compatibility states that the bill does not engage any of the applicable human rights or freedoms. However, as set out above, the right to freedom of expression extends to the communication of information or ideas through any medium and that would include waving or destroying a flag.

1.22 As the statement of compatibility does not identify that the bill limits the right to freedom of expression, it does not explain how criminalising the conduct of a person who damages the Australian flag and is reckless to whether the act will 'offend', 'insult' or 'humiliate' another person or persons, is a justifiable limitation on their right to freedom of expression.[4]

1.23 As set out above at paragraph [1.18], prohibiting certain acts which threaten public safety or the rights or reputations of others may pursue a legitimate objective for the purposes of international human rights law. However, it is insufficient to prohibit acts on the basis of their merely offending, insulting or humiliating another person.

1.24 The UN Human Rights Committee has previously explained that the:

> …value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be

1 'The expression 'public order (*ordre public*)'…may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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

3 Explanatory memorandum (EM), statement of compatibility (SOC) [4].

4 EM, SOC [4].

> insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant… Accordingly, the Committee expresses concern regarding laws on such matters as…disrespect for flags and symbols.[5]

1.25 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,[6] 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'.[7] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.26 In this regard, the committee notes that burning or destroying a flag will not constitute an offence 'to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'.[8] However, the protection in relation to political communication that has been implied by the High Court as a matter of Australian constitutional law is more limited than the freedom of expression protected under international law.

1.27 Therefore, the committee is concerned that the new criminal offence is excessively broad and likely to be disproportionate to any legitimate objective, should such an objective be identified by the legislation proponent, such as public safety or the rights and reputations of others.

1.28 **The committee's assessment of the creation of a new criminal offence in relation to destructive acts to Australian flags against article 19 of the International Covenant on Civil and Political Rights raises concerns as to whether the bill is compatible with the right to freedom of opinion and expression.**

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5 Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 38 (2011).

6 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

7 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

8 Subsection 7A(3).

1.29 **As set out above, the bill engages and limits the right to freedom of opinion and expression. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the legislation proponent 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.**

Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016

Portfolio: Social Services
Introduced: House of Representatives, 2 March 2016

Purpose

1.30 The Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 (the bill) introduces provisions into four social security Acts to give the Secretary of the Department of Social Services (the secretary) power to issue departure prohibition orders (DPOs) to certain persons who have outstanding social welfare payment debts.

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

Departure prohibition orders

1.32 The bill inserts provisions into the *Social Security Act 1991*, *A New Tax System (Family Assistance) (Administration) Act 1999, Paid Parental Leave Act 2010* and the *Student Assistance Act 1973*, which empower the secretary to make a DPO if:

- a person has one or more debts to the Commonwealth under the relevant Act; and
- the person does not have satisfactory arrangements in place to repay the debt; and
- the secretary believes on reasonable grounds that it is desirable to make the order to ensure the person does not leave Australia without having paid the debt(s) or having satisfactory arrangements in place for the debt(s) to be paid.

1.33 A person in respect of whom a DPO has been issued must not leave Australia unless authorised by the secretary, or until the DPO has been revoked or set aside by a court. New section 102B of the bill is a criminal offence provision which provides that breaching the prohibition on leaving Australia will be a criminal offence subject to a penalty of 12 months' imprisonment.

1.34 The amendments require the secretary to consider certain matters before making a DPO including; the person's capacity to repay the debt(s); any previous debt recovery action and its outcome; and the length of time the debt(s) have remained unpaid. However, the bill does not set out minimum thresholds on the amount of outstanding debt, or the length of time that a debt remains unpaid that will enliven the secretary's power to make a DPO.

1.35 The committee considers that, by prohibiting certain persons with social security debts from leaving Australia, the bill engages and may limit the right to freedom of movement.

Right to freedom of movement

1.36 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country. The right may be restricted in certain circumstances.

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

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

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

1.40 As with the right to freedom of movement within Australia, there can be limitations on the right to leave a country, including where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.

Compatibility of the measure with the right to freedom of movement

1.41 The statement of compatibility to the bill recognises that the bill engages the right to freedom of movement, and states that:

> The Bill contains provisions to allow for travel on humanitarian grounds or where the person's travel may be in Australia's best interests, through the issuance of a DAC [departure authorisation certificate], in spite of a DPO being in place.
>
> Debtors will also be able to travel through the issuance of DACs where it is likely the person will depart and return to Australia within an appropriate period or where the person has given an appropriate level of security.
>
> Therefore, the human right permitting a person to leave his country under the UDHR, and the ICCPR, is preserved and protected provided the person complies with the law (as provided under this Bill) and makes the arrangements necessary to repay his social welfare payment debt to the country that provided him with the social support. Further, those rights

> are enshrined in the capacity for [the] person to travel under a DAC on humanitarian grounds.[1]

1.42 The committee accepts that the objective of the bill, which is to encourage the repayment of social security debts by people who are no longer recipients of social welfare, is a legitimate objective for the purposes of international human rights law. The committee also accepts that the measures in the bill are rationally connected to that objective, as a prohibition on overseas travel is likely to be a strong incentive for a person to repay any outstanding social security debts, or enter into a repayment arrangement.

1.43 However, the bill applies to all social security debts, regardless of whether the debt has arisen through a failure of the individual recipient or the department, and regardless of the amount of the debt and the time that has elapsed since the excess payment occurred. Once a DPO is issued in respect of a person, it becomes a criminal offence for that person to leave Australia if the person knows the order is in force or is reckless as to whether an order is in force.

1.44 The absence of minimum thresholds for the amount of debt, or length of time for repayment of the debt, and the broad nature of the secretary's discretion to make DPOs, raises questions as to whether the measures in the bill are sufficiently circumscribed to ensure that the measures do not disproportionately limit a person's right to freedom of movement and are the least rights restrictive way of achieving the bill's objective.

1.45 **The committee's assessment of the proposed powers to issue departure prohibition orders against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) raises questions as to whether the measure adopts the least rights restrictive approach.**

1.46 **As set out above, the proposed powers to issue departure prohibition orders engage and limit the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective, in particular, whether the measure is sufficiently circumscribed to ensure it operates in the least rights restrictive manner.**

1 Statement of compatibility (SOC) 2-3.

Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116]

Portfolio: Foreign Affairs and Trade
Authorising legislation: Charter of the United Nations (Sanctions—Iran) Regulations 2008 [F2015C00063]
Last day to disallow: 21 June 2016 (Senate)

Purpose

1.47 The Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116] (the instrument) amends the Charter of the United Nations (Sanctions—Iran) Document List 2014 (Iran list), which lists documents specified by the Minister for Foreign Affairs determining goods to be prohibited for export to, or importation from, Iran. Goods mentioned in the documents will be included in the definition of export and import sanctioned goods for the purposes of the Charter of the United Nations (Sanctions—Iran) Regulations 2008 [F2015C00063] (Iran Sanctions Regulations).

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

Offences of dealing with export and import sanctioned goods

1.49 The Iran Sanctions Regulations define 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument. The documents that are specified by the minister in the instrument take various forms, including letters and information circulars, rather than setting a clear and comprehensible list of goods that would meet the drafting standards for the framing of an offence.

1.50 Regulations 10 and 12 of the Iran Sanctions Regulations, respectively, prohibit supply of export sanctioned goods to Iran, and importation of import sanctioned goods. The Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2016C00061] (the Declaration), provides that contravention of regulations 10 and 12, of the Iran Sanctions Regulations are contraventions of a 'UN sanction enforcement law'. The effect of this is to make breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the Act). Therefore, a person commits an offence under the Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions in the Iran Sanctions Regulations. This is then punishable by up to 10 years' imprisonment and/or a fine of up to 2500 penalty units (or $450 000).

1.51 The committee considers these measures engage and may limit the right to a fair trial, as the definition of 'export sanctioned goods', which is an important element of the offences in the regulations, may, in being determined by reference to goods 'mentioned' in the five listed documents, lack a clear legal basis as the definition is vaguely drafted and imprecise.

Right to a fair trial

1.52 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Quality of law

1.53 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

Compatibility of the measure with the right to a fair trial and quality of law test

1.54 The statement of compatibility for the instrument states that the instrument 'protects human rights by ensuring that persons and entities that violate measures imposed by the UN Security Council will be subject to UN Security Council sanctions.'[1] Neither the Iran List, the Iran Sanctions Regulations, nor the Declaration were accompanied by a statement of compatibility at the time they were registered.

1.55 It is unclear whether the five documents added to the Iran list contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the first and second documents, INFCIRC/254/Rev.12/Part 1 and NFCIRC/254/Rev.12/Part 2, appear to provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods that are prohibited. The committee is therefore concerned that persons potentially subject to these offence provisions may not be able to determine with sufficient precision particular items that are export and import sanctioned goods for the purposes of the Iran Sanctions Regulations.

1.56 The committee also notes for completeness that the construction of the offence provision in this way appears inconsistent with the Commonwealth Guide to Framing Offence Provisions which states that:

> It is normally desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear to the Parliament and those subject to the offence. This also enables the entirety of the content of an offence to be scrutinised by Parliament. An offence to the following effect would normally be considered undesirable:

1 Explanatory statement, statement of compatibility [1].

> A person commits an offence if the person fails to comply with obligations set out in Regulations / a document published by the Minister / a code of conduct.[2]

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

1.58 By defining the term 'export sanctioned goods' with reference to goods mentioned in documents listed in the instrument, the content of the offences to which this definition relates is imprecise and uncertain. Accordingly, there are significant questions as to whether the instrument, read together with the Iran Sanctions Regulations and the Declaration, is sufficiently precise to ensure a fair trial for the purposes of international human rights law.

1.59 **The committee's assessment of the offences of dealing with export and import sanctioned goods against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial) raises questions as to whether the offences as drafted are sufficiently prescribed and justifiable to meet the quality of law test.**

1.60 **As set out above, the offences of dealing with export and import sanctioned goods engage and limit the right to a fair trial as there is an ambiguity in the drafting that requires further explanation. The committee therefore seeks the advice of the Minister for Foreign Affairs as to:**

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

2 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27, available at https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113]

Portfolio: Prime Minister and Cabinet
Authorising legislation: Royal Commissions Act 1902
Last day to disallow: 21 June 2016 (Senate)

Purpose

1.61 The Royal Commissions Amendment Regulation 2016 (No. 1) (the instrument) amends the Royal Commissions Regulations 2001 (the principal regulations) to enable information gathered by the Royal Commission into Trade Union Governance and Corruption (TURC) to be given, accessed and used by different persons and bodies.

1.62 Witnesses before Royal Commissions are afforded only a limited privilege against self-incrimination (as per section 6A of the *Royal Commissions Act 1902* (RC Act)), and the instrument dispenses with the requirement to individually notify the person or body who initially provided such information to the TURC, when information will be transferred to a different person or body.

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

Sharing of information in circumstances where the witness was not afforded the privilege against self-incrimination

1.64 The instrument enables information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies without notification to the person or body who initially provided it to the TURC.

1.65 The committee considers that this measure engages the right to a fair trial, fair hearing rights and the right to privacy.

Right to a fair trial and fair hearing rights

1.66 The right to a fair trial and fair hearing rights are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right guarantees to all persons a fair and public hearing by a competent, independent and impartial tribunal established by law.

1.67 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial and fair hearing rights

1.68 The statement of compatibility explains that the provision of access and use of information gathered by the TURC is for the purposes of expediting the prosecution of criminal and civil wrongdoing and the committee acknowledges that this is a legitimate objective. The committee also considers that the measures are rationally connected to this legitimate objective, as enabling information to be passed quickly to agencies will assist them in their investigations of matters arising from the TURC.

1.69 However, the committee considers that the statement of compatibility has not demonstrated that the instrument imposes a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

1.70 Under the RC Act, hearings may be open or closed, or restricted to certain classes of persons.[1] It is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.[2] When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.[3] These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government.

1.71 The statement of compatibility acknowledges that providing law enforcement agencies with access and use of information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, engages and limits the right to a fair hearing. The statement of compatibility states:

> This access and use of information is reasonable, necessary and appropriate. While the Royal Commissions serve the important function of inquiring into matters of public interest, they do not have powers to prosecute civil or criminal wrongdoing. Provision of access to the Royal Commission's records is the only way by which criminal and civil offences can be further investigated and prosecuted.[4]

1.72 However, the statement of compatibility has not sufficiently explained why provision of access to the TURC records is 'the only way' criminal and civil offences can be further investigated and prosecuted.

1.73 To assess the proportionality of provisions which abrogate the privilege against self-incrimination, the committee looks to the availability of 'use immunities' and 'derivative use immunities'. A 'use immunity' provides that self-incriminatory information or documents provided by a person cannot be used in subsequent

1 *Royal Commissions Act 1902* (Cth) (RC Act), section 6D(5).

2 RC Act, sections 3 and 6B.

3 RC Act, section 6A.

4 Explanatory memorandum (EM), statement of compatibility (SOC) [3].

proceedings against that person, but can be used to investigate unlawful conduct by that person and third parties. A 'derivative use immunity' provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.[5]

1.74 For completeness, the committee notes that the Commonwealth Guide to Framing Offences explains that where privilege against self-incrimination is to be overridden, 'it is usual to include a 'use' immunity or a 'use and derivative use' immunity provision, which provides some degree of protection for the rights of individuals.'[6]

1.75 As noted above, witnesses before Royal Commissions are afforded only a limited privilege against self-incrimination.[7] Section 9 of the RC Act also provides for the custody and use of records of Royal Commissions. Sections 9(2) and 9(11) provide that regulations may provide for the custody, use or transfer of, or access to, Royal Commission records; and that such records may be dealt with without consent, notice or opportunity to be heard. Under this instrument copies of and access to information gathered by the TURC may be given to a person or body who:

> performs a function relating to law enforcement purposes within the meaning of section 9 of the [RC] Act; or
>
> is responsible for advising a Minister of the Commonwealth, of a State or of a Territory about the administration of a law of the Commonwealth, of that State or of that Territory.

1.76 Section 9 of the RC Act and the instrument provides 'use immunity' and not a 'derivative use immunity' as there is no prohibition on the use of any information, document or thing indirectly obtained as a consequence of the self-incriminating information. The absence in the RC Act and the instrument of a 'derivative use immunity' is relevant to an assessment of the proportionality of the measure. The statement of compatibility provides no information as to the necessity and scope of the intended purposes for which the TURC records are to be shared without the knowledge of affected individuals. The instrument itself contains no safeguards that

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5 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or my lead to the discovery of real evidence of an incriminating character.' See *Rank Film Distributors Ltd and Others v Video Information centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27, available at https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

7 RC Act, section 6A.

protect the use of TURC records for the purpose of prosecuting criminal and civil wrongdoing.

1.77 **The committee considers that sharing information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies for purposes as broad as 'the administration of a law' engages and limits the right to a fair trial and fair hearing rights. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.**

Right to privacy

1.78 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

Compatibility of the measure with the right to privacy

1.79 As set out above at paragraph [1.70], under the RC Act, it is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.[8] When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality. [9] These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government.

1.80 The statement of compatibility acknowledges that sharing information gathered by the TURC to law enforcement agencies engages the right to privacy. The statement of compatibility argues that the instrument promotes freedom from arbitrary or unlawful interference as 'individuals who are, or have been the victims of unlawful interference may have their complaints investigated and offenders brought to justice'.[10]

1.81 As stated above at paragraph [1.68], the statement of compatibility explains that the provision of access and use of information gathered by the TURC is for the purposes of expediting the prosecution of criminal and civil wrongdoing and the committee acknowledges that this is a legitimate objective. The committee also

8 RC Act, sections 3 and 6B.

9 RC Act, section 6A.

10 EM, SOC [4].

considers that the measures are rationally connected to this legitimate objective, as enabling information to be passed quickly to agencies will assist them in their investigations of matters arising from the TURC.

1.82 However, the committee considers that the statement of compatibility has not demonstrated that the instrument imposes a proportionate limitation on the right to privacy in pursuit of that legitimate objective.

1.83 The statement of compatibility has not explained why it is necessary to permit the provision of access and use of all information gathered by the TURC. For example, it is unclear, whether the regulation could result in the provision of confidential information to another person or body without consent.

1.84 The committee also considers that the statement of compatibility has not sufficiently explained why it is necessary to share information gathered by the TURC to a person or body 'responsible for advising a Minister… about the administration of a law,' if the intention is that the records be used to expedite the prosecution of criminal and civil wrongdoing. A person or body 'responsible for advising a Minister…about the administration of a law,' would appear to encapsulate a large class of persons, with little or no specificity as to their official function, qualifications or attributes and appears to suggest a purpose broader than prosecuting criminal and civil wrongdoing.

1.85 **The committee considers that sharing information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies for purposes as broad as 'the administration of a law' engages and limits the right to privacy. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.**

Further response required

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

Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 13 August 2015 (Senate)

Purpose

1.87 The Migration (Resolving the Asylum Legacy Caseload) Regulation 2015 (the regulation) amends the Migration Regulations 1994 to:

- provide the manner in which the Immigration Assessment Authority will exercise its functions in the fast track assessment process;
- remove most references to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) and replace them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations; and
- establish criteria for the grant of the Temporary Protection Visa (TPV) and Safe Haven Enterprise Visa (SHEV).

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

Background

1.89 The regulation is consequential to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the RALC Act). The committee reported on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the* 44th *Parliament*.[1]

1.90 In this report the committee raised concerns about the compatibility, among other things, of:

- the fast track assessment process with the rights of the child, the right to a fair hearing and the obligation of non-refoulement;
- removing most references to the Refugee Convention from the *Migration Act 1958*, and replacing them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations, with multiple human rights; and

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

- TPVs with the obligation not to place any person at risk of refoulement, the obligation to consider the best interests of the child as a primary consideration, the right to the protection of the family and the right to health.

1.91 It also concluded that the fast-track assessment process, in excluding merits review for certain applicants, was incompatible with Australia's obligations of non-refoulement.

1.92 The committee noted previously that the statement of compatibility to the regulation relies on the statement of compatibility for the RALC Act to assess the human rights implications of the measures contained in the regulation.[2]

1.93 To the extent that the regulation is consequential to the amendments introduced by the RALC Act, the concerns set out in the committee's previous report in relation to the RALC bill apply to the regulation.[3]

1.94 The committee previously reported on the instrument in its *Twenty-fourth Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether the measures are compatible with the right to freedom of movement.[4]

Safe haven enterprise visas

1.95 SHEVs were created by the RALC Act. These visas may be granted to persons who are found to be owed protection obligations and who indicate an intention to work or study in regional areas in Australia. The regulation sets out certain criteria for the grant of a SHEV.

1.96 The main criteria for the grant of a SHEV were included by an amendment to the RALC bill, and the committee therefore did not examine the human rights compatibility of the SHEV regime during its consideration of the bill. However, many of the previous report's concerns in relation to TPVs implemented by the RALC bill apply equally to the SHEV regime, particularly in relation to Australia's non-refoulement obligations.[5]

1.97 The regulation raises a human rights compatibility concern in respect of providing that people who hold a SHEV, and people whose last substantive visa was a SHEV, are unable to make a valid application for a Bridging Visa B. A Bridging Visa B has a travel facility attached to it.

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2 See explanatory statement (ES), Attachment B 5-9.

3 See above footnote 1.

4 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 20-24.

5 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

1.98 The committee previously considered that the restriction on travel for SHEV holders engages and limits the right to freedom of movement.

Right to freedom of movement

1.99 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

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

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

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

Compatibility of the measure with the right to freedom of movement

1.103 The statement of compatibility for the regulation acknowledges that preventing SHEV holders from applying for a visa that allows the visa holder to travel limits the right to freedom of movement.[6]

1.104 The committee previously acknowledged that protecting the integrity of the protection visa regime may be regarded as a legitimate objective for the purposes of international human rights law. However, the committee found it to be unclear how denying a person the right to travel is rationally connected to that objective.

1.105 The SHEV regime allows a visa holder to travel in compassionate and compelling circumstances, as approved by the minister in writing, and to places other than the country in respect of which protection was sought.[7] However, it is unclear why it is necessary to require the minister's written approval before the SHEV holder is able to travel to any country, as merely seeking to travel would not appear to indicate in and of itself that a person is not in need of protection.

1.106 Further, the regulation does not allow a SHEV holder, or former SHEV holder to ever apply for a Bridging Visa B. It is not clear how this blanket denial of the right

6 ES, Attachment B 9.

7 See clause 8570 of Schedule 8 to the Migration Regulations 1994.

to apply for this type of visa could, even if rationally connected to a legitimate objective, be regarded as proportionate to that objective.

1.107 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is a rational connection between the limitation and the stated objective, in particular, how denying access to travel to SHEV holders to *any* country furthers the objective of maintaining the integrity of the protection visa regime; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and in particular, why it is necessary to prohibit access entirely to Bridging Visa B for all SHEV, or former SHEV, holders.

Minister's response

1.148 The committee's assessment of denying SHEV holders access to a Bridging Visa B, against article 12 of the International Covenant on Civil and Political Rights [ICCPR] (right to freedom of movement), raises questions as to whether the restrictions are justifiable.

To clarify, non-citizens who hold a SHEV are able to apply to leave and re-enter Australia. Despite the restriction of access to a Bridging visa B for SHEV holders, this does not mean that they may not travel outside Australia. In order to do this, a SHEV holder must submit a 'Permission to Travel' form and have their request assessed and approved by the Department. In this situation, the Minister must be satisfied that there are compelling or compassionate circumstances that justify the entry to that other country.

If a SHEV holder or a former SHEV holder makes a further application for a SHEV or any other visa, he or she will hold a bridging visa associated with their further visa application. During the time when the applicant only holds a bridging visa, they will be unable to apply for a Bridging visa B, and will be unable to travel. In this circumstance, the applicant must await the outcome of their further substantive visa application or leave Australia.

Article 12 of the ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

The Government does not consider that the removal of access to Bridging visa Bs for persons who hold a SHEV, or whose last substantive visa was a

SHEV, is a restriction against article 12. The removal of access does not limit a SHEV holder's (or former holder's) movement inside Australia (Art 12(1)), ability to leave Australia (Art 12(2)), or to enter the SHEV-holder's own country (Art 12(4)).

Rather, the removal of access to Bridging visa Bs restricts the future ability of SHEV holders and former SHEV holders to re-enter Australia if they choose to leave. This restriction is entirely consistent with the Government's immigration regime, which is provided by law (Art 12(3)) under the *Migration Act 1958*.

The Government notes that the SHEV is a temporary visa and does not confer the rights of a permanent visa or citizenship, meaning that Australia is not taken to be a SHEV-holder's 'own country' as stated in Article 12(4) and elsewhere in the ICCPR.

1.149 As set out above, denying SHEV holders access to a Bridging Visa B engages and may limit the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is a rational connection between the limitation and the stated objective, in particular, how does denying access to travel to SHEV holders to any country further the objective of maintaining the integrity of the protection visa regime; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and in particular, why it is necessary to prohibit access entirely to Bridging Visa Bs for all SHEV, or former SHEV, holders.**

As stated above, the Government does not consider that the removal of access to Bridging visa Bs for SHEV holders and former SHEV holders is a restriction against article 12 of the ICCPR or any other international human right. The Government further does not consider that there is any particular or general right for a SHEV holder or former SHEV holder on a bridging visa to have access to a Bridging visa B, given that the protection visa regime is aimed at fulfilling domestic and international legal obligations for those who are refugees or otherwise owed protection due to a real risk of them suffering significant harm in their country of reference.

The removal of access to Bridging visa Bs for SHEV holders and former SHEV holders follows the Government's decision to place restrictions regarding travel on the holders of protection visas. This decision is discussed at length elsewhere, for example, the letter dated 20 November 2013 from the then-Minister for Immigration and Border Protection, the Hon. Scott Morrison MP, to the then-Chair of this Committee.

> The Government agrees that SHEV holders and former SHEV holders certainly have a right to exit Australia, however, it does not agree that they necessarily have a right to re-enter Australia without first being permitted to do so. [8]

Committee response

1.108 **The committee thanks the Minister for Immigration and Border Protection for his response.**

1.109 The minister's response states that the government does not agree that there is a restriction on the right to freedom of movement in restricting access to Bridging Visa Bs for persons who have held a SHEV. The minister bases this on the fact that not being able to access a visa that would allow a visa holder to travel abroad, and thus return to Australia at the conclusion of that travel, does not limit the person's ability to leave Australia. Rather, it just restricts them from returning to Australia at the conclusion of their travel (and they have no right to re-enter Australia as Australia could not be said to be their 'own country').

1.110 The right to leave a country is a right both to legally leave the country as well as practically leave the country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad. States are required to provide necessary travel documents to ensure this right can be realised.[9] A person who has been recognised as a refugee but does not have the necessary travel documents that would allow them to travel (and return to Australia at the conclusion of their travel) is not able to practically realise their right to leave the country. This right applies to every person lawfully within Australia, including those who have been recognised as refugees. The committee therefore considers that the right to freedom of movement is engaged and limited by the measure.

1.111 No further information is given in the minister's response as to how restricting access to a Bridging Visa B for SHEV holders and former SHEV holders is rationally connected to the stated objective of protecting the integrity of the protection visa regime. The committee understands that a person on a SHEV has the ability to seek the approval of the minister to travel in certain circumstances. However, this does not apply when the person is on a bridging visa pending the determination of their application for a further SHEV or a different visa. The committee appreciates this is for a limited timeframe pending determination of a substantive visa, but adequate reasons have not been advanced by the minister as to why it is necessary to refuse to allow former SHEV holders the ability to travel while they are waiting their substantive visa application being determined.

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8 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 20 July 2015) 2-3.

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

1.112 **The committee's assessment of the measure against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) is that it limits the right to freedom of movement and raises questions as to whether this limitation is justifiable.**

1.113 **The Minister for Immigration and Border Protection's response does not provide any assessment as to whether the limitation on the right to freedom of movement is justifiable. The committee reiterates its request for advice from the Minister for Immigration and Border Protection as to:**

- **whether there is a rational connection between the limitation and the objective sought to be achieved; in particular, how does denying access to travel to Safe Haven Enterprise Visa, or former, Safe Haven Enterprise Visa holders to <u>any</u> country further the objective of maintaining the integrity of the protection visa regime; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective; in particular, whether it is the least rights restrictive approach; and why it is necessary to entirely prohibit access to Bridging Visa B for all Safe Haven Enterprise Visa, or former Safe Haven Enterprise Visa, holders.**

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.

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 24 June 2015

Purpose

2.3 The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the bill) proposed to amend the *Australian Citizenship Act 2007* (Citizenship Act) to expand the basis on which a dual citizen's Australian citizenship will cease. The bill included two broad bases on which the citizenship of dual nationals will cease:

(a) automatic cessation on the basis of conduct:

- if the person engages in specified conduct; or
- if the person fights for, or is in the service of, a declared terrorist organisation; and

(b) automatic cessation on the basis of conviction:

- if the person is convicted of a specified offence.

2.4 The bill also provided that the minister may revoke the citizenship of a child of a parent whose citizenship has automatically ceased under any of these new provisions.[1]

2.5 Proposed new section 33AA operated so that a dual Australian citizen would automatically cease to be an Australian citizen if they engaged in specified conduct, as defined in the *Criminal Code Act 1995* (Criminal Code).

2.6 Under proposed section 35A, a dual Australian citizen would have ceased to be an Australian citizen if convicted of one of 57 offences under either the Criminal Code or the *Crimes Act 1914* (Crimes Act). In addition to the type of conduct giving rise to automatic cessation of citizenship under proposed section 33AA, citizenship would also have ceased following conviction for a range of offences.

1 See amendments in item 6 of the bill to paragraph 36(1)(a) of the Citizenship Act.

2.7 Under subsections 33AA(6) and 35A(6), the Minister for Immigration and Border Protection was required to give written notice to an Australian citizen whose conduct or conviction resulted in the cessation of their citizenship, as soon as the minister became aware of that conduct. The minister was able to either rescind a notice or exempt the person from the effect of these sections if he or she considered it in the public interest to do so. The bill provided that the minister's powers would be personal and non-compellable, and that the rules of natural justice would not apply.

2.8 The bill would have applied to all Australian citizens holding dual citizenship, regardless of how the person became an Australian citizen. Accordingly, the provisions would not render a person stateless.

2.9 A person who lost their citizenship under the bill would have been prohibited from ever obtaining Australian citizenship again unless the minister allowed it.

Background

2.10 The committee first reported on the bill in its *Twenty-fifth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Immigration and Border Protection as to the compatibility of the bill with Australia's international human rights obligations.[2]

2.11 On 24 June 2015 the bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) by the Attorney-General.

2.12 On 4 September 2015 the PJCIS handed down its report. The report contained 27 recommendations, all of which were accepted by the government.

2.13 The committee's previous report seeking further information was tabled on 11 August 2015. However, no response was received either in relation to the original bill or the revised bill prior to the passage of the bill by both Houses of Parliament.

2.14 The amended bill passed both Houses of Parliament on 3 December 2015 and achieved Royal Assent on 11 December 2015. A response to the committee was received from the Minister for Immigration and Border Protection on 11 January 2016.

2.15 As emphasised in the committee's Guidance Note 1, the committee sees its human rights scrutiny task as primarily directed at ensuring that the parliament has the necessary analysis and information to understand the compatibility or otherwise of legislation before the parliament. In this instance, the delay between the committee's request to the minister for more information and the minister's response has prevented the committee from providing its final remarks before the parliament considered and passed the bill.

2 Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 4-46.

2.16 The following section summarises the provisions of the revised measures as enacted in the Citizenship Act.

Amendments

2.17 The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (the Act) amended the Citizenship Act to expand the basis on which a dual citizen's Australian citizenship will cease.

2.18 The Citizenship Act now includes two broad bases on which the citizenship of dual nationals will cease:

(a) automatic cessation on the basis of conduct under section 33AA:

- if a person over 14 years of age, engages in specified conduct with a specified intention; or
- if a person over 14 years of age, fights for, or is in the service of, a declared terrorist organisation, and the fighting or service occurs outside Australia; and

(b) revocation on the basis of conviction under section 35A:

- if the person is convicted of a specified offence; and
- the minister is satisfied that it would be in the public interest and that the conviction demonstrates a repudiation of allegiance to Australia.

Automatic cessation on the basis of conduct

2.19 New section 33AA of the Citizenship Act operates so that a dual Australian citizen aged 14 years or older will automatically cease to be an Australian citizen if they engage in specified conduct (with a specified intention) outside Australia, as defined in the Criminal Code such as:

- engaging in international terrorist activities using explosive or lethal devices;[3]
- engaging in a terrorist act;[4]
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;[5]
- directing the activities of a terrorist organisation;[6]
- recruiting for a terrorist organisation;[7]
- financing terrorism;[8]

3 Section 72.3 of the Criminal Code.

4 Section 101.1 of the Criminal Code.

5 Section 101.2 of the Criminal Code.

6 Section 102.2 of the Criminal Code.

7 Section 102.4 of the Criminal Code.

- financing a terrorist;[9] and
- engaging in foreign incursions and recruitment.

2.20 The term 'engaging in foreign incursions and recruitment', includes:

- entering a foreign country with the intention of engaging in hostile activity, engaging in, or preparing to engage in, hostile activity (which includes intending to overthrow by force or violence the government of a foreign country; intimidating the public of a foreign country; and unlawfully destroying or damaging property belonging to the government of a foreign country);[10]
- entering or remaining in an area declared by the Minister for Foreign Affairs;[11]
- providing or receiving military training (or being present at a meeting intending to provide or receive training), in order to prepare for engaging in hostile activity;[12]
- giving money, goods or services with the intention of supporting or promoting the offence of engaging in hostile activity;[13]
- allowing a building to be used to hold a meeting with the intention of committing, supporting or promoting military training or the giving of money or goods to support or promote engagement in hostile activity;[14] and
- publishing an advertisement or an item of news (for money or other consideration) and either being reckless as to whether it is for the purpose of recruiting persons to serve in any capacity with foreign armed forces; or the advertisement or news item contains information relating to where applications or information can be sought regarding serving with the armed forces in a foreign country; or relating to how a person can travel to another country in order to serve with the armed forces of a foreign country.[15]

2.21 Section 33AA applies to the conduct listed above, only if the conduct is engaged with the intention, set out in section 33AA(3), of advancing a political, religious or ideological cause, and coercing or influencing a government or intimidating the public or a section of the public.

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8 Section 103.1 of the Criminal Code.

9 Section 103.2 of the Criminal Code.

10 Section 119.1 and 119.4 of the Criminal Code.

11 Section 119.2 of the Criminal Code.

12 Subsections 119.4(3) and (4) of the Criminal Code.

13 Subsection 119.4(5) of the Criminal Code.

14 Section 119.5 of the Criminal Code.

15 Section 119.7 of the Criminal Code.

2.22 However, if when the person engaged in the relevant conduct, the person was a member of a declared terrorist organisation (or acting on instruction of, or in cooperation with, a declared terrorist organisation), the person is taken to have engaged in the conduct with the requisite intention without further need of proof of intention.[16]

Revocation on the basis of conviction

2.23 Under new section 35A of the Citizenship Act, a dual Australian citizen will cease to be an Australian citizen in the following circumstances:

- the person has been convicted of one of certain offences, each of which are drawn from the Criminal Code and the Crimes Act, as specified in section 35A(1)(a); and
- the person has been sentenced to a period of imprisonment for at least six years; and
- the minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
- having regard to a range of factors, the minister is satisfied that it is not in the public interest for the person to remain an Australian citizen.

2.24 The revised explanatory memorandum to the bill explains that the specified offences reflect the policy intention that the basis for loss of citizenship 'must be a terrorism-related offence where the maximum penalty is at least 10 years imprisonment'. It states that the nature of such offences is that, on the face of it, a person who commits such an offence has 'repudiated their allegiance to Australia'. The offences include:

- international terrorist activities using explosive or lethal devices;
- treason;
- treason—material assisting enemies;
- espionage;
- terrorist acts;
- providing or receiving training connected with terrorist acts;
- possessing things connected with terrorist acts;
- collecting or making documents likely to facilitate terrorist acts;
- other acts done in preparation for, or planning, terrorist acts;
- directing the activities of a terrorist organisation;
- membership of a terrorist organisation;

16 Section 33AA(4).

- recruiting for a terrorist organisation;
- training involving a terrorist organisation;
- getting funds to, from or for a terrorist organisation;
- providing support to a terrorist organisation;
- financing terrorism;
- financing a terrorist;
- incursions into foreign countries with intention to engage in hostile activities;
- entering or remaining in a declared area overseas where terrorist organisations are engaged in hostile activities;
- allowing use of buildings, vessels and aircraft to commit foreign incursions offences;
- recruiting persons to join organisations engaged in hostile activities against foreign governments;
- recruiting persons to serve in or with an armed force in a foreign country;
- treachery by overthrow of the Constitution or government, levying war or assisting in levying war, or instigating an armed invasion;
- sabotage by destroying, damaging or impairing Australian Defence Force equipment;
- incursions into foreign states with intention of engaging in hostile activities; and
- preparations for incursions into foreign states for the purpose of engaging in hostile activities.

2.25 The minister must consider public interest matters before making a determination to revoke a person's citizenship. These matters include:

- the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18—the best interests of the child as a primary consideration;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations; and
- any other matters of public interest.

Minister to give notice

2.26 Under subsections 33AA(10) and 35A(10) of the Citizenship Act, the Minister for Immigration and Border Protection must give written notice to an Australian citizen whose conduct has resulted in the cessation of their citizenship (section 33AA), or by virtue of conviction of a relevant offence and ministerial decision has had their citizenship revoked (section 35A). This notice must include the person's rights of review.

2.27 The Citizenship Act provides the minister with the power to rescind any such notice and exempt a person from the effect of sections 33AA and 35A if he or she considers it in the public interest to do so. The Citizenship Act provides that the minister's powers are personal, non-compellable and the rules of natural justice do not apply.[17] However, if the minister does decide to consider exercising this power, he or she must have regard to a number of factors, including, if the person is aged under 18 years old, the best interests of the child as a primary consideration.

2.28 The Citizenship Act applies only to Australian citizens holding dual citizenship, regardless of how the person became an Australian citizen. Accordingly, its provisions cannot operate to render a person stateless.

2.29 A person who loses their citizenship under the Citizenship Act is prohibited from ever obtaining Australian citizenship again unless the minister makes a determination to exempt the person, or a court finds that the person either did not engage in the conduct or with the specified intention, or was not a dual citizen at the time they engaged in the conduct.

Human rights considerations

2.30 The committee notes at the outset that the recommendations of the PJCIS were aimed at 'making the [then] bill's scope more limited and procedures more transparent'.[18] In doing so, the recommendations rectified several concerns that this committee raised in relation to the original bill, as set out in its previous report.

2.31 However, the PJCIS was not tasked with scrutinising the bill with reference to Australia's obligations under international human rights law. While supportive of the intent and substance of the PJCIS recommendations, this committee remains concerned that in significant respects, the Citizenship Act is incompatible with Australia's obligations.

2.32 The committee's initial analysis included requests for further information from the minister in relation to multiple human rights. However, the minister's response does not deal with the majority of those requests beyond a global

17 Section 33AA(20), (22).

18 Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (September 2015) 179, paragraph [9.3].

comment that the bill has been amended as a result of PJCIS recommendations and the statement of compatibility has been amended accordingly.

2.33 **The committee noted the importance of protecting the security of all Australians. The committee also recognises the specific importance of protecting Australians from terrorism and individuals who have engaged in terrorist conduct.**

2.34 **In this context, some committee members believe that the deprivation of citizenship of those who endanger the security of Australians is desirable as a matter of policy, notwithstanding the incompatibilities with international human rights law identified in the analysis below.**

Report structure

2.35 The following analysis of the measures' compatibility with human rights consists of three parts:

- Part 1 considers the new measures' engagement of substantive human rights (such as the right to freedom of movement) flowing from the loss of citizenship in the bill. This part of the analysis considers the loss of citizenship by both conduct and conviction together, as the consequences of loss of citizenship is the same regardless of the method by which it is lost.
- Part 2 of the analysis considers the bill's engagement of procedural or process rights (right to a fair hearing, right to a fair trial and right to an effective remedy). This part of the analysis considers provisions providing for the automatic loss of citizenship from conduct, separately from the loss of citizenship on conviction, as the measures engage the process and procedural rights in different ways.
- Part 3 considers how the measures impact on children, in relation to both the substantive loss of citizenship provisions and the minister's power to remove the citizenship of a child whose parents have lost their citizenship.

Part 1—Substantive human rights engaged by the bill

Cessation of citizenship

2.36 As set out above, Citizenship Act now contains two new grounds on which Australian citizenship will cease.

2.37 Prior to the amendments, citizenship could only be lost in very limited circumstances. The Citizenship Act provided for only a limited form of renunciation by application (with limits on the minister's power to accept an application, see section 33). The principal exception to this was section 35 which allowed for automatic cessation of citizenship if a person serves in the armed forces of a country at war with Australia. This provision has never been used to deprive a person of citizenship.

Multiple rights

2.38 The committee's original analysis identified that the expanded provision for the cessation of Australian citizenship engages and may limit the following human rights and human rights standards:

- right to freedom of movement;[19]
- right to a private life;[20]
- protection of the family;[21]
- right to take part in public affairs;[22]
- right to liberty;[23]
- obligations of non-refoulement;[24]
- right to equality and non-discrimination;[25]
- right to a fair hearing and criminal process rights;[26]
- prohibition against retrospective criminal laws;[27]
- prohibition against double punishment;[28] and
- rights of children.[29]

2.39 The committee's analysis and its questions for the minister focus on the immediate consequences of loss of citizenship. However, the committee notes that there are broader economic, social and cultural rights which are also engaged and may be limited as a consequence of loss of citizenship, including:[30]

19 Article 12 of the International Covenant on Civil and Political Rights (ICCPR).

20 Article 17 of the ICCPR.

21 Articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

22 Article 25 of the ICCPR.

23 Article 9 of the ICCPR.

24 Articles 6 and 7 of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

25 Article 26 of the ICCPR.

26 Article 14 of the ICCPR.

27 Article 15 of the ICCPR.

28 Article 14(7) of the ICCPR.

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

30 For example, full access to a range of benefits, such as social security, health care, education and work rights, may only be available to citizens (or those holding permanent residency visas) and loss of citizenship, and a consequential loss of a right to full residence in Australia, would constitute a limitation on the ex-citizen's economic, social and cultural rights.

- right to work;[31]
- right to social security;[32]
- right to an adequate standard of living;[33]
- right to health;[34] and
- right to education.[35]

Right to freedom of movement (right to leave any country)

2.40 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) protects freedom of movement. The right to freedom of movement includes the right to leave any country. The right may be restricted in certain circumstances.

Compatibility of the measures with the right to freedom of movement (right to leave any country)

2.41 In its analysis of the original bill, the committee considered that the automatic loss of an Australian's citizenship engages and limits their right to freedom of movement, including the right of a person to leave any country. The statement of compatibility for the bill acknowledged the right is engaged but concluded that it is not limited because:

> ….the person is a dual citizen, either a travel document from the person's other country of nationality, a temporary document issued by Australia, or some other facility could potentially be used.[36]

2.42 However, as the committee noted, this analysis assumes that the person's other country of nationality would issue (or has previously issued and would not cancel) a passport, or that the person is able to apply for alternative travel documents. For those whose citizenship ceases when they are outside Australia, and in a country which they do not hold nationality, their right to leave another country may be particularly limited in the absence of any valid travel documents.

2.43 The committee also expressed concern over the bill's operation on a person who is in Australia at the time that their citizenship ceases. A dual citizen in Australia would be entitled to an ex-citizen visa. This visa would allow them to remain in Australia but restrict any travel from Australia as a person who leaves Australia on an ex-citizen visa loses any entitlement to return to Australia.

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31 Articles 6, 7 and 8 of the ICESCR.

32 Article 9 of the ICESCR.

33 Article 11 of the ICESCR.

34 Article 12 of the ICESCR.

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

36 Explanatory memorandum (EM), Attachment A 29.

2.44 Accordingly, the committee considered that the automatic cessation of citizenship not only engages but also limits the right to freedom of movement (right to leave any country).

2.45 The statement of compatibility noted that the objective of the bill, in providing further grounds for the loss of citizenship, is to ensure the safety of the Australian community. It did not assess whether the measures are rationally connected, or proportionate, to this objective.

2.46 The committee noted that the statement of compatibility for the bill did not provide reasoning or evidence that the measures supported a pressing or substantial concern, including information about how many people are likely to be affected by the cessation of citizenship powers and why existing methods of keeping the community safe and protecting national safety are insufficient.

2.47 The committee also noted that it is not clear that the automatic cessation of citizenship is rationally connected to its stated objective. The automatic cessation of citizenship in the original bill applied to a broad range of activities, many of which did not appear to fall within the description of 'serious terrorism-related activities'.[37]

2.48 In terms of safeguards, the committee noted that in the first instance, where cessation of citizenship occurs at the time of the conduct, there may be a genuine contest as to whether or not that conduct has in fact occurred. An individual may have their freedom of movement limited, not only in the absence of a conviction, but prior to or during their attempt to challenge whether the conduct occurred. How this is reasonable and proportionate was not explained in the statement of compatibility.

2.49 The committee further noted that it is not clear that the measures, in automatically depriving a person of citizenship in relation to a broad range of circumstances, can be said to be proportionate. In order to be proportionate a limitation on a right must be the least rights restrictive means of achieving a legitimate objective and must include appropriate safeguards.

2.50 The broad range of conduct to which automatic cessation would apply indicates that the measure appears significantly broader than necessary. The committee was also concerned that ministerial power to exempt a person was an insufficient safeguard.

2.51 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective. In particular, how many people are likely to be affected by these measures and

37 See Second Reading Speech, the Hon Peter Dutton MP, Minister for Immigration and Border Protection (24 June 2015).

why existing laws and powers are insufficient to protect national security and the safety of the Australian community;

- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice was sought as to how decisions will be made by the minister or officials to effectively decide that a person's citizenship has ceased and whether this is the least rights restrictive approach. In addition, specific advice was sought in relation to each of the following offences or conduct, as to how each offence operates in practice and whether it is proportionate that citizenship should cease on the basis of each offence or conduct:
  - engaging in foreign incursions and recruitment as defined in Division 119 of the Criminal Code (with specific information given in relation to each offence provision in Division 119);
  - sections 80.1(2), 80.2, 80.2A, 80.2B, 80.2C, 91.1, 102.6(2), 102.7(2), 103.1, 103.2 of the Criminal Code; and
  - sections 24AB, 27 and 29 of the Crimes Act.

2.52 The committee also sought the minister's advice on these questions regarding each of the human rights set out in Part 1 of the below analysis (articles 9, 12, 17, 23, 25 and 26 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)), as set out below.

Minister's response

I respectfully refer the Committee to the detailed information in the Statement of Compatibility in the Explanatory Memorandum which accompanied the revised Bill, which comprehensively addresses the human rights set out in articles 12, 13, 14, 15, 17, 23, 24 and 26 of the ICCPR and Article 3 of the Convention on the Rights of the Child ('CRC').

As a general statement, any measures restricting freedom of movement in relation to a person in Australia will have a lawful domestic basis. In circumstances where a person has been convicted and sentenced to imprisonment for a specified crime/s such that their continued citizenship is not in the public interest, such measures will be necessary to protect national security, public order, and the rights and freedoms of the Australian community at large. This is consistent with the ICCPR, being explicitly contemplated by Article 12(3) and being proportionate, in the Government's judgement, to the existing and emerging threats to national security which Australia faces.

With regard to a person who is outside Australia when their citizenship has ceased, it is the Government's view that, where a person has objectively demonstrated through their conduct that they have repudiated their

allegiance to Australia, any ties they have to Australia for the purposes of [Article] 12(4) have been voluntarily severed. Depriving such a person of the right to enter Australia would not be arbitrary, as it would be based on a genuine threat to Australia's security posed by a person.

In response to the Committee's questions regarding how decisions will be made by the Minister that a person's citizenship has ceased, I offer the following advice:

- Subsection 33AA provides that if a person has engaged in a form of conduct with the requisite intention, they will have acted contrary to their allegiance to Australia and renounced their citizenship, thus causing it to automatically cease by operation of law. Subsection 33AA(2) provides a list of relevant conduct which mirrors the terrorism-related offences listed under the *Criminal Code Act 1995* (Cth). Subsection 33AA(3) outlines 'intention' to mean where the person undertakes one of the listed forms of conduct to advance a political, religious or ideological cause and to coerce or influence by intimidation an arm of the Australian Government or a foreign government or the public (or a section of the public).
- In considering whether a person has engaged in conduct with the requisite intention, these terms have the same meaning as defined under the Criminal Code and draw only on the factual elements contained in those definitions. As such, conduct will be made out if there is factual evidence which demonstrates that the person has engaged in one of the actions listed at subsection 33AA(2) such as engaged in a terrorist act, recruited for a terrorist organisation or financed a terrorist. Factual evidence will also be drawn on to identify the expressed motivation of the person when engaging in the relevant conduct.
- A similar approach will be adopted under section 35 where a dual national or citizen has acted contrary to their allegiance to Australia by fighting for or being in the service of a declared terrorist organisation and the person's citizenship has ceased automatically by operation of law. Again, factual evidence will also be drawn upon to identify whether a person has undertaken combat with regular forces of a country at war with Australia or has taken up arms for or is in the service of a declared terrorist organisation.
- For both these streams, the Minister will be supported by existing whole-of government and law enforcement coordination mechanisms that will provide information and intelligence about persons of interest who may be engaging in relevant conduct or fighting for or in the service of a declared terrorist organisation for the purposes of the Allegiance Act.

Upon becoming aware of information indicating that a dual national or citizen has engaged in conduct or is fighting for or is in the service of a declared terrorist organisation which has resulted in the automatic loss of

their citizenship, I am required to provide (or make reasonable attempts to provide) written notice to the person that I have become aware of such conduct which has caused the person's citizenship to cease. The notice must also include a basic description of the conduct and the person's rights of review.

Furthermore and at any time after a person has ceased to be a citizen under sections 33AA or 35, I may consider whether to make a determination to rescind the notice and exempt the person from the effect of the section, thus providing for the person's citizenship to be restored. In considering whether to make a determination, I must have regard to:

- the severity of the matters that were the basis of the notice;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18 - the best interests of the child as a primary consideration;
- whether the person is being or likely to be prosecuted in relation to the matters that were the basis of the notice;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations; and
- any other matters of public interest.

The Allegiance Act also requires that natural justice be applied in instances where I decide to consider exercising my power in relation to the making of a determination to rescind a notice or not. Where I make such a determination, I must table a statement to both Houses of Parliament.

Under section 35A and where a dual national or citizen is convicted of a terrorism-related offence, the courts (through trial processes, sentencing and conviction of the individual) will have identified the factual evidence and intention which went to the person's level of engagement and conduct in committing the terrorism-related offence.

Additional parliamentary scrutiny measures and review rights have also been incorporated into the Allegiance Act as a result of recommendations of the PJCIS.

Upon receiving my written notice that their citizenship has ceased due to their conduct, a person will have the right to seek judicial review of the basis on which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether

> or not the person was a dual citizen/national at the time of the conduct. For those individuals convicted of and sentenced in relation to a terrorism-related offence in Australia, I am required to revoke my determination if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.
>
> The Government is also required to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in the Allegiance Act, and provide a brief statement of reasons. I will also be required to notify the PJCIS on the issuing of a notice for the loss of citizenship under the Allegiance Act. The PJCIS will also be required to review, by 1 December 2019, on the operation, effectiveness and implications of the application of the provisions under the Allegiance Act.
>
> These oversight mechanisms achieve an appropriate balance between protecting the basic human rights of individuals while ensuring that dual national[s] and citizens who do not demonstrate their allegiance to Australia do not retain the privilege and benefits of Australian citizenship.[38]

Committee response

2.53 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.54 The minister directs the committee to the revised explanatory memorandum's statement of compatibility. While the statement notes that the right may be 'indirectly' engaged, and has had minor changes to its discussion of the right to freedom of movement (right to leave a country), these changes do not address the committee's initial concerns.[39]

2.55 The committee's consideration of the original bill noted that the statement of compatibility identified the legitimate objective of the bill, in providing further grounds for the loss of citizenship, as being to ensure the safety of the Australian community. The committee noted further that the statement of compatibility did not assess whether the measures were rationally connected, or proportionate, to this objective.

Legitimate objective

2.56 Under international human rights law, ensuring the safety of the community would be considered a legitimate objective provided that such an objective is founded on reasoned and evidence-based explanations of why the measures address a pressing or substantial concern. As the Attorney-General's Department's guidance on the preparation of statements of compatibility states, the 'existence of a

38 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 3-6.

39 Revised explanatory memorandum (Revised EM), Attachment A 55.

legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'. As such, the committee sought the advice of the minister.

2.57 Unfortunately, the minister's response does not provide any reasoning or evidence that the measures support a pressing or substantial concern. Instead the minister's response repeats assertions that depriving a person of their Australian citizenship is 'in the public interest', and by virtue of that, 'will be necessary to protect national security, public order, and the rights and freedoms of the Australian community at large'. No evidence is given as to what threats apply to national security and public order. The revised statement of compatibility is also silent on this point.

2.58 In order to determine that the bill pursues a legitimate objective, the committee requires evidence and reasoning as to the nature of the threat to national security including information about how many people are likely to be affected by the cessation of citizenship powers and why existing methods of keeping the community safe and protecting national safety are insufficient.

2.59 In the absence of such evidence the committee is unable to conclude that the measure seeks a legitimate objective.

Rational connection

2.60 Even if the requirement of a legitimate objective, supported by evidence and reasoning, were met, in its previous report, the committee raised concerns as to whether the measures are likely to be effective in achieving the objective being sought and are proportionate to that objective.

2.61 In its analysis of the original bill, the committee noted that cessation of citizenship would apply to a very broad range of activities, many of which did not appear to fall within the description of 'serious terrorism-related activities'.[40] For example, the committee noted that it is not clear that removing citizenship from a person who has damaged property or who has published an item of news would be effective to protect national security or the Australian community.

2.62 The minister's response notes that the original measure was amended on the basis of recommendations proposed by the PJCIS. In particular, a requirement that any loss of citizenship on the basis of a conviction can only occur if the person is sentenced to a six year minimum sentence has narrowed the applicability of the provisions, and the offences of which a person must be convicted in order to enliven the automatic cessation of citizenship power have been narrowed. These offences are listed above at paragraph [2.24]. The revised explanatory memorandum explains

40 See Second Reading Speech, the Hon Peter Dutton MP, Minister for Immigration and Border Protection (24 June 2015).

that these offences were chosen because they 'prima facie indicate that a person has acted contrary to his or her allegiance to Australia'.[41]

2.63 The committee agrees that this revised, narrowed list of offences is more clearly connected to the objective of the Act. However, notwithstanding these amendments, the committee remains concerned that the measures may not be proportionate.

Proportionality

2.64 As an overall proposition, the minister has not provided reasons why the criminal process of arrest and prosecution ordinarily followed for all crimes, including the most serious crimes, is not capable of protecting public order and the Australian community should persons who have engaged in the specified conduct return to Australia.

2.65 Even if one were to accept that the loss of citizenship may fulfil this objective in certain circumstances, pursuant to the Citizenship Act, loss of citizenship, either automatically under section 33AA, or via conviction under section 35A, ultimately turns on an exercise of ministerial discretion. In the case of automatic cessation this is because the only exception is an exercise of ministerial discretion to exempt a person from loss of citizenship. In the case of cessation after conviction, ministerial discretion is a step within the process set out in section 35A.

2.66 The committee acknowledges, and welcomes, amendments to the measures as originally proposed, that provide more detail concerning the factors that the minister must take into account when determining whether to exempt a person from the operation of the Citizenship Act.[42] The committee also welcomes the limited application of the rules of natural justice to a decision by the minister to make or not make a determination to exempt a person. Finally, the committee acknowledges the amendments to require the minister's notice informing a person that their citizenship has been revoked to include the reasons for the revocation and the person's rights of review.

2.67 However, the committee reiterates its significant concerns from its previous report. In particular, the minister's power remains personal, non-delegable and non-compellable.[43] Further, the rules of natural justice are expressly *excluded* in relation to the decision not to consider exercising the power to exempt a person.[44] The committee is not satisfied that this discretionary power is a robust enough safeguard (for the purposes of international human rights law) to ensure that

41 Revised EM, Attachment A 52.

42 The original bill simply provided that the minister has the power to exempt a person if he or she considered it 'in the public interest' to do so: see Original bill, proposed section 33AA(7), 35A(6).

43 Citizenship Act, section 33AA(15), (20), 35A(10).

44 Citizenship Act, section 33AA(22), 35A(11).

individuals do not lose their citizenship and thus freedom of movement in circumstances that would be unjust.

2.68 Further, the requirement that the minister detail the reasons for revocation of citizenship is limited. While the committee appreciates that national security and personal safety may preclude some information, the committee is concerned that this broad list may operate to deny a person the ability to comprehend the reasons for their loss of citizenship, and compromise any ability to challenge the basis for the loss of citizenship before a court. Further, the minister retains the power to not issue a notice to a person at all if the minister considers that a notice may prejudice Australian security. In these cases the committee's concern is only heightened.

2.69 Under the original bill and in the Citizenship Act as now amended, loss of citizenship is permanent. A person who has lost their citizenship is ineligible under section 36A to resume citizenship at any time. The revised statement of compatibility does not explain how this measure is proportionate to its objective. However, there are three narrow exceptions to the permanent loss of citizenship:

- first, if the minister decides to exercise his or her power to rescind the notice and exempt a person;
- second, if a court finds that the person did not engage in the conduct or with the requisite intention, or that the person was not a national or citizen of another country at the time of the conduct; and
- third, if a declaration under section 35AA is disallowed by either House of Parliament and the person's citizenship would not have ceased if that declaration had not been made.

2.70 The committee considers that these exceptions are insufficient to conclude that the measure is compatible with human rights. In particular, the committee has already noted its concerns with the minister's discretionary, non-compellable power at paragraphs [2.66] to [2.67].

2.71 In relation to the additional parliamentary scrutiny measures and review mechanisms incorporated into the Citizenship Act, these measures serve to improve parliamentary oversight of the executive. However, they do not mitigate the effect that cessation of citizenship would have on an individual's right to freedom of movement. In particular, six-monthly reports on the number of times a notice for loss or revocation of citizenship has been issued, notification of such to the PJCIS, and an intended review of the operation of the new provisions by the PJCIS by 1 December 2019, do not ameliorate the limitation on the right to a person's freedom of movement introduced by the new measures.

2.72 However, certain further amendments have improved the measures as proposed in the original bill. In particular, the bill expressly excluded section 39 of the *Australian Security Intelligence Organisation Act 1979*. This provision provides that a Commonwealth agency must not take any action on the basis of any

communication from the Australian Security Intelligence Organisation (ASIO) that does not amount to a security assessment. Accordingly, the bill would have allowed a Commonwealth agency to act on preliminary ASIO information that was less certain than a security assessment when determining whether someone is an Australian citizen or whether in fact they had lost that citizenship based on conduct outlined by ASIO.

2.73 In practice, this may have allowed, a decision to be made that a person had lost their citizenship on the basis of supposition and conjecture as to whether they may have engaged in specified conduct. This could have applied when the person is not in Australia and not in a practical position to challenge the lawfulness or correctness of this decision. The committee therefore welcomes the removal of this provision from the Act.

2.74 Nevertheless, despite improvements from the original bill, the committee considers that the new measures introduced to the Citizenship Act are disproportionate to the objective sought to be achieved. The automatic cessation of citizenship for a broad range of offences, with limited oversight and legislative safeguards, is not the least rights restrictive means of achieving the objective of national security.

Right to freedom of movement (right to enter one's 'own country')

2.75 The right to freedom of movement includes the right to enter one's own country—including a right to remain in the country, return to it and enter it. The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.

2.76 There are few, if any, circumstances in which depriving a person of the right to enter their own country could be justified. Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

Compatibility of the measure with the right to freedom of movement (right to enter one's own country)

2.77 The statement of compatibility to the original bill acknowledged that the right to enter one's 'own country' could apply to people whose citizenship has ceased:

> While a person whose citizenship has ceased or has been renounced would no longer be a citizen under Australian law, under international law Australia may still be considered their 'own country' for the purposes of Article 12(4). The phrase 'his own country' has been interpreted broadly by the UN Human Rights Committee and the drafting history of the provisions

supports the interpretation that 'own country' goes beyond mere nationality.[45]

2.78 The statement of compatibility to the original bill stated that the 'own country' provisions do not apply to a person whose citizenship has automatically ceased by their own conduct because, by those very actions, that person will have repudiated their allegiance to Australia and any ties they may have to Australia will have been voluntarily severed.[46]

2.79 However, the committee noted that the automatic cessation of citizenship provisions would not have required a person to specifically repudiate their citizenship of Australia—rather the provisions were to operate automatically.[47] Accordingly, the committee considered that the statement of compatibility provided insufficient information to demonstrate that the 'own country' provisions do not apply.

2.80 The committee considered that it was clear from the statement of compatibility to the original bill that the intention was to exclude Australian citizens who are outside Australia at the time their citizenship ceases, from being able to return to Australia. This clearly limits the right to return to one's own country.

2.81 The committee therefore sought the advice of the Minister for Immigration and Border Protection in the terms set out above at paragraphs [2.51] and [2.52].

Minister's response

2.82 The minister's response is extracted above in relation to the right to freedom of movement (right to leave any country) immediately following paragraph [2.52].

Committee response

2.83 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.84 The minister directs the committee to the revised explanatory memorandum's statement of compatibility, which repeats the original statement of compatibility's analysis with minor amendments.[48]

2.85 The minister's response and the revised statement of compatibility do not directly respond to the committee's questions. The revised statement of compatibility simply repeats the analysis of the original statement of compatibility, which the committee had assessed as not addressing the significant limitations on

45 EM, Attachment A 29.

46 EM, Attachment A 29.

47 See proposed section 35A of the bill which provides that citizenship ceases if a person is convicted of an offence against section 29 of the Crimes Act, which makes it an offence to damage property belonging to the Commonwealth.

48 Revised EM, Attachment A 55.

the right to freedom of movement. In addition, the minister's response provides insufficient justification on this point, simply asserting that depriving a person of the right to enter Australia would be 'based on a genuine threat to Australia's security posed by a person'. Evidence as to the extent or severity of this threat, and an explanation of how existing powers are insufficient to deal with this threat, is not provided.

2.86 Despite the amendments to the measures as proposed in the original bill, the committee considers that the explanatory material and ministerial response have not justified that the measures pursue a legitimate objective and are proportionate. This analysis is set out above at paragraphs [2.53] to [2.74]. In this instance, the committee's view is confirmed by the UN Human Rights Committee's statement that there are few, if any, circumstances in which it could be reasonable to deprive a person of access to their own country.[49]

Right to a private life

2.87 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

2.88 A private life is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

2.89 This right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to a private life

2.90 The statement of compatibility to the original bill made no reference to the right to a private life. However, the committee considered that there was a strong argument that the bill engaged and limited the right to a private life. The term 'private life' has been interpreted broadly, encompassing notions of a person's identity, which has been said to be linked to a person's nationality.

2.91 The European Court of Human Rights, in interpreting the right to a private life, has stated:

> [T]he concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity…the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an

49 UN Human Rights Committee, *General Comment 27, Freedom of Movement* (1999) [21].

> issue under [the right to a private life] because of the impact of such a denial on the private life of the individual.[50]

2.92 The United Kingdom Joint Committee on Human Rights, when examining the UK's laws enabling the removal of citizenship, stated that 'nationality is part of a person's identity and therefore, potentially at least, their private life'.[51] The UK government acknowledged in its supplementary memorandum on the bill that gave additional powers to the Secretary of State to strip a person of citizenship, that 'deprivation of citizenship is capable of engaging [the right to a private life]'. The UK government referred to the case of *Genovese v Malta* cited above and concluded:

> …nationality is part of a person's identity and, therefore, potentially their private life. This applies to all deprivation, not just deprivation rendering some stateless.[52]

2.93 Accordingly, the committee considered that the deprivation of citizenship engaged and limited the right to a private life. The committee therefore wrote to the Minister for Immigration and Border Protection seeking his advice as to how this limitation is justified in the terms set out above at paragraphs [2.51] and [2.52].

Minister's response

2.94 The minister's response is extracted above in relation to the right to freedom of movement (right to leave any country) immediately following paragraph [2.52].

Committee response

2.95 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.96 The committee notes that the minister's response did not discuss the right to a private life and referred the committee to the statement of compatibility for the revised explanatory memorandum.

2.97 However, the revised statement of compatibility still makes no reference to the right to a private life. Despite the amendments to the measures as originally proposed introducing a number of safeguards, the committee remains concerned in relation to the legitimate objective and proportionality of the measures. This analysis is set out above at paragraphs [2.53] to [2.74].

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50 *Genovese v Malta*, European Court of Human Rights, Application no. 5314/09 (11 November 2011). This is based on article 8 of the European Convention on Human Rights which is in substantially similar terms to article 17 of the ICCPR.

51 UK Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (second report), Twelfth Report of Session 2013-14* (26 February 2014) available at: http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/142.pdf.

52 Immigration Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office (January 2014) [12], available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf.

Protection of the family

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

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

Compatibility of the measure with the right to protection of the family

2.100 The statement of compatibility to the original bill acknowledged that it engaged the right to protection of the family:

> The cessation or renunciation of the Australian citizenship of a parent may engage the right of a child to be cared for by his or her parents in Article 7(1) and the right to family in Article 23(1). However, they would only be engaged in circumstances where the actions of the parent whose citizenship has ceased or been renounced casts serious doubt on their suitability as a parent, and where the safety and security considerations and Australia's national security are likely to justify a limitation of the right.
>
> The right to family may also be engaged in circumstances without children, for example in circumstances where a husband's Australian citizenship ceases or renounces but his wife's citizenship does not. The Government has considered this right and has assessed that the security and safety considerations of Australians and national security outweigh the rights of the individuals affected.[53]

2.101 In its analysis of the original bill, the committee noted that the offences and conduct for which citizenship would automatically cease was extremely broad and did not support the statement that such conduct 'casts serious doubts on their suitability as a parent'. For example, damaging property (including graffiti) or travelling to a location declared to be off limits by the Minister for Foreign Affairs does not necessarily suggest that such a person is not a suitable parent, or whether it is reasonable and proportionate to separate that person from their family.

2.102 The committee also noted that the statement of compatibility to the original bill appeared only to identify the objective of the measure—being security and safety considerations—and did not assess the question of rational connection or, importantly, the proportionality of the measures. In particular, no information was given as to whether due consideration would be given to maintaining the family unit

53 EM, Attachment A 33-34.

when decisions are made to deny an ex-citizen re-entry to Australia or to deport a person from Australia. The committee therefore sought the advice of the Minister for Immigration and Border Protection in the terms set out above at paragraphs [2.51] and [2.52].

Minister's response

2.103 Please see the minister's response above in relation to the right to freedom of movement (right to leave any country) immediately following paragraph [2.52].

Committee response

2.104 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.105 The committee acknowledges that the original bill was amended in several significant ways. In particular, as set out above at paragraphs [2.62] to [2.63] the range of offences under which a person could have their citizenship revoked has been narrowed.

2.106 The committee notes that the minister directs the committee to the revised explanatory memorandum's statement of compatibility.

2.107 However, the revised statement of compatibility does not directly address the committee's questions but simply reasserts that the measure is proportionate 'in the Government's view'.[54]

2.108 Despite amendments to the measures as originally proposed that introduced a number of safeguards, the committee remains concerned in relation to the legitimate objective and proportionality of the measures. This analysis is set out above at paragraphs [2.53] to [2.74].

Right to take part in public affairs

2.109 Article 25 of the ICCPR protects the right to take part in public affairs. Article 25 provides the right to take part in public affairs and elections, and guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service. The right to take part in public affairs applies only to citizens.

Compatibility of the measure with the right to take part in public affairs

2.110 In its analysis of the original bill, the committee noted that one of the consequences of losing citizenship is that a person who was previously entitled to the right to take part in public affairs would be denied that right. A person would therefore not be entitled to the right to vote, to stand for public office or to hold positions in the public service. The statement of compatibility to the original bill

54 Revised EM, Attachment A 56.

made no mention of, and therefore did not assess, the effect of the cessation of citizenship on the right to take part in public affairs.

2.111 The committee therefore sought advice from the Minister for Immigration and Border Protection in the terms set out above at paragraphs [2.51] and [2.52].

Minister's response

2.112 Please see the minister's response above in relation to the right to freedom of movement (right to leave any country) immediately following paragraph [2.52].

Committee response

2.113 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.114 The committee notes that the minister's response did not discuss the right to take part in public affairs; and that the minister referred the committee to the statement of compatibility in the revised explanatory memorandum.

2.115 However, the committee notes that the revised statement of compatibility still makes no reference to the right to take part in public affairs. It is not clear why this right was not identified or discussed in either the original statement of compatibility or in the revised explanatory memorandum issued after the committee's report on the original bill.

2.116 Despite amendments to the measures as originally proposed that introduced a number of safeguards, the committee remains concerned in relation to the legitimate objective and proportionality of the measures. This analysis is set out above at paragraphs [2.53] to [2.74].

Right to equality and non-discrimination

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

2.118 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.

2.119 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[55] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely

55 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.

affecting human rights.[56] 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.[57]

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

2.120 The statement of compatibility to the original bill noted that the right to equality and non-discrimination is engaged by these measures, but argued that any limitation on this right was justifiable on the following bases:

> Differentiation on the basis of dual nationality is the consequence of obligations relating to statelessness, and as such represents a measure of extra protection for those without dual nationality, rather than a means of possibly selecting those who may be subject to the new provisions.
>
> The broader differentiation at the heart of the cessation and renunciation amendments, i.e. that by acting against the interests of Australia by choosing to engage in terrorism, they have evidently repudiated their allegiance to Australia, thereby renouncing their Australia citizenship, is proportionate to the seriousness of the conduct.[58]

2.121 However, aside from direct discrimination on the basis of dual nationality, the committee noted that there was also the possibility of indirect discrimination on the basis of race or religion.

2.122 International human rights law recognises that a measure may be neutral on its face but in practice have a disproportionate impact on groups of people with a particular attribute such as race, colour, sex, language, religion, political or other status. Where this occurs without justification it is called indirect discrimination.[59] Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice.

2.123 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. Nevertheless, such a disproportionate effect may be justifiable, and thereby not unlawfully discriminatory. The statement of compatibility to the original bill recognised this, noting that:

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

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

58 EM, Attachment A 32.

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

> As observed by the Human Rights Committee in General Comment no. 18, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[60]

2.124 However, the statement of compatibility did not address the issue of indirect discrimination, and in relation to direct discrimination, simply stated that the cessation of citizenship was proportionate to the seriousness of the conduct, without providing any analysis of its proportionality (given the range of offences it applies to). As it was not clear whether the measures would impact disproportionality on persons from a particular race or religion, the committee sought the advice of the Minister for Immigration and Border Protection in the terms set out above at paragraphs [2.51] and [2.52].

Minister's response

2.125 Please see the minister's response above in relation to the right to freedom of movement (right to leave any country) immediately following paragraph [2.52].

Committee response

2.126 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.127 The committee notes that the minister's response did not discuss the compatibility of the cessation of citizenship measures with the right to equality and non-discrimination; and that the minister referred the committee to the revised statement of compatibility. However, while the revised statement assesses the measures against this right, it does not directly address the questions asked by this committee.

2.128 The revised statement of compatibility does not address the issue of indirect discrimination, and does not discuss whether these measures would impact disproportionality on persons from a particular race or religion. Despite the reason behind the application to dual nationals alone, the *effect* of the Act can be considered to create two classes of citizenship in Australia, with dual citizenship made more precarious.[61] The committee considers that such a step should only be taken with careful consideration of impact on racial and religious groups, and with due justification.

2.129 In relation to direct discrimination, the revised statement of compatibility states that the cessation of citizenship provisions are proportionate to the seriousness of the conduct, without providing any analysis to support this conclusion.

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60 EM, Attachment A 32.

61 Niamh Lenagh-Maguire and Kim Rubenstein, 'More or Less Secure? Nationality questions, deportation and dual nationality' in Edwards and van Waas (eds) *Nationality and Statelessness under International Law* (Cambridge 2014).

2.130 Despite amendments to the measures as originally proposed that introduced a number of safeguards, the committee remains concerned in relation to the legitimate objective and proportionality of the measures. This analysis is set out above at paragraphs [2.53] to [2.74].

Right to liberty and obligations of non-refoulement

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

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

2.133 Article 9 applies to all forms of deprivations of liberty, including immigration detention.

2.134 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[62] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[63]

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

62 CAT, article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

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

2.136 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[64]

Compatibility of the measures with the right to liberty and Australia's non-refoulement obligations

2.137 In its consideration of the original bill, the committee noted that the right to liberty is engaged by the automatic cancellation of citizenship as it appears likely that any person whose citizenship has ceased because of having engaged in, or been convicted of, specified conduct, is likely to have their ex-citizen visa cancelled on character grounds. Following cancellation of this visa the ex-citizen would be subject to mandatory immigration detention pending their deportation.

2.138 As the committee noted, the detention of a non-citizen on cancellation of their visa and pending their deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, as the committee has previously noted, in the context of a system of mandatory detention in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, there may be situations where a person's detention could become arbitrary under international human rights law.[65] It is the blanket and mandatory application of detention to those persons whose visa has been cancelled, but whom Australia cannot deport, that makes such detention arbitrary.[66]

2.139 This is most likely to apply in cases where the person cannot be returned to their country of nationality on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). This may apply to ex-citizens who have had their citizenship cancelled on the basis of having engaged in specified conduct and whose country of dual nationality may be unwilling to allow them entry.

2.140 In its consideration of the original bill, the committee also considered that the automatic cessation of citizenship powers raises questions as to whether depriving a person of citizenship, and therefore potentially exposing them to

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

65 For example, see *A v Australia* (Human Rights Committee Communication No. 560/1993) and *C v Australia* (Human Rights Committee Communication No. 900/1999). See also *F.K.A.G et al v Australia* (Human Rights Committee Communication No. 2094/2011) and *M.M.M et al v Australia* (Human Rights Committee Communication No. 2136/2012).

66 For further analysis see the committee's analysis in this report in relation to the Migration and Maritime Powers Amendment Bill (No. 1) 2015.

deportation, is compatible with Australia's non-refoulement obligations, given the lack of statutory protection and lack of 'independent, effective and impartial' review of decisions to remove a person.

2.141 The committee noted further that, even if a person can be deported to their country of dual nationality or a third country, deportation in certain situations may raise concerns around Australia's of non-refoulement obligations (see paragraphs [2.134] to [2.136]).

2.142 There is nothing in Australian law that would prevent an unlawful non-citizen, including ex-citizens, from being removed to a place where they may face persecution. Rather, section 198 of the *Migration Act 1958* (Migration Act) requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

2.143 The statement of compatibility to the original bill did not identify that automatic cancellation of citizenship as engaging and potentially limiting the right to liberty and the obligations of non-refoulement.

2.144 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the cessation of citizenship provisions and decisions to remove an ex-citizen will be subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

Minister's response

> The provisions of the Allegiance Act are compatible with Australia's non-refoulement obligations.
>
> The Minister's discretionary power to cease a person's citizenship where the person is in Australia will not result directly in them being liable for removal from Australia. Any such liability would come only after the person's lawful status in Australia was rescinded and the person was detained under the Migration Act 1958 (Migration Act) as an unlawful non-citizen.
>
> Upon my determination to cease a person's citizenship under section 35A of the Allegiance Act, the person will be granted an ex-citizen visa under section 35 of the Migration Act. The ex-citizen visa is a permanent visa allowing the holder to remain in, but not re-enter Australia. The grant of this visa is an automatic process. Any action in relation to the cancellation of this visa on character grounds involves a separate process under the Migration Act. Whether the person engages one of Australia's non-refoulement obligations can be considered as part of deciding whether or not a person should hold a visa. A visa cancellation decision by a delegate of mine will be subject to merits review, and my personal visa cancellation

> decisions are subject to judicial review. I consider both merits and judicial review to be 'independent, effective and impartial', and where relevant, the review may consider non-refoulement obligations claimed to be owed by Australia.
>
> Should there be cases of individuals convicted of terrorism-related offences who may also engage Australia's non-refoulement obligations, such obligations do not extend to an obligation to grant permanent residency or any particular type of visa in Australia. Rather, for people who are found to be owed a non-refoulement obligation but are ineligible for the grant of a visa on character or national security grounds, Australia will put in place appropriate measures to ensure the protection of the person's human rights while balancing the protection and security of the Australian community. Australia does not intend to resile from its non-refoulement obligations.[67]

Committee response

2.145 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.146 The committee welcomes the minister's commitment that Australia does not and will not resile from its non-refoulement obligations. In particular the committee acknowledges the minister's intention to ensure that people who are found to be owed a non-refoulement obligation but are ineligible for the grant of a visa on character or national security grounds have their rights protected.

2.147 However, notwithstanding the committee's original analysis identifying that the cancellation of citizenship provisions engage and may limit the right to liberty, the revised statement of compatibility does not identify or discuss this right.

2.148 The minister explains that a person whose citizenship ceases under these provisions and who is in Australia at the time their citizenship ceases, acquires an ex-citizen visa by operation of law.[68] This is a permanent visa (though subject to cancellation at any time) allowing the holder to remain in, but not re-enter Australia. The minister explains further that ceasing a person's citizenship where the person is in Australia 'will not result directly in them being liable for removal from Australia' because any action in relation to the cancellation of the ex-citizen visa on character grounds 'involves a separate process under the Migration Act'. As part of this process, 'whether the person engages one of Australia's non-refoulement obligations can be considered'.[69]

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67 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 6.

68 See section 35 of the *Migration Act 1958*.

69 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 6.

2.149 However, the revised statement of compatibility acknowledges that in circumstances where a person's citizenship is cancelled, the cancellation of an ex-citizen visa is almost certain:

> While the grant of this visa is an automatic process, in the circumstances under contemplation it is likely that the Minister would at least consider immediately cancelling this visa on character or national interest grounds, assuming the relevant criteria were met.[70]

2.150 Following cancellation of this visa, the ex-citizen would be subject to mandatory immigration detention pending their deportation.

2.151 In the absence of information from the minister justifying this limitation, the committee's concerns on the measure's impact on the right to liberty remain.

2.152 Despite the amendments to the measures as originally proposed that introduced a number of safeguards, the committee remains concerned in relation to the legitimate objective and proportionality of the measures. This analysis is set out above at paragraphs [2.53] to [2.74].

2.153 Regarding Australia's obligation of non-refoulement, as the committee has stated on a number of occasions, the obligation of non-refoulement is absolute and the right to an effective remedy requires an opportunity (before removal) for effective, independent and impartial review of the decision to expel or remove. The committee refers to its previous conclusion that judicial review of the minister's decision to cancel a visa on character grounds, as currently provided for under the Migration Act, is insufficient to meet Australia's non-refoulement obligations.[71]

Part 1 - Conclusion

2.154 **The committee's assessment of the cessation of citizenship powers is that they engage multiple human rights protections under international law as set out above at paragraph [2.38]. The revised statement of compatibility and minister's response do not provide sufficient evidence to demonstrate that the measures are compatible with those rights, and in relation to many rights, do not provide any justification for the limitations on rights that the committee has identified. In addition, although many of the amendments introduce stronger safeguards, the committee considers that these safeguards are insufficient for the purposes of international human rights law.**

2.155 **Nevertheless, some committee members reiterate their belief, noted above at paragraph [2.33] to [2.34], that the deprivation of citizenship of those who endanger the security of Australians is desirable as a matter of policy, notwithstanding the incompatibilities with international human rights law identified in the analysis above.**

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70 Revised EM, Attachment A 53.

71 Most recently, see *Thirty-Fourth Report of the 44th Parliament* (23 February 2016) 34-37.

Part 2 – Procedural and process rights

2.156 Part 2 addresses procedural and process rights in relation to the cessation or revocation of citizenship under the new measures.

2.157 As discussed above, the enjoyment of a range of rights and entitlements under Australian law is tied to Australian citizenship. It is therefore of critical importance that the processes by which citizenship may cease or be revoked contain sufficient safeguards to ensure that powers are exercised only in the appropriate circumstances, on information and reasoning that is tested and reliable.

2.158 The committee previously noted that the proposed provisions for the loss of citizenship engaged and limited a number of procedural and process rights including:

- the right to a fair trial;
- the right to a fair hearing; and
- the right to an effective remedy.

2.159 Each measure which removes the citizenship of adults is addressed below in turn. Particular human rights concerns in relation to loss of a child's citizenship are set out in Part 3.

Automatic loss of citizenship through conduct

2.160 As noted at [2.19] to [2.22] above, automatic loss of citizenship through conduct is provided for by new sections 33AA and 35(1) of the Citizenship Act.

Right to a fair hearing

2.161 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right applies where rights and obligations, including personal property or other private rights, are to be determined.

2.162 In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private.

Compatibility of the measure with the right to a fair hearing

2.163 The statement of compatibility to the original bill stated that the right to a fair hearing is not limited by the measure as judicial review of decisions is available.[72] However, it did not fully explain how this would be sufficient for compatibility with the right to a fair hearing.

2.164 In its previous report, the committee considered that, given the unusual construction of sections 33AA and 35(1) regarding the automatic loss of citizenship

72 EM 31.

on the basis of conduct, it was not clear that the automatic citizenship involved a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The mechanism of renunciation by conduct was contrasted to renunciation made effective by the decision of a court or the executive (for example, the mechanism that provides for renunciation by application in section 33).

2.165 The committee did consider that other forms of relief may be available, though not provided for in the bill itself, such as declaratory relief that a person's citizenship has never been lost. However, it observed that any such review would be attended by significant difficulties.

2.166 First, it is unclear whether, in the absence of a decision, the onus of proof in such a matter would rest with the respondent or with the plaintiff (that is, with the person whose citizenship has purportedly been lost). If the latter, the plaintiff may be placed in the difficult position of having to prove that they had not engaged in the conduct which led to the automatic loss of their citizenship. The inherent difficulty in proving a negative for a plaintiff may seriously limit that person's right to a fair hearing.

2.167 Second, the proceedings would be civil rather than criminal in nature under Australian domestic law, operating on a the civil standard of proof rather than the criminal standard of beyond reasonable doubt, as well as lacking the protections of a criminal proceeding. Yet, the conduct at issue would be criminal conduct. As discussed below, the application of civil burdens and standards of proof without the usual protections afforded in a criminal proceeding also adversely affects the compatibility of the measure with the right to a fair trial.

2.168 Further, the effect of the operation of sections 33AA and 35(1) is that a person is considered to have lost their citizenship through conduct. However, the evidence in relation to that alleged conduct may be in fact contested, which means that an individual may be treated as a non-citizen before having the opportunity to challenge or respond to allegations of specified conduct.[73]

2.169 For these reasons, the committee considered that the right to a fair hearing is engaged and limited in relation to the proposed measure.

2.170 In light of the serious consequences that may result from loss of citizenship, it is critical that there is clarity and certainty around the process for challenging any loss of citizenship. In this regard, the onus is on the legislation proponent to ensure that proposed processes are compatible with the right to a fair hearing, including that there is procedural fairness and equality in proceedings.

2.171 However, the statement of compatibility for the original bill did not provide any information on how judicial review would operate in respect of proposed

73 For example, an individual maybe denied consular assistance at an Australian embassy on the basis that they are no longer a citizen because they have travelled to Mosul which a declared area.

sections 33AA and 35(1), including which party will bear the applicable burden of proof or standard of proof, or address other uncertainties with respect to the operation of sections 33AA and 35(1).

2.172 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the availability of judicial review and the potential for declaratory relief is sufficient for compatibility with the right to fair hearing in light of the particular construction of sections 33AA and 35(1) (including with reference to where the burden of proof falls and the standard of proof applicable to such proceedings).

Minister's response

> I respectfully disagree with the views of the Committee and am of the position that the Allegiance Act does not limit a person's right to a fair hearing and a fair trial.
>
> As outlined earlier and upon receiving my written notice to the effect that their Australian citizenship has ceased, a person will have the right to seek judicial review on the basis of which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.
>
> For those individuals who have been convicted of a terrorism-related offence, I will also be required to revoke my determination of cessation of citizenship if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.[74]

Committee response

2.173 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.174 The committee notes the clarification that the Federal Court and High Court's original jurisdiction, in relation to the minister's written notice under the Act, is the basis upon which judicial review is considered to be available in relation to automatic loss of citizenship by conduct.

2.175 The committee also recognises that, following the recommendation of the PJCIS, notes are provided in the Act to the effect that, once the minister gives notice under either section 33AA(10) or section 35(5), a person may seek review of the basis of the notice in the High Court of Australia under section 75 of the Constitution or the Federal Court of Australia under section 39B of the Judiciary Act. The

74 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 8.

amendments to the bill as enacted also provide that the written notice under section 33AA(10) and section 35(5) must set out the person's rights of review.[75]

2.176 However, beyond stating the availability of these general avenues of review, which are independent of the Act and unaltered by the Act, the minister's response does not attempt to address the committee's concerns regarding the right to a fair hearing and the right to a fair trial in the context of the provisions as enacted.

2.177 Neither the revised bill nor the minister's response addressed the difficulties raised in the committee's previous report, including the onus and standard of proof in relation to a challenge to automatic loss of citizenship (as set out above at paragraphs [2.165] to [2.169]). Nor does the minister's response explain how judicial review, likely restricted to errors of law, will constitute effective review for the purposes of international law. This is particularly concerning given the complex questions of fact and difficult questions of evidence that are likely to arise when a minister makes a decision on whether a person has engaged in conduct constituting a criminal offence, independent of the criminal trial process. As this committee has explained previously judicial review is not sufficient to fulfil the international standard required of 'effective review', where it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision.

2.178 Further, the minister's response relies on review which is available on the receipt of a written notice. However, this is not the point at which, pursuant to the Act, citizenship is lost. Therefore, a person loses a set of critically important rights prior to having any access to a court or tribunal. Moreover, pursuant to section 33AA(12) and section 35(7), the minister may determine that a written notice not be given to a person. In the event that a written notice is not given, it is unclear from the minister's response how judicial review is available to a person who has, in the minister's view, lost her citizenship by conduct.

2.179 **Accordingly, the committee's assessment of the automatic loss of citizenship provisions against article 14 of the International Covenant on Civil and Political is that the provisions do not provide for the determination of citizenship rights by a fair hearing by an independent and impartial tribunal and are thereby incompatible with Australia's obligations under international human rights law.**

Right to a fair trial

2.180 In addition to the general right to a fair hearing, where a person is subject to a criminal charge, or otherwise subject to a penalty that may be considered criminal, there are additional specific rights (the requirements of a fair trial) protected by article 14 of the ICCPR.

2.181 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These

75 See section 33AA(11) and section 35(6) of the Citizenship Act.

include the presumption of innocence (article 14(2)), the right not to be punished twice for the same conduct (article 14(7)) and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial

2.182 The statement of compatibility to the original bill argued that the right to a fair trial is not limited as individuals will have access to judicial review.

2.183 As noted above at paragraphs [2.164] to [2.169], the committee considered in its previous report that the courts may be able to engage in review as to whether alleged conduct leading to the automatic loss of citizenship has not occurred, with the result that an individual's citizenship was never lost. However, by engaging in such review, a court would effectively need to determine whether or not a particular crime has been committed.

2.184 For the reasons set out below, the committee considered that the court would effectively be determining a criminal charge, and therefore the criminal process rights contained in article 14 of the ICCPR are engaged by the automatic loss of citizenship provisions.

2.185 The concept of a 'criminal charge' extends to acts that are criminal in nature with sanctions that must be regarded as penal or punitive.[76]

2.186 It appears on the face of the Act that the conduct giving rise to automatic loss of citizenship is criminal in nature; indeed it is defined by reference to offences in the Criminal Code.

2.187 In any event, the right to fair trial in engaged if a person is subject to a penalty that is regarded as 'criminal' under international human rights law.

2.188 As set out in the committee's Guidance Note 2, the first consideration in determining whether a penalty is 'criminal' under human rights law is whether the penalty is classified as 'criminal' under Australian domestic law. In this case it is unclear whether or not the penalty is classified as 'criminal'. However, given the direct references to loss of citizenship resulting from criminal conduct in the proposed provision, it is arguable that under Australian domestic law the penalty is classified as criminal in key respects.

2.189 The second consideration is that, even if the penalty of loss of citizenship is not classified as criminal under Australian domestic law, it may still be 'criminal' for the purposes of article 14 on the basis of the nature and severity of the penalty.

2.190 In relation to the nature 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

76 See UN Human Rights Committee, General Comment 32 [15].

being restricted to people in a specific regulatory or disciplinary context). In this regard, the statement of compatibility states that the measure may have a significant deterrent effect and could apply to all dual citizens and is not limited to a particular regulatory context.

2.191 Even if both (a) and (b) of the above test are not fully satisfied, a penalty may be considered 'criminal' based upon its severity. In this regard, the serious consequences that may ultimately flow from the loss of a person's citizenship may also mean that the penalty is considered 'criminal' for the purpose of human rights law, thereby engaging the full range of criminal process rights under article 14.

2.192 The sanction of automatic loss of citizenship may be considered to be a form of banishment.[77] Banishment has historically been regarded as one of the most serious forms of punishment.[78] The statement of compatibility to the original bill acknowledges that the ultimate outcome of cessation of citizenship will most likely be removal from Australia for the individual concerned.[79]

2.193 For these reasons, the committee considered in its previous report that the right to a fair trial under article 14 was engaged by the bill.

2.194 Any judicial review sought of the loss of citizenship under section 33A or s35(1) would be a civil matter under Australian domestic law and civil burdens and standards of proof would therefore apply. That is, the matter would be decided on the balance of probabilities. On the application of this lower standard of proof an individual could therefore lose their citizenship despite reasonable doubt as to whether they had engaged in the purported conduct. On this basis, the measure would limit the right to be presumed innocent.

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77 See, J Bleichmar, 'Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law', *Georgetown Immigration Law Journal* (1999) 27. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at http://philpapers.org/archive/BARCWC-3.pdf; Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists" 39(2) *Queen's Law Journal* (2014) 573; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' 40(1) Queen's Law Journal (2014) 1-54.

78 See, Rebecca Kingston, 'The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France', (2005) 9 *Citizenship Studies*23. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at http://philpapers.org/archive/BARCWC-3.pdf.

79 See EM 30 which acknowledges that the measures may ultimately result in the expulsion of the former Australian citizen.

2.195 Further, the process of seeking review could only occur after citizenship has already purportedly been lost. This means that the Australian government may treat the person as a non-citizen on the basis of conduct alleged but not proven. The measure would accordingly limit the right to be presumed innocent. The presumption of innocence generally requires that the prosecution prove each element of a criminal offence to the criminal standard of beyond reasonable doubt. However, the statement of compatibility provides no justification in relation to this limitation on the right to a fair trial.

2.196 Further, in seeking review an individual who had lost their citizenship would have to bring evidence to the court as to why, for example, a declaration should be provided in their favour and would not be able to rely on other criminal process rights such as the protection against self-incrimination.

2.197 Given the limitations placed on the right to fair trial, the committee sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

2.198 Please see the minister's response above in relation to the right to a fair hearing immediately following paragraph [2.172].

Committee response

2.199 The committee's previous report set out in detail the reasons why the fair trial protections in article 14 were engaged and limited by the automatic loss of citizenship by conduct provisions.

2.200 The minister, in responding that the measures do not limit a person's right to a fair trial, does not specify whether his view is that the measures do not engage the right to a fair trial (for instance, because he considers they do not impose a criminal penalty) or whether the measures do not limit the right to a fair trial. However, elsewhere in his response, the minister states the view that section 33AA is administrative, not criminal, in nature (see extract below, following paragraph [2.213].

2.201 With respect to the question of whether the provisions engage the right to a fair trial, in the absence of any contrary reasoning or information from the minister, the committee maintains its view, for the reasons set out above at paragraphs [2.189] to [2.193] that the loss of citizenship ought to be considered a criminal penalty for the purposes of article 14, and thereby the fair trial protections in article 14 are engaged.

2.202 As to whether these protections are met, it is evident that judicial review proceedings pursuant to the original jurisdiction of the High Court and Federal Court are civil in character and do not involve the protections required for a fair trial, such as the presumption of innocence or protection against self-incrimination. The minister has presented no reasoning to the contrary.

2.203 **Accordingly, the committee's assessment of the automatic loss of citizenship provisions against article 14 of the International Covenant on Civil and Political is that the provisions do not provide for a fair trial and are thereby incompatible with Australia's obligations under international human rights law.**

Quality of law

2.204 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interferes with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

Compatibility of the measure with the quality of law test

2.205 In its consideration of the original bill the committee noted that there was a high degree of uncertainty as to how the automatic loss of citizenship provisions would work in practice. This included how an individual could seek declaratory relief if they believed they had not engaged in conduct that led to the automatic cessation of their citizenship, and how the courts would determine the rights and responsibilities of the parties in court proceedings.

2.206 The committee noted that, as a matter of international human rights law, it is critical that there is clarity and certainty around the processes for challenging any loss of citizenship. In this regard, the onus is on the legislation proponent to ensure that the proposed processes are compatible with the right to a fair hearing and right to a fair trial, including that there is procedural fairness and equality in proceedings. For the purposes of the quality of law test, it is insufficient for the legislation proponent to simply assert that the courts would manage these uncertainties in accordance with established practice and principles. Instead the proposed legislation should be clear as to how the provisions would operate in practice and how the rights of individuals to due process and the rule of law would be protected by the bill.

2.207 The committee therefore sought the advice of the minister as to whether the provisions providing for automatic loss of citizenship for certain conduct are sufficiently certain.

Minister's response

2.208 The minister's response did not address this question.

Committee response

2.209 The committee acknowledges that the bill was amended in significant ways to clarify how the automatic loss of citizenship provisions would work in practice. However, notwithstanding the introduction or clarification of review mechanisms and additional parliamentary safeguards, the entire process of revocation relies on an administrative determination that a person has engaged in the specified conduct. Who makes this determination and how such a determination is made is not entirely clear. As such, the committee maintains serious concerns surrounding the clarity and quality of the provisions.

2.210 **The committee's assessment of the cessation of citizenship powers against the quality of law test raises questions as to whether the provisions providing for automatic loss of citizenship for certain conduct are sufficiently certain. In the absence of any information from the Minister for Immigration and Border Protection the committee must conclude that the measures are likely to be incompatible with the quality of law test.**

Prohibition on double punishment

2.211 The right to a fair trial includes specific procedural guarantees. Article 14, paragraph 7 of the ICCPR, provides that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law.

Compatibility of the measure with the prohibition on double punishment

2.212 In the committee's consideration of the original bill, the committee noted its concern that the provisions that provide for automatic loss of citizenship on the basis of defined conduct may be considered punitive for the purposes of international human rights law. That is because the loss of citizenship is a punishment for the conduct engaged in, notwithstanding the absence of a court process to determine guilt beyond reasonable doubt. The practical effect of this is that loss of citizenship may occur before or during a criminal trial for specific offences that relate to that conduct. Potentially, citizenship could also be lost in the context of a trial at which a person is ultimately acquitted (because of the differing standards of proof), meaning a person could effectively be tried twice for the same conduct (which is also prohibited by article 14(7) of the ICCPR).

2.213 An individual subjected to both the automatic loss of citizenship and a criminal conviction and punishment for the same conduct will effectively suffer double punishment. The statement of compatibility did not address how these measures were compatible with the prohibition on double punishment and the committee therefore sought the advice of the Minister for Immigration and Border Protection.

Minister's response

> I respectfully disagree with the views of the Committee that in considering the terrorism-related conduct of a person who is offshore, including if they are fighting for or in the service of a declared terrorist organisation, such provisions are of a criminal nature and therefore act as a double punishment.
>
> Section 33AA of the Allegiance Act is administrative in nature and applies consequences that arise automatically in response to a person acting inconsistently with their allegiance to Australia. As explained earlier and in considering whether a person has engaged in terrorism-related conduct for the purposes of section 33AA, these terms have the same meaning as defined under the Criminal Code and draw only on the factual elements contained in those definitions. As such, conduct will be made out if there is factual evidence which demonstrates that the person has engaged in one of the actions listed at subsection 33AA(2) such as engaged in a terrorist act, recruited for a terrorist organisation or financed a terrorist. Factual evidence will also be drawn on to identify the expressed motivation of the person when engaging in the relevant conduct.
>
> In addition, the Allegiance Act also provides for a person's right to seek judicial review of the basis on which the notice was made and which provides a further safeguard in the application of these provisions. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.[80]

Committee response

2.214 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.215 The committee acknowledges the minister's advice that new section 33AA of the Citizenship Act is 'administrative in nature', rather than criminal, and therefore does not engage the prohibition against double punishment. However, the committee reiterates the view set out above at paragraphs [2.189] to [2.193] that the consequences of section 33AA—automatic loss of citizenship—are sufficiently serious to be properly characterised as criminal for the purposes of article 14.

2.216 The committee acknowledges that, relative to the measures as originally proposed, the measures included in the Citizenship Act contain more safeguards relevant to their compatibility with the prohibition against double punishment. Under section 33AA(7) of the Citizenship Act, automatic loss of citizenship is limited

80 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 8-9.

to conduct offshore, or conduct within Australia but where the person has left Australia and had not been tried for any offence related to the conduct. The committee notes that in these cases the prospect of criminal conviction may be low, and as such, loss of citizenship would not be a 'second' punishment. However, even so, the person would remain liable to trial and conviction for the conduct that led to the revocation of their citizenship, leaving them at risk of being punished for the same conduct twice.

2.217 In any case, the revised statement of compatibility and the minister's response do not examine the imposition of this additional penalty on a person.

2.218 **The committee's assessment of the automatic loss of citizenship through conduct provisions against article 14(7) of the International Covenant on Civil and Political Rights (prohibition against double punishment) is that, while amendments have reduced the scope for double punishment, there remains the possibility for double punishment, that is, effective banishment through loss of citizenship in addition to a penalty received pursuant to a criminal conviction. As such, the committee considers that the measures are incompatible with Australia's obligations under international human rights law.**

Right to an effective remedy

2.219 Article 2 of the ICCPR requires state parties to ensure access to an effective remedy for violations of human rights. State parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

2.220 State parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

2.221 Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person including, and particularly, children.

Compatibility of the measure with the right to an effective remedy

2.222 The automatic loss of citizenship by conduct provisions under section 33AA of the Citizenship Act engage and may limit the right to an effective remedy as they operate automatically and may apply in circumstances where the individual concerned contests whether the conduct actually occurred.

2.223 In its analysis of the original bill, the committee noted that a person, who contests that they did not engage in the conduct causing the automatic loss of citizenship, may apply to the federal courts to seek declaratory relief. However, as

set out above at paragraphs [2.164] to [2.169], there is significant uncertainty as to how an application for declaratory relief regarding the automatic loss of citizenship would operate in practice. This uncertainty raises concerns about the efficacy of any judicial process to ensure that a person who wrongfully lost their citizenship is able to seek effective review and redress.

2.224 The committee also noted that an Australian who loses their citizenship outside of Australia may face significant practical hurdles in seeking access to courts to seek declaratory relief. These include difficulty in obtaining the necessary visas to travel to Australia to appear before the courts and the ability to seek and obtain necessary documentary evidence to present to the courts.

2.225 The statement of compatibility for the bill did not assess the effect of the cessation of citizenship on the right to an effective remedy.

2.226 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> I respectfully disagree with the views of the Committee and am of the position that the Allegiance Act does not limit a person's right to a fair hearing and a fair trial.
>
> As outlined earlier and upon receiving my written notice to the effect that their Australian citizenship has ceased, a person will have the right to seek judicial review on the basis of which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.
>
> For those individuals who have been convicted of a terrorism-related offence, I will also be required to revoke my determination of cessation of citizenship if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.[81]

Committee response

2.227 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.228 The minister directs this committee to the revised explanatory memorandum's statement of compatibility**.** However, the revised statement of

81 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 8.

compatibility does not identify that the right to an effective remedy is engaged by the Act, and therefore does not attempt to justify the limitation.

2.229 The committee acknowledges that, relative to the measures as originally proposed, the measures as introduced to the Citizenship Act contain more significant safeguards that are relevant to the assessment of their compatibility with the right to an effective remedy. In particular, the Citizenship Act makes clear that citizenship is taken never to have been lost if the facts on which a loss of citizenship was based were subsequently found to have been incorrect. Additionally, the Citizenship Act gives the minister the power to annul a revocation decision if the relevant conviction is later overturned on appeal or quashed, with the result that the person's citizenship is taken never to have been lost. The committee welcomes these amendments.

2.230 The committee notes the minister's explanation that a person has the right to challenge the revocation of citizenship in the Federal Court or High Court. The committee notes first that this amendment merely clarified a right that likely existed under the constitution. Second, the committee reiterates its longstanding position that judicial review in and of itself is insufficient to constitute an effective remedy.

2.231 Further, the committee remains concerned that the practical difficulties of challenging a decision persist. In its analysis of the original bill, the committee noted that the automatic cessation provisions would enable government officials to take action, including declining consular assistance, notwithstanding that the minister had not yet issued a notice, and in the absence of a criminal conviction. This has not been remedied. Section 33AA(10) requires the minister only to 'make reasonable attempts to give written notice' to the person concerned, and in cases where the minister considers that giving notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations, the minister need not give notice.[82] In these cases, the person may not be aware that their citizenship has been revoked, and will therefore not be able to seek judicial review of that revocation.

2.232 **The committee's assessment of the automatic cessation of citizenship powers against article 2 of the International Covenant on Civil and Political Rights (right to an effective remedy) is that the measure is incompatible with Australia's obligations under international human rights law. The revised statement of compatibility does not identify that this right is engaged and therefore does not sufficiently justify it for the purposes of international human rights law.**

Loss of citizenship on conviction

2.233 As noted at paragraph [2.23], under section 35A, a dual Australian citizen will cease to be an Australian citizen if they are convicted of any one of 57 offences and the minister is satisfied that revocation of the person's citizenship is in the public

82 Section 33AA(12).

interest. The loss of citizenship following conviction engages the prohibition on double punishment.

2.234 In addition, the provisions apply to individuals who are convicted following the day after the Act received Royal Assent (on 12 December 2015) even if the conduct that is the subject of that conviction occurred prior to that date. Accordingly, the committee's analysis of the original bill noted that the provisions engage the prohibition on retrospective criminal laws.

Prohibition on double punishment

2.235 The prohibition on double punishment is outlined at paragraph [2.212] above.

Compatibility of the measure with the prohibition on double punishment

2.236 As outlined at paragraphs [2.214] to [2.217], the act of removing someone's citizenship may be considered punitive for the purposes of international human rights law. Provisions that automatically impose a loss of citizenship following conviction for certain offences may be considered to impose an additional punishment to that imposed by the court in accordance with the Criminal Code. However, statement of compatibility to the bill did not address how these measures are nevertheless compatible with the prohibition on double punishment.

2.237 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment).

Minister's response

2.238 The minister did not address this question.

Committee response

2.239 In the absence of further information from the minister, the committee reiterates its analysis above at paragraphs [2.214] to [2.217] concluding that automatic loss of citizenship due to 'renunciation by conduct' under section 33AA of the Citizenship Act is of a criminal nature for the purposes of international human right law.

2.240 The committee notes that revocation of citizenship on conviction under section 35A is materially distinct from the loss of citizenship due to 'renunciation by conduct' under section 33AA. The committee also acknowledges that following the amendments to the measures as originally proposed, the Citizenship Act does no longer provide for *automatic* loss of citizenship on conviction, but requires the minister to determine whether citizenship should be revoked.

2.241 However, the committee notes that the introduction of the requirement for a ministerial determination does not mitigate the severity of the punishment or the seriousness. Indeed, the committee notes the harshness of the punishment, and the

likely consequence of expulsion from Australia. Loss of citizenship following conviction for certain offences imposes an additional punishment to that imposed by the court in accordance with the Criminal Code. The retrospective operation of the measures serves to compound the infringement on the prohibition on double punishment.

2.242 **The committee's assessment of the loss of citizenship on conviction provisions against article 14(7) of the International Covenant on Civil and Political Rights (prohibition against double punishment) is that the measure is incompatible with Australia's obligations under international human rights law. The removal of an Australian's citizenship, in circumstances which may ultimately lead to their effective banishment is a penalty that comes in addition to a penalty delivered by a court on conviction of a certain offence and thus breaches the prohibition against double punishment.**

Prohibition against retrospective criminal laws

2.243 Article 15 of the ICCPR prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

2.244 This is an absolute right, which means that it can never be justifiably limited.

2.245 Article 15 requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed. Laws must not impose greater punishments than those which would have been available at the time the acts were done. Further, if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender.

Compatibility of the measure with the prohibition on retrospective criminal laws

2.246 In its consideration of the original bill, the committee noted its concern that the automatic loss of citizenship on conviction measure under proposed section 35A may be incompatible with the prohibition on retrospective criminal laws. The committee noted further that as part of the bill's referral to the PJCIS, the Attorney-General asked that committee to consider whether proposed section 35A 'should apply retrospectively with respect to convictions prior to the commencement of the [measure]'.[83]

2.247 The committee also noted that this issue was not identified or addressed in the statement of compatibility, and therefore sought the advice of the Minister for

83 See the terms of references to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Citizenship_Bill/Terms_of_Reference.

Immigration and Border Protection as to whether the measures are compatible with article 15 of the ICCPR (prohibition on retrospective criminal laws).

Minister's response

A recommendation of the PJCIS was the inclusion of amendments to provide for conviction-based provisions to apply retrospectively for relevant offences that had occurred prior to the commencement of the Allegiance Act. In supporting retrospectivity in relation to convictions, the PJCIS stated:

> *'…the Parliament has introduced legislation with retrospective effect in special circumstances, and these laws have been held to be legally valid. The Committee notes the Bill's purpose is to ensure the safety and security of Australia and its people and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia. …on balance the Committee determined these to be special circumstances. The Committee formed the view that past terrorist-related conduct, to which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant and a deliberate step outside of the values that define our society. …In addition, the Minister's decision would include a current assessment of whether the person's past conviction reveals that they have breached their allegiance to Australia and whether it is contrary to the public interest for them to remain a citizen.'*

The application provisions of the Allegiance Act provide for section 35A to apply to dual nationals or citizens who, in addition to being currently convicted of a specified offence with a sentence of at least 6 years imprisonment, may also apply to dual nationals or citizens who have been convicted of a specified offence with a sentence of ten years or more and which conviction has been handed down within the last ten years. The Government accepted this amendment was necessary to ensure coverage of people recently convicted of and sentenced in relation to very serious terrorism-related offences which show a clear repudiation of allegiance to Australia.[84]

Committee response

2.248 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.249 The committee notes the minister's statement that section 35A was amended on the recommendation of the PJCIS so that it would apply retrospectively

84 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 9.

only to convictions for relevant offences for which a person had been sentenced to ten years imprisonment or more by a court.[85]

2.250 Retrospective laws compromise basic rule of law values. Lord Bingham has summarised the general dangers inherent in retrospective criminal laws as follows:

> Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.[86]

2.251 The revised statement of compatibility contends that section 35A 'does not create a criminal offence' but 'allows for the imposition of a civil consequence' in respect of a conviction and penalty that occurred prior to the commencement of the measure. It also places emphasis on the fact that cessation is not automatic.

> Cessation of citizenship on this basis is not automatic and remains at the discretion of the Minister, having regard to the remainder of section 35A, in particular noting the Minister's required satisfaction that the conduct that led to the conviction demonstrates the person's repudiation of their allegiance to Australia, and that it not be in the public interest for the person to remain an Australian citizen.[87]

2.252 However, while cessation of citizenship remains at the discretion of the minister, the committee notes that the revised statement of compatibility indicates that it is very unlikely that the minister will determine not to revoke citizenship in such circumstances. Further, as noted above at paragraphs [2.214] to [2.217], the severity and seriousness of the consequences of the loss of citizenship means that it is appropriately considered a criminal punishment and not simply administrative in nature.

2.253 International human rights law is clear on the compatibility of retrospective criminal laws: they are prohibited in all circumstances except where an act was 'criminal according to the general principles of law recognised by the community of nations'.[88] This proviso has been interpreted to mean that legality is upheld so long as the conduct in question is considered 'fundamentally criminal' by the community of nations,[89] such as crimes against humanity or war crimes.[90]

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85 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (4 September 2015) 128, Recommendation 10.

86 Tom Bingham, *The Rule of Law* (2011) 74.

87 Revised EM, Attachment A 58.

88 ICCPR, article 15(2).

89 Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the way of Progressive Development of Law?' (2004) 2 *Journal of International Criminal Justice* 1007, 1011.

90 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

2.254 As noted above, while the list of relevant offences has been narrowed, it still includes conduct that does not fall within the exception to the prohibition on retrospective criminal laws—for example, it includes the broadly expressed offence of 'engaging in foreign incursions and recruitment'. Therefore, the committee considers that this limitation cannot be justifiable under international human rights law.

2.255 Further, even were the committee to accept that the limitation may be justifiable under article 15(2) of the ICCPR, the revised statement of compatibility and the minister's response do not provide sufficient evidence and reasoning to establish any such justification.

2.256 For example, the revised explanatory memorandum's discussion on proportionality is perfunctory in reaching the conclusion that the retrospective application is appropriate as 'a person should be subject to revocation of citizenship on the basis of past conduct where that conduct involves a high degree of criminality'.[91] No evidence is provided as to the number of people who may be subject to having their citizenship cancelled, or otherwise why retrospective application is otherwise appropriate.

2.257 Likewise, the revised statement of compatibility's discussion on the retrospective application of the measure focuses solely on the objective of the bill and justifies the measure by reference to the recommendation of the PJCIS. It states:

> the purpose of the provision is to ensure the safety and security of Australia, and to ensure that the community of Australian citizens comprises persons who have an allegiance to Australia. The retrospective application accords with the recommendations of the PJCIS.[92]

2.258 **The committee's assessment of the loss of citizenship on conviction provisions against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective laws) is that the provision is incompatible with Australia's obligations under international human rights law. The proposed amendment is criminal in nature and punishes a person more severely than the person could have been punished at the time of the offence.**

Part 3—Children

2.259 The preceding analysis of the human rights compatibility of the measures in sections 33AA, 35 and 35A of the Citizenship Act in Parts 1 and 2 applies equally to children. This Part considers specific, additional human rights obligations with respect to children—which under international human rights law means all people aged under 18 years.

91 Revised EM 42.

92 Revised EM, Attachment A 58.

2.260 Section 33AA operates so that a dual Australian citizen aged 14 or older will automatically cease to be an Australian citizen if they engage in specified conduct, as defined in the Criminal Code.

2.261 Likewise, section 35(1) applies to a dual Australian citizen aged 14 or over if that person serves in the armed forces of a country at war with Australia or 'fights for or is in the service of' a declared terrorist organisation outside Australia.

2.262 For section 35A, there is no age limit specified to its application (as statement of compatibility recognises).[93] The offences listed in section 35A as a basis for cessation of citizenship apply to children aged over 10 years of age. Children aged 10 to 14 would only be convicted, and thus subject to automatic loss of citizenship, if they knew that the conduct was wrong in accordance with the standards and procedures of domestic criminal law.

2.263 Under section 36A a person, including a child, who citizenship ceased under sections 33AA, 35 or 35A, is prevented from resuming Australian citizenship.

2.264 The statement of compatibility states that the application of the new loss of citizenship provisions to children is justified on the grounds that there are documented cases of children fighting with extremist organisations overseas and being otherwise involved in terrorist activities.[94]

Automatic loss of citizenship and loss of citizenship following conviction

Obligation to consider the best interests of the child

2.265 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.[95]

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

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

2.267 The statement of compatibility to the original bill explained that the automatic loss of citizenship for conduct engages the obligation to consider the best

93 Revised EM, Attachment A, 48.

94 Revised EM, Attachment A 50.

95 Article 3(1).

interests of the child, but that 'the protection of the Australian community and Australia's national security outweighs the best interests of the child'.[96]

2.268 In its previous report, the committee pointed out that this statement misapprehended the nature of the obligation to consider the best interests of the child and that the procedure for automatic loss of citizenship set out in the bill did not appear to provide for a consideration of the best interests of the child.

2.269 The only way that an individual child's circumstances would be taken into account under the original bill was if the minister decided to exempt a child from the operation of the provisions: a power that was entirely discretionary and not subject to the rules of natural justice. As a result, the committee considered that this provision is not a sufficient safeguard for the purposes of international human rights law.

2.270 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

2.271 The committee also sought the minister's advice on these questions in relation to the rights contained in articles 7, 8 and 12 of the CRC (right to a nationality and right of the child to be heard), as set out below.

Minister's response

> The Allegiance Act does not apply to a child under 10 years of age. Further, and in accordance with a recommendation of the Parliamentary Joint Committee on Intelligence and Security, a child's citizenship will not be revoked following the revocation of their parent's citizenship where the parent has been convicted of a terrorism-related offence. Where the Allegiance Act may apply to a child between the ages of 10 to 14, it does so in conformity with established norms in the Criminal Code.
>
> Furthermore, there are a number of safeguards built into the Allegiance Act which include:
>
> - Providing written notice to the child (including their parents or legal guardians) of the conduct which has caused their citizenship to cease. The notice must also include a basic description of the conduct and the person's rights of review;
> - Providing the Minister with a discretionary power to determine whether to rescind the notice and exempt the child from the effect of the section, thus providing for their citizenship to be restored. In

96 EM 33.

considering whether to make a determination, the Minister must have regard to, among other matters, the best interests of the child as a primary consideration; and

- Providing for natural justice in instances where the Minister decides to consider exercising their power in relation to the making of a determination to rescind a notice or not. Where the Minister makes such a determination, they must table a statement to both Houses of Parliament.[97]

Committee response

2.272 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.273 As set out above at paragraphs [2.19] to [2.29], the bill was significantly amended after the committee's initial consideration. Those amendments have significantly reduced the extent to which the bill would apply to children.

2.274 In relation to automatic loss of citizenship on the grounds of conduct the Citizenship Act now provides that a child may only lose their citizenship by conduct if they are aged 14 years or over. In relation to those children aged between 14 and 18, as a matter of international law, any loss of citizenship must follow a process in which the best interests of the child is a primary obligation. The Committee on the Rights of the Child has said that the CRC:

> seeks to ensure that the right is guaranteed in all decisions and actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration. The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures. [98]

2.275 It remains the case that the procedure for automatic loss of citizenship set out in the Citizenship Act does not provide for a consideration of the best interests of the child, as the provision applies automatically to specified conduct. The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the conduct in accordance with normative standards of Australian law. It does not take into account whether the loss of citizenship would be in the best interests of the child given their particular circumstances.

2.276 The Citizenship Act now provides that if the minister decides to exempt a child from the application of the automatic loss of citizenship provisions, the minister

97 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 14 January 2016) 11.

98 Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* [40].

must consider the best interests of the child as a primary obligation. However, the minister is under no obligation at law to consider exempting a child and at that point there is no obligation under Australian domestic law to consider the best interests of the child. The minister's power remains personal, non-delegable and non-compellable.[99] Further, the rules of natural justice do not apply to a decision by the minister not to consider whether to exempt a person, including a child, from the operation of the Citizenship Act.[100] The minister's discretionary power, as conferred by the Citizenship Act, is an insufficient safeguard for the purposes of international human rights law.

2.277 In relation to the loss of citizenship following conviction for a terrorist related offence, as set out at paragraphs [2.23] to [2.25], under section 35A, a person, including a child, who is convicted of a specified offence *may* have their citizenship revoked, *if* the minister is satisfied that the person has repudiated their allegiance to Australia and the minister is satisfied that it is not in the public interest for the person to remain an Australian citizen.

2.278 In determining whether or not it is in the public interest for a child who has been convicted of a relevant offence to remain an Australian citizen, the minister must have regard to the best interest of the child as a primary consideration amongst a list of other considerations. Accordingly, the only obligation is 'to have regard' to the best interests of the child as a primary obligation.

2.279 The committee notes that the obligation under international law is to actively consider and take into account the best interests of the child in every decision affecting a child.

2.280 Moreover, the minister's decision is not subject to merits review which would enable a child to challenge a decision that their loss of citizenship was in the public interest. While the minister must give reasons for revoking citizenship, there is no specific requirement to outline in those reasons how the minister has taken the best interests of the child into account.

2.281 The minister's response notes that the citizenship revocation provisions 'apply to a child between the ages of 10 to 14, … in conformity with established norms in the Criminal Code.' However, the Criminal Code considers the criminal culpability of the child in relation to specific offence. It does not consider whether the child should lose their citizenship as a result of their conduct and whether the conduct is so serious as to warrant a loss of citizenship. This consideration falls squarely within the minister's powers under the new section 35A, which as set out above, is not subject to merits review.

99 Citizenship Act, section 33AA(15), (20), 35A(10).

100 Citizenship Act, section 33AA(22), 35A(11).

Right to nationality

2.282 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the ICCPR.[101] Accordingly, Australia is required to adopt measures, to ensure that every child has a nationality when born. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

Compatibility of the measure with the right to nationality

2.283 The statement of compatibility acknowledges that the automatic loss of citizenship for conduct provision engages and limits the right of a child to preserve his or her nationality. The statement of compatibility states that the provisions are lawful as a matter of domestic law and that the loss of nationality 'would in all the circumstances be reasonable, proportionate and necessary'.[102]

2.284 Whether or not the provisions are lawful under Australian domestic law is not determinative of whether the provisions comply with Australia's obligations under international law.

2.285 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.

Minister's response

2.286 Please see the minister's response above in relation to the obligation to consider the best interests of the child immediately following paragraph [2.271].

Committee response

2.287 The minister's response does not specifically address the right of a child to have and retain their nationality as protected by articles 7 and 8 of the CRC. The revised explanatory memorandum does not provide further information in relation to these rights.

2.288 The right of a child to preserve their identity maybe subject to lawful interference. In order to be lawful, the interference must be set out in law and be in the best interests of the child.[103]

2.289 The measures in the bill are lawful as a matter of Australian domestic law. For the reasons set out above at paragraphs [2.272]-[2.281], the committee has concluded that the loss of citizenship provisions are not constructed in a manner

101 Article 24(3) of the ICCPR.

102 EM 34.

103 Professor Jaap Doek,'The CRC and the Right to Acquire and to Preserve a Nationality' *Refugee Survey Quarterly* 25(3), 26.

consistent with Australia's obligations to consider the best interests of the child. Accordingly, the provisions appear inconsistent with article 8 of the CRC.

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

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

2.291 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Compatibility of the measures with the right of the child to be heard

2.292 The statement of compatibility to the original bill acknowledged that the measures in the original bill engage the right of the child to be heard. The statement of compatibility to the original bill focused on the minister's power to exempt a person from the application of the loss of citizenship provisions but did not address the automatic nature of the provisions themselves. As the provisions create an automatic loss of citizenship flowing from certain conduct there is no opportunity for a child to express their views and be heard before losing citizenship, which is inconsistent with article 12.

2.293 In relation to the ministerial exemption power, the statement of compatibility to the original bill states that the limitation is 'necessary and proportionate in the circumstances, given the serious conduct on the part of a child'.[104]

2.294 No analysis or evidence is provided to support the statement that the limitation on the right to be heard is necessary and proportionate. As set out above at [2.285], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

Minister's response

2.295 Please see the minister's response above in relation to the obligation to consider the best interests of the child immediately following paragraph [2.271].

Committee response

2.296 The minister's response does not specifically address the right of the child to be heard in judicial and administrative proceedings. The revised explanatory memorandum notes that the power to revoke a child's citizenship upon conviction is

104 EM 34.

discretionary and not automatic and that the minister will consider the best interests of the child in making a determination.

2.297 As the minister has not specifically addressed the committee's original question, no further information is provided as to how a provision that creates an automatic loss of citizenship flowing from certain conduct provides the necessary opportunity for a child to express their views and be heard before losing citizenship as required by article 12 of the CRC.

2.298 Similarly in relation to the minister's discretionary power to revoke a child's citizenship following conviction of certain terrorist related offences, there is no mechanisms for the child to express their views prior to the minister making a decision and no requirement for the minister to hear a child's submissions and given them due weight prior to making a determination. As set out above neither procedure provides merits review which would enable a child to test the substance of the claims in detail regarding the decision to revoke citizenship.

2.299 **The committee's assessment of the loss of citizenship provisions against articles 3, 8 and 12 of the Convention on the Rights of the Child is that the provision is incompatible with Australia's obligations under international human rights law.**

Discretionary power to remove the citizenship of a child whose parent has automatically lost their citizenship

2.300 Item 6 of the original bill would have amended the Citizenship Act to provide that, where a person ceases to be an Australian citizen at a particular time under sections 33, 33AA, 34, 34A, 35, or 35A and the person is a responsible parent of a child under the age of 18, the minister may revoke the child's citizenship (with specified exceptions).

2.301 Although serious consequences flow from loss of Australian citizenship, affecting the enjoyment of many human rights, no separate analysis was provided of the human rights engaged and limited by this measure.

2.302 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to the justification, including reasoning and evidence, for why such limitations were a reasonable and proportionate measure for the achievement of the bill's objectives. In particular, advice was sought as to how decisions will be made by the minister or officials to remove a child's citizenship and whether this is the least rights restrictive approach.

Minister's response

2.303 Please see the minister's response above in relation to the obligation to consider the best interests of the child immediately following paragraph [2.271].

Committee response

2.304 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.305 As outlined in the minister's response, the bill was subsequently amended so that a child's citizenship will not be revoked following the revocation of their parent's citizenship where the parent has been convicted of a terrorism-related offence or lost their citizenship automatically as a result of conduct.

2.306 **Accordingly, the committee's concerns about the compatibility with human rights of the proposed discretionary power to remove the citizenship of a child whose parent has automatically lost their citizenship have been addressed by removing those amendments from the bill.**

Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

Portfolio: Attorney-General

Introduced: Senate, 12 November 2015

Purpose

2.307 The Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (the bill) seeks to make amendments to a number of Acts: the *Criminal Code Act 1995* (the Criminal Code), the *Crimes Act 1914* (the Crimes Act), the *Surveillance Devices Act 2004* (the SD Act), the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), the *Classification (Publication, Films and Computer Games) Act 1995*, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act), the *Taxation Administration Act 1953*, the *Administrative Appeals Tribunal Act 1975* and the *Public Interest Disclosure Act 2013*.

2.308 Key amendments in the bill are set out below.

2.309 Schedule 2 seeks to amend the Criminal Code to enable control orders to be imposed on persons aged 14 and 15 years of age.

2.310 Schedule 5 seeks to amend the Criminal Code to define the meaning of 'imminent' for the purposes of obtaining a PDO.

2.311 Schedule 8 seeks to amend the Crimes Act to establish regimes to monitor the compliance of individuals subject to a control order through search warrants, surveillance device warrants and telecommunications interception warrants.

2.312 Schedule 9 seeks to amend the TIA Act to grant agencies the power to obtain telecommunications interception warrants to monitor a person subject to a control order, to monitor their compliance with that control order, and to permit the chief officer of a specified agency to defer public reporting on the use of that warrant in certain circumstances.

2.313 Schedule 10 seeks to amend the SD Act to allow law enforcement officers to apply to an issuing authority for a surveillance device warrant for the purposes of monitoring compliance with a control order.

2.314 Schedule 15 seeks to amend the NSI Act to broaden protections for national security information in control order proceedings, and to allow an issuing court to consider information in these proceedings which is not disclosed to the subject of the control order or their legal representative.

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

Background

2.316 The committee has previously considered three bills in relation to counter-terrorism and national security, namely the National Security Legislation

Amendment Bill (No. 1) 2014,[1] the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Foreign Fighters Bill),[2] and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.[3]

2.317 The committee first reported on the bill in its *Thirty-second Report of the 44th Parliament*, and requested further information from the Attorney-General as to the compatibility of the bill with Australia's international human rights obligations.[4]

National security and human rights

2.318 As noted in its previous analysis of national security legislation, the committee recognises the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of all Australians. Moreover, the committee recognises the specific importance of protecting Australians from terrorism. The Australian government and the parliament have the responsibility to ensure that laws and operational frameworks support the protection of life and security of the person. In addition, Australia has specific international obligations to detect, arrest and punish terrorists.

2.319 The bill contains 17 schedules of amendments. The analysis below relates to six of those schedules focusing on the most serious human rights issues. Accordingly, the committee has concluded that 11 of the schedules in the bill do not require further explanation or are otherwise likely to be compatible with human rights.

2.320 In relation to the remaining six schedules, much of the analysis below is targeted at ensuring that, while law enforcement agencies and intelligence agencies have appropriate and effective powers, those powers are not broader than is necessary and are subject to appropriate safeguards. The procedural guarantees provided for by international human rights law recognises that human error and mistakes are possible, and such safeguards seek to minimise the harm caused by any such errors and provide redress where appropriate. Such safeguards are not intended to thwart legitimate efforts to ensure the safety of Australians.

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1 See Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014) 6-13; and Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 33-60.

2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3-69; Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 56-100; and Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 82-101.

3 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7-21; and Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 129-162.

4 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 3-37.

Schedule 2—Extending control orders to 14 and 15 year olds

2.321 The bill proposes to amend the control orders regime under Division 104 of the Criminal Code to allow for control orders to be imposed on children aged 14 or 15 years of age. Currently, control orders may only be imposed on adults and children aged 16 or 17 years of age.

2.322 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,[5] and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.[6] The bill's expansion of the control orders regime to children aged 14 and 15 years of age raises the threshold question of whether the existing control orders regime is compatible with human rights.

2.323 The control orders regime grants the courts power to impose a control order on a person at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.

2.324 The steps for the issue of a control order are:

- a senior AFP member must obtain the Attorney-General's written consent to seek a control order on prescribed grounds;
- once consent is granted, the AFP member must seek an interim control order from an issuing court, which must be satisfied on the balance of probabilities:

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

6 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (November 2014) 7.

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or

(iii) that the person has engaged in a hostile activity in a foreign country; or

(iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or

(v) that the person has been convicted in a foreign country for an equivalent offence; or

(vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or

(vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and

- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:

  (i) protecting the public from a terrorist act; or

  (ii) preventing the provision of support for or the facilitation of a terrorist act; or

  (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country; and

- the AFP must subsequently seek the court's confirmation of the order, with a confirmed order able to last up to 12 months.

2.325 The control orders regime clearly imposes a range of limitations on personal liberty and engages and limits multiple human rights.

2.326 Schedule 2 also provides for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who is subject to an interim control order. This measure engages and limits article 12 of the Convention on the Rights of the Child (CRC). This issue deals with a discrete part of the control orders regime and will be dealt with separately below.

Multiple rights

2.327 The control orders regime, and the amendments to that regime proposed by the bill, engage and limit a number of human rights, including:

- right to equality and non-discrimination;[7]
- right to liberty;[8]
- right to freedom of movement;[9]
- right to a fair trial and the presumption of innocence;[10]
- right to privacy;[11]
- right to freedom of expression;[12]
- right to freedom of association;[13]
- right to the protection of the family;[14]
- prohibition on torture and cruel, inhuman or degrading treatment;[15]
- right to work;[16] and
- right to social security and an adequate standard of living.[17]

2.328 The proposed expansion of the control orders regime to children aged 14 and 15 years of age also engages the obligation to consider the best interests of the child and a range of rights set out in the CRC which are consistent with the rights outlined above.[18]

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7 Articles 2, 16 and 26, International Covenant on Civil and Political Rights (ICCPR). Related provisions are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

8 Article 9, ICCPR.

9 Article 12, ICCPR.

10 Article 14, ICCPR.

11 Article 17, ICCPR, and article 16, CRC.

12 Article 19, ICCPR and articles 13 and 14, CRC.

13 Article 22, ICCPR.

14 Articles 23 and 24, ICCPR.

15 Article 7, ICCPR, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

16 Article 6, International Covenant on Economic, Social and Cultural Rights (ICESCR).

17 Article 9 and 11, ICESCR.

18 Article 3, CRC.

Compatibility of the measure with multiple rights - summary

Threshold assessment of control orders—legitimate objective

2.329 The statement of compatibility focuses primarily on the proposed change to the age threshold for control orders rather than dealing more broadly with the human rights implications of the control orders regime.

2.330 The committee has previously concluded that the control orders regime pursues a legitimate objective of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia.[19]

Threshold assessment of control orders—rational connection

2.331 There may be doubt as to whether control orders are rationally connected to their stated objective as they may not necessarily be the most effective tool to prevent terrorist acts.[20]

2.332 Notwithstanding these doubts, set out in full in the committee's previous report, the committee notes the government's advice that the terrorism threat has subsequently evolved and that control orders have now been used four times since the committee last considered counter-terrorism legislation in late 2014. In addition, the current the Independent National Security Legislation Monitor (INSLM) is currently conducting an inquiry into control orders—originally due to report in February 2016—and is expected to report soon.

Threshold assessment of control orders—proportionality

2.333 In terms of proportionality there may be questions as to whether control orders are the least rights restrictive response to terrorist threats, and whether control orders contain sufficient safeguards to appropriately protect Australia's human rights obligations.

2.334 For example, there is no requirement that the conditions of a control order be the least rights restrictive measures to protect the public, as recommended by a 2013 review of counter-terrorism legislation prepared for the Council of Australian Governments (COAG).[21]

2.335 A least rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. It would simply require a decision-maker to take into account any possible less invasive

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

20 For example, see Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

21 Recommendation 37, Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013).

means of achieving public protection. In the absence of such requirements it is difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.

Attorney-General's response

> Control orders are an important element of Australia's counter-terrorism strategy and have been a protective and preventative measure available to law enforcement since 2005. The Government supports recommendation 26 of the COAG *Review of Counter-Terrorism Legislation* (COAG Review), which recommended the retention of control orders (with additional safeguards and protections).
>
> The proposed amendments in Schedule 2 of the Bill extend the regime to 14 and 15 year olds, and also include additional safeguards in recognition of the lower age. These additional safeguards are also extended to 16 and 17-year-olds-who are already covered by the regime but without the additional safeguards.
>
> Accordingly, the human rights compatibility statement for these amendments focuses on the extension of the existing regime to 14 to 15-year-olds.
>
> As noted above, the PJCIS has completed its inquiry into the Bill, which included consideration of Part One of the Independent National Security Legislation Monitor's (INSLM) January 2016 report on control order safeguards. The Government is presently considering the reports of the INSLM and the PJCIS.[22]

Committee response

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

2.337 The committee has noted, in relation to its previous considerations of amendments to the control order regime, that the control orders regime was legislated prior to the establishment of the committee. This means that the control order regime has not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[23]

2.338 In this respect, in March 2015, the committee recommended that a statement of compatibility be prepared for the control order regime which sets out in detail how the necessarily coercive powers provided for by control orders are necessary and proportionate having regard to the availability and efficacy of existing ordinary criminal just processes (e.g. arrest, charge and remand).

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22 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 3.

23 Report 14, 16, 19 and 22.

2.339 As set out in the committee's initial analysis, there is doubt as to whether control orders are the most effective tool to prevent terrorist acts. For example, the former INSLM has stated:

> The effectiveness, appropriateness and necessity of COs [control orders] are all reduced or made less likely if it is feasible that comparatively early in the course of offending a person may be charged with a terrorism offence. Australia's inchoate or precursor terrorism offences under the [Criminal] Code are striking in that they criminalise conduct at a much earlier point than has traditionally been the case.[24]

2.340 The particular character of terrorism laws has also been recognised in Australian domestic courts which have noted, for example:

> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.[25]

2.341 In terms of the evidence required for a control order, the former INSLM has also noted:

> …the kind and cogency of evidence in support of an application for a CO [control order] converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution…Nothing was obtained in private hearings [primarily with law enforcement and intelligence agencies investigating these issues] suggesting to the contrary.[26]

2.342 The committee notes the government's advice set out in the Explanatory Memorandum to the bill, that the terrorism threat has subsequently evolved and that control orders have now been used four times since the committee considered counter-terrorism legislation in late 2014. Accordingly, while there may be some doubt that control orders are an effective tool to respond to terrorism, above and beyond Australia's traditional criminal justice response, the committee acknowledges that there have been significant recent developments in the counter-terrorism space in recent times.

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24 Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

25 *Lodhi v R [2006] NSWCCA 121* per Spigelman CJ at [66].

26 Independent National Security Legislation Monitor, *Declassified Annual Report* (20th December 2012) 30.

2.343 Nevertheless, the amendments to the control order regime proposed in the bill are being brought before the parliament while the current INSLM is conducting an inquiry into control orders and has yet to release his findings. The current INSLM has noted in respect of his specific inquiry into the efficacy of the safeguards that apply to the control order regime that:

> The case for control orders is weakened if control orders are of little utility without such far reaching surveillance [proposed in the current bill].[27]

2.344 Without the current INSLM's completed full assessment of the necessity of control orders it is difficult for the committee to assess whether the terrorism threat in Australia has evolved significantly to render the former INSLM's assessment of control orders no longer valid.

2.345 In terms of proportionality, there may be questions as to whether control orders are the least rights restrictive response to terrorist threats, and whether control orders contain sufficient safeguards to appropriately protect Australia's human rights obligations.

2.346 For example, amendments introduced by the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 allow control orders to be sought in circumstances where there is not necessarily an imminent threat to personal safety. In the absence of an imminent threat it is difficult to justify as proportionate the imposition of a significant limitation on personal liberty without criminal charge.

2.347 In addition, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act. However, there is no requirement that the conditions be the least rights restrictive measures to protect the public, as recommended by a 2013 review of counter-terrorism legislation prepared for the Council of Australian Governments (COAG).

2.348 A least rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. It would simply require a decision-maker to take into account any possible less invasive means of achieving public protection. In the absence of such requirements, it is difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.

2.349 **The committee considers the control order regime engages and limits a range of human rights. As noted above, the control order regime has not been subject to a foundational assessment of human rights nor has a standalone statement of compatibility been provided for the control order regime. The**

27 The Hon Roger Gyles AO QC, *Control order safeguards – (INSLM Report) Special Advocates and the Courter Terrorism Legislation Amendment Bill (No1) 2015* (January 2016) 3.

committee therefore reiterates its recommendation that a statement of compatibility be prepared for the control order regime, that sets out in detail how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal just processes (e.g. arrest, charge and remand).

Applying control orders to 14 and 15 year olds—legitimate objective

2.350 Turning to the specific amendments in Schedule 2, which would allow the AFP to seek a control order for children aged 14 or 15 years of age, the statement of compatibility does not explicitly set out the legitimate objective of these measures.

2.351 To be capable of justifying a proposed limitation of human rights, a legislation proponent must provide a reasoned and evidence-based explanation as to how the measures address a pressing or substantial concern. Neither the statement of compatibility nor the explanatory memorandum explain in detail how the current criminal law does not adequately provide for the protection against terrorist acts by 14 and 15 year olds.

Applying control orders to 14 and 15 year olds—rational connection

2.352 In addition, as outlined above, it is not clear from the statement of compatibility how the measures are rationally connected to a legitimate objective.

Applying control orders to 14 and 15 year olds—proportionality and safeguards

2.353 In terms of proportionality, the bill makes a number of significant legislative changes to control orders applying to children aged 14 to 17 years of age.

2.354 The committee considers that many of these provisions provide safeguards for the purposes of international human rights law (and relative to the control orders regime that applies to adults).

2.355 However, for the reasons set out below, it has not been fully explained in the statement of compatibility whether these safeguards will fully ensure that the control orders regime will impose only proportionate limitations on the multiple human rights identified above.

Applying control orders to 14 and 15 year olds—proportionality and best interests of the child considerations

2.356 In relation to the requirement for a court to consider the best interests of the child when assessing each of the proposed obligations, prohibitions and restrictions under a control order, the statement of compatibility explains:

> …the issuing court will be required to consider the child's best interests as a primary consideration. New subsection 104.4(2A) treats the child's best interests as "a primary" consideration.[28]

28 EM 16.

2.357 However, the court is not required to consider the child's best interests when initially considering whether, on the balance of probabilities, a control order is necessary in accordance with the legislative criteria. In addition, while the court must consider the best interests of the child in determining each of the proposed obligations, prohibitions and restrictions under the control order, the word 'primary' (as in a 'primary consideration') is not included in the proposed provision or referred to in the explanatory memorandum to the bill. However, the CRC requires that the best interests of the child be 'a primary consideration' and not just 'a consideration'. Accordingly, it is unclear how this provision is consistent with Australia's obligations under the CRC.

Applying control orders to 14 and 15 year olds—proportionality and the right to liberty

2.358 The statement of compatibility states that a child will not be separated from their family or be denied access to school;[29] however, there is nothing in the legislation that would prevent this.

2.359 In addition, a control order may include a requirement that a person be confined to a particular place and subject to a curfew of up to 12 hours in a 24 hour period. This would appear to meet the definition of detention (or deprivation of liberty) under international human rights law, which is much broader than being placed in prison.[30]

2.360 In terms of the proportionality of such detention, the UK courts have found that curfews of 18 hours per day amount to disproportionate deprivations of liberty, and that curfews of 12 to 14 hours may not be disproportionate.[31]

2.361 The European Court of Human Rights and the House of Lords have held that control order conditions must be considered cumulatively, such that a nine hour curfew combined with other stringent measures may effectively amount to a deprivation of liberty.[32]

2.362 The statement of compatibility has not fully explained whether the detention that may be imposed as part of a control order under this bill is proportionate.

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29 EM 15.

30 See United Nations Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and Security of person),* UN Doc CCPR/C/GC/35, 1-2.

31 *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45; *Secretary of State for the Home Department v E & Another* [2007] UKHL 47; *Secretary of State for the Department v MB & AF* [2007] UKHL 46; *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

32 *AP v Secretary of State for the Home Department [2010]* UKSC 24. See also *Guzzardi v Italy, Application 7367/76*, Decision of 11 June 1980.

2.363 The issues outlined above raise questions as to the proportionality of Schedule 2, which could have been explained more fully in the statement of compatibility.

2.364 As set out above, the amendments engage and limit multiple human rights. The committee therefore sought the advice of the Attorney-General as to the legitimate objective, the rational connection, and the proportionality of the measure.

Attorney-General's response

Legitimate objective

The availability of control orders as a measure to manage and mitigate the risk or threat of certain activities being undertaken by young people at risk of engaging in violent extremism is reasoned and supported by evidence.

Recent counter terrorism operations have unfortunately shown that people as young as 14 years of age can pose a significant risk to national security through their involvement in planning and supporting terrorist acts.

In this context, it is important that our law enforcement and national security agencies are well equipped to respond to, and prevent, terrorist acts. This is the case even where the threats are posed by people under the age of 18 years.

The Australian Federal Police (AFP) submission to the PJCIS, dated 15 December 2015, discusses the operational context for the proposed amendments:

> Recent events have clearly demonstrated the vulnerability of young people to ideologies espousing violent extremism. Law enforcement and intelligence partners have observed both the attraction of terrorist groups to minors, as well as the 'grooming' of minors by adults. With the internet providing easy access to propaganda and recruiters, both domestic and international, through social media, young people are at risk of falling prey to terrorist groups who promise a sense of purpose, belonging and excitement. Worryingly, law enforcement is also observing that adults are increasingly looking to use young people to evade law enforcement surveillance and/or attention.[33]
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> Control orders provide significant benefits to the community by placing limits and controls on the behaviour of a person identified as being a risk to the safety and security of the community. The amendments in the Bill that propose targeted monitoring of individuals the subject of a control order (discussed later) will

33 Publicly available on the PJCIS website: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security

contribute to these benefits by facilitating the monitoring of such individuals.

Control orders can also assist the person subject to the control order by ensuring individuals who have engaged in conduct or activities of concern can remain in the community and largely continue with their ordinary lives (for example, attend school, work, and places to participate in cultural and religious practices), while being required to discontinue or minimise activities which may enable or encourage them to participate in terrorist activity. Maintaining connection to society through participation in ordinary activities is of benefit to the individual, both in relation to their personal interests and from a remedial perspective.

The vulnerability of young people to violent extremism demands proportionate, targeted measures to divert them from extremist behaviour. It is appropriate and important that all possible measures are available to avoid a young person engaging with the formal criminal justice system to mitigate the threat posed by violent extremism. Consequently, the ability to use control orders to influence a person's movements and associations, thereby reducing the risk of future terrorist activity, addresses a substantial concern and the regime is aimed and targeted at achieving a legitimate objective.

Rationally connected

The proposed expansion of the scheme to cover 14 and 15-year-olds is rationally connected to the legitimate objective of managing and mitigating the risk posed by a young person where laying charges is not justified, appropriate or possible.

The overriding need to protect the community from harm means that law enforcement must identify emerging threats and constantly balance the need to investigate and collect evidence while a terrorist threat develops, against the need to protect the community from the impact should the threat be realised.

In the current fluid and evolving terrorism threat environment, police may have sufficient intelligence to establish serious concern regarding the threat posed by an individual or group, but may not have sufficient evidence to commence criminal prosecution. In these circumstances other mechanisms, including control orders, provide a mechanism to manage the threat in the short to medium term. Control orders should be considered as a tool that can be used in conjunction with and complementary to other options, including criminal prosecution and countering violent extremism programs.

Proportionate

The control order regime, including its extension to 14 and 15 year old persons of security concern, is reasonable and proportionate to achieve the objectives mentioned above.

While a control order can be sought where there is a threat, there is no requirement that the threat be imminent. However, a control order can only be issued if the court is satisfied that each of the requested obligations, restrictions and prohibitions is reasonably necessary and reasonably adapted and appropriate to protecting the public from a terrorist act or preventing support or facilitation of a domestic terrorist act or hostile activities overseas.

A control order is a preventative measure, and is not intended to be punitive or used as a substitute for prosecution. Where a person poses a significant risk to the community and there is sufficient evidence to charge a person with an offence, criminal prosecution will be pursued.

Best interests of the child consideration

Subsection 104.4(1) of the *Criminal Code Act 1995* (Criminal Code) provides the test for making an interim control order. When deciding whether to impose a control order on a young person, the issuing court must be satisfied on the balance of probabilities that, for example, the order will substantially assist in preventing a terrorist act or the person has engaged in particular conduct, such as participating in training with a listed terrorist organisation. In addition, the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on a person by the order are reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a terrorist attack, preventing the provision of support for or the facilitation of a terrorist attack or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Proposed subsection 104.4(2) of the Criminal Code specifies matters the court must consider when determining what is "reasonably necessary, and reasonably appropriate and adapted". These matters are the impact of the particular obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age-the best interests of the person. Given the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age-the best interests of the person, are both listed as factors the court must consider, it is clear that such considerations are important and should carry weight over other possible considerations (with the exception of national security or

protecting the community from terrorism). This is why the Explanatory Memorandum referred to the best interests of the person as a 'primary' consideration. However, it is appropriate that the court has the ability to consider any possible relevant factor and determine what weight it should be given.

The report expresses concern that the regime would not prevent an order being made that separates a child from their family or requires them not to attend a particular school (paragraph 1.77). While that is technically correct, in practice the court would not make an order including such restrictions unless they were in the best interests of the child, and it was reasonably necessary and reasonable appropriate to do so. It is difficult to contemplate a scenario in which that could occur, particularly given the requirement for the court to consider the impact on the child's personal circumstances and the child's best interests.

The report also considers whether the ability of the court to impose a curfew on a person amounts to a deprivation of liberty (paragraphs 1.78 to 1.81). In this context it is important to note that the Bill does not change the 'curfew' provision in any way. Indeed that provision was amended in 2014 to implement a Council of Australian Governments' Review of Counter-Terrorism Legislation recommendation to clarify the maximum period of a curfew on the face of the legislation. Accordingly, while a court could impose a curfew of up to 12 hours, the court could only do so if satisfied that such a restriction would be in the best interests of the child, and was reasonably necessary and reasonable appropriate and adapted to mitigating the risk of terrorism or foreign fighting or the support or facilitation of terrorism or foreign fighting.

Recommendation one of the PJCIS report considers the best interests of the child consideration. The Government is presently considering the PJCIS report and its recommendations.[34]

Committee response

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

2.366 The committee considers that the measures are in pursuit of the legitimate objective of managing and mitigating the risk or threat of certain activities being undertaken by young people at risk of engaging in violent extremism.

2.367 In terms of whether the measures are rationally connected to that objective, the committee reiterates its analysis at paragraphs [2.339] to [2.344] that there is some doubt as to the efficacy of control orders in combating terrorism above and beyond standard criminal justice processes. The response refers to recent events as

34 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 3-6.

having clearly demonstrated the vulnerability of young people to ideologies espousing violent extremism. However, no information is provided in the response as to whether control orders, if available, would have been effective to significantly reduce the risk of a specific terrorist act planned or carried out by a child less than 16 years of age. In addition, no information is provided as to whether other measures were, or would have been, available to mitigate any risk of a terrorist act occurring, whether those measures were taken, and whether or how far they were successful.

2.368 In terms of whether the measures are proportionate, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act. However, there is no requirement that the conditions be the least rights restrictive measures necessary to protect the public.

2.369 In addition, there is no requirement that the court consider whether there are other criminal justice alternatives that may achieve the protection of the public but impose less restrictions on a person subject to the control order.

2.370 Further, the committee notes its analysis at paragraphs [2.345] to [2.348] that there is some doubt as to whether the control order regime imposes restrictions in a least rights restrictive manner or whether there are sufficient safeguards.

2.371 In the case of children, it is unclear why it is not possible to target the individuals that are encouraging the child to be involved in a terrorist act rather than the child. If it is because those individuals are outside of Australia's jurisdiction, it would be possible to limit the imposition of a control order on a child to circumstances where it was not possible to control the individuals seeking to influence the child.

Best interests of the child

2.372 In terms of the best interests of the child, the Attorney-General's response provides a detailed summary of how the control order regime would work in relation to children. However, the response does not specifically engage with many of the concerns raised by the committee in its initial analysis.

2.373 Effectively, the control order application process (referred in the Criminal Code as the interim Control Order) consists of three steps:

(a) a senior AFP member drafts the control order;

(b) the senior AFP member seeks the Attorney-General's written consent to request the control order; and, if granted, then

(c) the senior AFP member requests the court to grant the control order.

2.374 In relation to the first step, the AFP member is not required to turn his or her mind to the best interests of the child. The legislative criteria for the AFP to commence the control order application process is that the AFP member must

consider on reasonable grounds that the order would substantially assist in preventing a terrorist act (broadly defined) or suspects on reasonable grounds certain other matters. The senior AFP officer is not required to turn his or her mind to the best interests of the child

2.375 In relation to the second step, the AFP must provide the Attorney-General with information about the person's age if they are less than 18, a statement of fact as to why the order should be made and an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person. The AFP are not required to consider the best interests of the child nor explain how they have considered the best interests of the child as a primary consideration in drafting the control order. The Attorney-General is not required to be satisfied that the control order terms have taken into account the best interests of the child as a primary consideration.

2.376 In relation to the third step, a court is not required to consider the child's best interests when initially considering whether, on the balance of probabilities, a control order is necessary in accordance with the legislative criteria. In the case of an imminent threat to life it would appear entirely appropriate that the legislative criteria focus primarily on national security issues. However, control orders may now be obtained in circumstances removed from imminent threats and in circumstances where it may be more appropriate to lay charges for a precursor offence.

2.377 The court may issue the control order if it is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions in the draft control order are reasonably necessary and reasonably appropriate and adapted, for the purposes of protecting the public from terrorist acts, preventing support for or the facilitation of a terrorist act or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

2.378 Accordingly, the legislation requires the court to explicitly focus on whether the control order terms are necessarily appropriate for the purposes of protecting the public from a broad range of potential acts related to terrorism. As part of that process, under the bill, a court would be required to take into account the best interests of the child. While the court must take the best interests of the child into account, the court is not required to be satisfied that the terms of the control order are in the best interests of the child, nor that the control order terms are the least rights restrictive terms that would protect the public. In taking the child's interests into account, the court is not required to weigh those interests up as a primary consideration.

2.379 The CRC requires that the best interests of the child be 'a primary consideration' and not just 'a consideration'. The Attorney-General's response states that it is clear from the drafting of the legislation that the best interests of the child consideration are 'are important; and 'should carry weight over other possible considerations'. In the absence of the word primary being included in the provision,

it is unclear how this provision is consistent with Australia's obligations under the CRC.

2.380 The PJCIS has recommended that these provisions be amended so that it is clear that a court must, in determining whether each of the proposed obligations, prohibitions and restrictions under the control order are necessary and appropriate, consider the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration.

2.381 The requirement under international law that the best interests of the child be a primary consideration, does not mean that the best interests of the child will always prevail over all other considerations. However, in all actions concerning a child, their best interests must be given high priority. The Committee on the Rights of the Child has stated:

> The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.
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> ….
>
> However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). …If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.[35]

Best interests of the child – separation from family and education

2.382 The Attorney-General's response states that, while theoretically possible, a court would not make an order that separates a child from their family or requires them not to attend a particular school unless they were in the best interests of the child and it was reasonably necessary and reasonably appropriate to do so. However, the primary consideration of the court is whether it is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed

35 UN Committee on the Rights of the Child, General Comment 14, (2013), UN Doc. CRC/C/GC/14, [37]- [39]

on the person by the order is reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a broad range of activities associated with terrorism. As part of those considerations the court must take into account the best interests of the child.

2.383 The court is not required to be satisfied that each of the obligations prohibitions and restrictions to be imposed on the child are explicitly in their best interests nor is the court required to take into account the best interests of the child as a primary consideration. Accordingly, a child subject to a control order may be separated from their family and required to change schools if the court is satisfied that such actions are reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a broad range of activities associated with terrorism.

Best interests of the child – arbitrary detention

2.384 As set out in the committee's initial analysis, a control order may include a requirement that a person be confined to a particular place and subject to a curfew of up to 12 hours in a 24 hour period. This would appear to meet the definition of detention (or deprivation of liberty) under international human rights law, which is much broader than being placed in prison. The United Nations Human Rights Committee has explained:

> Examples of deprivation of liberty include police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport as well as being involuntarily transported.[36]

2.385 In terms of the proportionality of such detention, the UK courts have found that curfews of 18 hours per day amount to disproportionate deprivations of liberty, and that curfews of 12 to 14 hours may not be disproportionate.[37]

2.386 The European Court of Human Rights and the House of Lords have held that control order conditions must be considered cumulatively, such that a nine hour curfew combined with other stringent measures may effectively amount to a deprivation of liberty.[38]

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36 United Nations Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and Security of person),* UN Doc CCPR/C/GC/35, 1-2 [Footnotes omitted].

37 *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45; *Secretary of State for the Home Department v E & Another* [2007] UKHL 47; *Secretary of State for the Department v MB & AF* [2007] UKHL 46; *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

38 *AP v Secretary of State for the Home Department [2010]* UKSC 24. See also *Guzzardi v Italy, Application 7367/76*, Decision of 11 June 1980.

2.387 In assessing what constitutes a deprivation of liberty, the issue is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, which contribute to the controlee's social isolation, may also be taken into account along with the period of the curfew.[39]

2.388 The Attorney-General's response states:

> Accordingly, while a court could impose a curfew of up to 12 hours, the court could only do so if satisfied that such a restriction would be in the best interests of the child, and was reasonably necessary and reasonable appropriate and adapted to mitigating the risk of terrorism or foreign fighting or the support or facilitation of terrorism or foreign fighting.

2.389 However, as set out above, the primary consideration of the court is whether it is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a broad range of activities associated with terrorism.

2.390 The court is not required to be satisfied that that the curfew is in the best interests of the child but rather that the curfew is necessary and appropriate to protect Australians from a range of behaviours broadly related to terrorism *taking into account* the best interests of the child. Accordingly, a court may issue a control order that includes a curfew in circumstances where it is not explicitly satisfied that such a restriction would be in the best interests of the child.

2.391 The Attorney-General's response does not explicitly respond to the jurisprudence outlined in the committee's initial analysis and repeated above. The issuing of a control order may constitute arbitrary detention where the control order includes a curfew of sufficient length to be so restrictive as to amount to a deprivation of liberty. This is because the detention would be ordered on the lower civil standard of proof and not the criminal standard of proof beyond reasonable doubt.

2.392 **The committee has assessed the amendments to lower the age at which a person may be subject to a control order to 14 years of age against multiple human rights in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.**

2.393 **As set out above, the amendments engage and limit multiple human rights.**

2.394 **Notwithstanding the legal advice provided to the committee, some committee members consider that the amendments are compatible with international human rights law.**

39 *AP v Secretary of State for the Home Department [2010]* UKSC 24.

2.395 **Other committee members consider that the amendments enable the imposition of control orders in a manner incompatible with multiple human rights.**

Schedule 2—Court-appointed advocate for children

2.396 Item 46 of Schedule 1 to the bill would insert a new section 104.28AA in the Criminal Code to provide for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who has been made subject to an interim control order.

2.397 The court-appointed advocate would not be acting as the child's legal representative and, as such, is not obliged to act on the instructions or wishes of the child.

2.398 The committee previously considered that the introduction of court-appointed advocates for children engages and limits the right of the child to be heard in judicial and administrative proceedings.

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

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

2.400 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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

2.401 The court-appointed advocate is not required to take into account the wishes of the child or act on their instructions during any court proceedings, and is able to act independently and make recommendations as to a specific course of action which may be explicitly in opposition to the wishes of the child.

2.402 Further, the court-appointed advocate is authorised to disclose to the court any information provided to the advocate by the child, if the advocate believes that the disclosure is in the best interests of the child. This disclosure is authorised even in situations where it may be against the wishes of the child.[40]

2.403 Further, the recommendations of the advocate are not required to take into account a consideration of the age of the child, or an individual assessment of their maturity. The primary obligation under the CRC is to support decision making by minors consistent with their maturity and capacity. The children affected by these

40 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(4).

amendments would be between the ages of 14 and 17, and likely to have strong or well-formed opinions regarding how their situation is handled before the courts.

2.404 The statement of compatibility does not address this right.

2.405 The committee therefore sought the advice of the Attorney-General as to the legitimate objective, the rational connection, and the proportionality of the measure.

Attorney-General's response

Background

As noted in the report, the court appointed advocate model is based on the Family Court's independent children's lawyer (ICL) model (paragraph 1.99). While the court appointed advocate is not the young person's legal representative, nothing in Division 104 or elsewhere prohibits a young person (or any other person the subject of a control order) from engaging an independent legal representative.

Legitimate objective, rationally connected and proportionate

The court appointed advocate model in the Bill seeks to achieve the following outcomes:

- ensure the controls imposed by the control order and the consequences of failing to comply with them is fully explained to the child by an independent person (noting that interim control orders are generally obtained on an ex parte basis, such that the young person would not likely have legal representation at the time of service). The AFP will continue to be required to provide this and other information to the child at the time of service
- ensure there is an independent person who can provide the court with an assessment about what is in the child's best interests, and
- ensure, particularly in circumstances where the child does not have separate legal representation, that there is a legally qualified person from whom the child can seek advice, and who can adduce evidence and make submissions for the child during proceedings.

On 14 December 2015, the PJCIS requested the Department to review the submissions made by bodies such as the Law Council of Australia and the Gilbert and Tobin Centre of Pubic Law and respond to the issues raised. On 15 January 2016, the Department provided the PJCIS with a supplementary submission which sought to address each of those sets of issues. A number of the submissions discuss the court appointed advocate model and the PJCIS has asked the Department to consider whether an alternate model is feasible. The Department has advised the PJCIS that an alternate model may help address the concerns raised in those submissions, although any alternate model would be subject to agreement by the States and Territories under the requirements of the 2004 Inter-Governmental Agreement on Counter-Terrorism Laws.

> Recommendation two of the PJCIS report considers the court appointed advocate model. The Government is presently considering the PJCIS report and its recommendations.[41]

Committee response

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

2.407 The response explains that there are three key objectives to be sought by the court appointed advocates for children regime. In relation to the second and third points in the Attorney-General's response, the committee's initial analysis noted that under the bill, court appointed advocates would not be required to take into account the age of the child, or an individual assessment of their maturity. The primary obligation under the CRC is to support decision making by minors consistent with their maturity and capacity. The children affected by these amendments would be between the ages of 14 and 17, and likely to have strong or well-formed opinions regarding how their situation is handled before the courts.

2.408 The response notes that a child may also engage their own independent legal representative.[42] However, the ability of the court-appointed advocate to make recommendations against the wishes of the child nevertheless engages the right of the child to be heard in judicial and administrative proceedings.

2.409 The current INSLM has raised similar concerns regarding the court appointed advocate regime in schedule 2 of the bill:

> That procedure is adapted from sections 68L and 68LA of the Family Law Act 1975 which principally apply in custody cases. In those cases there will be a choice as to the best arrangements for custody and access involving an assessment of the suitability of the potential custodians – usually parents or close relatives. A child may well have emotional attachments that cloud his or her attitude or may be too young to be able to form a sensible view. Furthermore, a child is not a party to family law proceedings. It is a large step to move from that context to one where the proceeding is against the child and the choice is whether or not to impose an intrusive control order with criminal liability for breach. It is also odd, to say the least, that the parents who ordinarily would have the custody and control of the young person have no responsibilities in relation to control orders.[43]

2.410 The PJCIS has recommended that the bill be amended to expressly provide that the young person has the right to legal representation in control order regimes and that the bill be amended to remove the role of the court appointed advocate.

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41 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 6-7.

42 EM, SOC 17.

43 The Hon Roger Gyles AO QC, *Control order safeguards – (INSLM Report) Special Advocates and the Courter Terrorism Legislation Amendment Bill (No1) 2015,* January 2016, 3.

The committee supports these amendments provided that the child has an active role in choosing the legal representative that will represent them in control order proceedings.

2.411 **The committee has assessed amendments allowing for the court-appointed advocate for children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings).**

2.412 **As set out above, the amendments engage and limit the right of the child to be heard in judicial and administrative proceedings. The committee in principle supports the recommendations of the PJCIS that bill be amended to expressly provide that young person has the right to legal representation in control order regimes and that the bill be amended to remove the role of the court appointed advocate.**

Schedule 5—'Imminent' test and preventative detention orders

2.413 Currently, a preventative detention order (PDO) can be applied for if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.[44] The terrorist act must be one that is imminent and expected to occur, in any event, at some time in the next 14 days.[45]

2.414 Schedule 5 of the bill seeks to change the current test of 'imminent' for the grant of (PDOs), by providing a new definition of 'imminent terrorist act' as one that it is suspected, on reasonable grounds, is capable of being carried out, and could occur, within the next 14 days.

2.415 As PDOs allow for the detention of a person for up to 48 hours, and the amendments would broaden the basis on which a PDO can be made, the bill engages and limits the right to liberty.

Right to liberty

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

2.417 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the

44 See subsection 105.4(4) of the *Criminal Code Act 1995* (Criminal Code). There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain a person to preserve evidence (subsection 105.4(6)).

45 See subsection 105.4(5) of the Criminal Code.

circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

Compatibility of the measure with the right to liberty

2.418 The statement of compatibility states that the change to the imminent test engages but does 'not impact upon the right' to liberty.

2.419 However, the proposed amendments would lower the threshold on which a PDO can be sought, so that instead of an event being 'expected to occur' within the next 14 days it need only be 'capable of being carried out' and 'could occur' within the next 14 days. In this regard, the measure limits the right to liberty, and accordingly it is necessary to understand whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

2.420 First, the statement of compatibility states that the legitimate objective of the PDO regime as a whole is to prevent an imminent terrorist act occurring and preserve evidence of, or relating to, a recent terrorist act.[46] However, the statement of compatibility does not provide an explanation of the legitimate objective for lowering the threshold as to when an act is considered to be 'imminent'.

2.421 The committee considered that it has also not been fully explained how the amendments lowering the threshold of what is considered to be imminent is rationally connected to that objective.

2.422 The committee further considered that it is not clear from the information provided in the statement of compatibility that these amendments are proportionate to their objective.

2.423 The committee therefore sought the advice of the Attorney-General as to the legitimate objective, the rational connection, and the proportionality of the measure.

Attorney-General's response

Background

Preventative detention orders (PDOs) are protective tools that are designed to achieve the following legitimate objectives:

- prevent an imminent terrorist act from occurring, or
- preserve evidence of, or relating to, a recent terrorist act.

Legitimate objective, rationally connected and proportionate

Currently, the issuing authority must be satisfied there are reasonable grounds to suspect that a terrorist act is imminent and is expected to occur, in any event, at some time in the next 14 days. The problem with

46 EM, SOC 22.

this test is that even where police have grounds to suspect a person has the capacity to carry out a terrorist act at any time, neither the AFP nor the issuing authority may have information as to the time that has been selected to carry out that act - if indeed a time has been selected. For example, if a terrorist is prepared and waiting for a signal or instruction to carry out their act, the AFP may not be able to identify when that signal or instruction will be sent. Indeed the terrorist themselves may not know. Under the existing test, the AFP may not be able to seek a preventative detention order without information as to the expected timing. Accordingly, there is an operational gap in ability to deal with terrorist acts that are not planned to occur on a particular date, even where the preparations for that terrorist act may be in their final stages, or complete. The legitimate objective of the amendments is to address this gap so that the objectives of the preventative detention order regime can be realised.

As the AFP noted in their submission to the PJCIS, if the point in time that an incident will take place is not known, the issuing authority may not be satisfied the act is expected to occur sometime in the next 14 days. The proposed amendment addresses this issue by placing the emphasis on the capacity for an act to be carried out in the next 14 days. If a terrorist act is capable of being carried out, and could occur, within 14 days, that terrorist act will meet the definition of an 'imminent terrorist act'. Accordingly, the proposed amendment ensures the AFP has the ability to apply for a PDO to safeguard the public against such risks where they are identified. The inclusion of a 14-day timeframe in which the act could occur retains the imminence requirement, but focusses on the capability of a person to commit a terrorist act, as opposed to the specific time in which the terrorist act is expected to occur. Accordingly, the amendments are rationally connected and proportionate to the objective of preventing imminent terrorist acts and the need to ensure the utility of the preventative detention order regime to achieve that objective.

Furthermore, existing requirements that the AFP member and issuing authority must be satisfied of under existing subsection 105.4(4) ensure the PDO regime remains a proportionate, protective tool to counter immediate threats to national security. To obtain a PDO, an AFP member must demonstrate that the order will "substantially assist in preventing a terrorist act occurring" (paragraph 105.4(4)(c)) and that detention is "reasonably necessary" for the purpose of preventing the terrorist act (paragraph 105.4(4)(d)). The issuing authority must be similarly satisfied of both requirements.

These proportionality requirements ensure that law enforcement agencies must make a case for why the significant limitations on an individual's freedoms under a PDO are justified in each instance. Viewing the proposed amendment to subsection 105.4(5) in the context of the PDO framework as a whole demonstrates that the safeguards in place protect against the inappropriate use of the regime.

> Recommendation fifteen of the PJCIS report considers the threshold for obtaining a PDO. The Government is presently considering the PJCIS report and its recommendations.[47]

Committee response

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

Threshold assessment of preventative detention orders

2.425 The committee has noted, in relation to its previous considerations of amendments to the preventative detention order (PDO) regime, that the PDO regime was legislated prior to the establishment of the committee. This means that that the regime has not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[48]

2.426 Preventative detention orders are administrative orders, made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, and without a necessary intention to charge the subject with any offence. PDOs raise human rights concerns as they permit a person's detention by the executive without charge or arrest.

2.427 In particular, there has been some debate as to the effectiveness of the PDO regime. In 2013, the Council of Australian Governments Review of Counter-Terrorism Legislation (the COAG review) extensively reviewed the PDO regime. It concluded that the PDO scheme 'is, as presently structured, neither effective nor necessary'. The review recommended that the PDO scheme be repealed entirely.[49]

2.428 The finding of the COAG review expanded on the concerns raised in 2012 by the former INSLM, who was highly critical of the efficacy and proportionality of PDOs taking into account their particular character and the extent of their use. The former INSLM noted:

> The combination of non-criminal detention, a lack of contribution to CT [(counter-terrorism)] investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.[50]

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47 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 7-8.

48 Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); and *Twenty-second Report of the 44th Parliament* (13 May 2015).

49 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 70 and recommendation 39.

50 Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012) 45.

2.429 The former INSLM noted that the case for extraordinary powers for policing of terrorism related offences, above the traditional powers and approaches to the investigation and prosecution of criminal behaviour, had not been established:

> There has been no material or argument demonstrating that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism. Nor has this review shown that the traditional methods used by police to collect and preserve evidence, eg search warrants, do not suffice for the investigation and prosecution of terrorist suspects. There is, by now, enough experience in Australia of police operations in the detection and investigation, and support for prosecution, of terrorist offences. There is therefore substantial weight to be given to the lack of a demonstrated functional purpose for PDOs as a matter of practical experience.[51]

2.430 The former INSLM therefore recommended that the PDO regime be repealed.[52]

2.431 Notwithstanding this evidence, the committee has previously noted the government's advice, that the terrorism threat has subsequently evolved; and, as such, this evidence may be outdated in the current security environment. The current INSLM is scheduled to conduct a review of the PDO regime.

2.432 In light of this information, in March 2015, the committee recommended that a statement of compatibility be prepared for the PDO regime which sets out in detail how the PDO regime is necessary and proportionate having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand).

2.433 Since the committee's establishment there have been a number of amendments to the PDO regime and statements of compatibility have been prepared for those individual amendments but not for the regime as a whole. It is imperative that this regime be fully justified in the context of Australia's international human rights obligations not to subject individuals to arbitrary detention.

2.434 The proposed amendments would lower the threshold on which a PDO can be sought, so that instead of an event being 'expected to occur' within the next 14 days it need only be 'capable of being carried out' and 'could occur' within the next 14 days.

Assessment of the proposed amendments to Preventative Detention Orders

2.435 The Attorney-General's response states that the problem with the current test is that even where police have grounds to suspect a person has the capacity to

51 Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012) 52-53.

carry out a terrorist act at any time, neither the AFP nor the issuing authority may have information as to the time that has been selected to carry out that act. The response states that if a terrorist is prepared and waiting for a signal or instruction to carry out their act, the AFP may not be able to identify when that signal or instruction will be sent and this would prevent the AFP from obtaining a PDO.

2.436 However, in the example given, it is unclear why that individual cannot be charged with the offence of planning or preparing for a terrorist act.[53] The very act of an individual preparing to wait for a signal or instruction would be a criminal offence under Australian law.

2.437 Terrorist laws are unique in Australia as they criminalise conduct that is so early in the preparation of an offence that it would not ordinarily meet the definition of an offence. This has been recognised in Australian domestic courts which have noted, for example:

> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.[54]

2.438 As a safeguard, the response notes that to obtain a PDO, an AFP member must demonstrate that the order will 'substantially assist in preventing a terrorist act occurring' (paragraph 105.4(4)(c)) and that detention is 'reasonably necessary' for the purpose of preventing the terrorist act (paragraph 105.4(4)(d)). However, it should be noted that the definition of terrorist act is very broad and goes beyond harm to the individual. A terrorist act includes an action or threat of action that seriously disrupts an electronic system such as a telecommunication system or financial system. Accordingly, a PDO may be obtained where the AFP believes that the PDO would substantially assist in preventing a threat of serious disruption to a telecommunication system and the detention is reasonably necessary.

2.439 In addition, there is no requirement for the officer to be satisfied that the PDO is the only way to stop the threat or to be satisfied that the ordinary process of arrest and charge are not available.

2.440 PDOs are administrative orders, made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, and without a necessary intention to charge the subject with any offence. In order for such a

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53 Section 101.6 of the Criminal Code make its offence to do 'any act in preparation for, or planning a terrorist act.

54 *Lodhi v R [2006] NSWCCA 121* per Spigelman CJ at [66].

regime to be justified for the purposes of international human rights law it must be in circumstances where there is a real and imminent threat to life where there is no alternative available under the criminal law to protect the community. It is not consistent with human rights law that powers of this nature be exercised if there is not a high risk of a terrorist attack.

2.441 Accordingly, it is not clear that the amendments are rationally connected to the legitimate objective of protecting national security and that the measures only impose a proportionate limitation on the right to liberty.

2.442 The PJCIS has recommended that:

> The Committee recommends that clause 105.4(5) of the Counter Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to replace the term 'imminent terrorist act' with 'terrorist act' in the threshold test for preventative detention orders (PDOs).[55]

2.443 This recommendation, if implemented, would further weaken the nexus between PDOs and imminent threats to life. For the reasons outlined above, this would not be compatible with international human rights law.

2.444 **The committee considers the preventative detention order (PDO) regime engages and limits the right to liberty. As noted above, the PDO has not been subject to a foundational assessment of human rights nor has a standalone statement of compatibility been provided for the PDO regime. The committee therefore reiterates its recommendation that a statement of compatibility be prepared for the PDO regime, that sets out in detail how the necessarily coercive powers only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal just processes (e.g. arrest, charge and remand).**

2.445 **The committee has assessed the amendments to lower the threshold of when an attack is considered to be 'imminent' for the purposes of a preventative detention order against article 9 of the International Covenant on Civil and Political Rights (right to liberty).**

2.446 **As set out above, the amendments engage and limit the right to liberty. The committee considers that the amendments may be incompatible with the right to liberty.**

Schedules 8 to 10—Monitoring compliance with control orders

2.447 Schedule 8 seeks to establish a regime of monitoring warrants to permit a police constable to enter, by consent or by monitoring warrant, premises connected to a person subject to a control order. A person subject to a control order may also, by consent or monitoring warrant, be subject to a search of their person including a

55 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (15 February 2016) xviii.

frisk search. A search must be for a prescribed purpose including protecting the public from a terrorist act or determining whether a control order is (or has been) complied with.

2.448 Schedule 9 seeks to amend the TIA Act to allow law enforcement agencies to obtain warrants for the purposes of monitoring compliance with a control order. It would allow telecommunications interception information to be used in any proceedings associated with that control order. The power to use telecommunications interception for monitoring purposes is a covert power.

2.449 Schedule 10 seeks to amend the SD Act to allow law enforcement agencies to obtain warrants to monitor a person who is subject to a control order to detect breaches of the order. The amendments would allow surveillance device information to be used in any proceedings associated with that control order. They would also extend the circumstances in which agencies may use less intrusive surveillance device without a warrant, to include monitoring of a control order, and allow protected information obtained under a control order warrant to be used to determine whether the control order has been complied with. The power to use surveillance devices for monitoring purposes will remain a covert power.

2.450 The Crimes Act and other Commonwealth legislation confer a range of investigative powers on law enforcement and intelligence agencies. The committee considered previously that the significant change proposed by these measures is the power to search premises, intercept telecommunications and install surveillance devices for the purposes of monitoring compliance with a control order in the absence of any evidence (or suspicion) that the order is not being complied with and/or any specific intelligence around planned terrorist activities.

2.451 These powers involve serious intrusions into a person's private life, including the power for law enforcement agencies to search property, conduct frisk searches, listen into telephone calls, monitor internet usage and install covert devices that would listen into private conversations between individuals.

2.452 The powers also involve significant intrusions into the privacy of individuals unrelated to the person who is subject to a control order, including people who use computers at the same education facilities as a person subject to a control order.

2.453 Accordingly, these schedules engage and limit the right to privacy.

Right to privacy

2.454 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

2.455 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

2.456 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measures with the right to privacy

2.457 The statement of compatibility states that the measures limit the right to privacy and concludes that any such limitation is justified.[56]

2.458 The committee previously considered that assisting law enforcement officers to prevent serious threats to community safety is likely to be a legitimate objective for the purposes of international human rights law and, as the monitoring powers may assist in law enforcement efforts, the measures are rationally connected to that objective.

2.459 In relation to proportionality, the primary expansion in investigative powers provided for by the measures is in relation to compliance with a control order.

2.460 The conditions of a control order could include requiring a person to stay in a certain place at certain times, preventing a person from going to certain places and preventing a person from possessing or using a telephone or the internet. A breach of a control order could be relatively minor—for example, breaching a curfew by 30 minutes or talking innocently on a phone in breach of an order.

2.461 A monitoring warrant may be obtained not just in relation to the place that a person subject to a control order is ordinarily resident but also in relation to premises to which the person has a 'prescribed connection'. This includes the place where such a person goes to school or university, a place where they work or undertake voluntary work and even a friend's place. Under these measures it would therefore be possible, for example, to obtain a monitoring warrant for a university library to determine whether a person subject to a control order, who is a student at that university, has used the library to access the internet in breach of their control order.

2.462 In relation to telephone intercepts, agencies will be able to apply for telecommunications service warrants (A-party (control order subject) and B-party (third party)) and named person warrants. An interception warrant may also authorise access to stored communications and telecommunications data associated with the service or device.

2.463 Under the bill a surveillance device may be authorised if it would substantially assist in determining that the control order has been, or is being, complied with. This would include listening into conversations between people in the home, car, workplace, or university of a control order subject, and thus would limit the right to privacy of those third parties. Accordingly, it appears that the privacy

56 EM 12.

implications of the use of surveillance devices could extend to innocent third parties in addition to the control order subject.

2.464 In terms of transparency, the bill would also introduce new deferred reporting arrangements which, in certain circumstances, will permit delayed public reporting on the use of telecommunications intercepts and surveillance devices in relation to a control order.

2.465 If these intrusive powers were used solely in respect of terrorism offences and not in relation to potentially minor breaches of a control order, it is likely that the measures in this bill would be compatible with international human rights law. However, as the powers are much broader, more information would assist the committee to assess whether these powers impose only a proportionate limitation on the right to privacy.

2.466 The committee therefore sought the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Attorney-General's response

Schedule 8—Monitoring compliance with control orders

Background

The former INSLM noted in his 2012 report that the efficacy of a control order depends largely upon the subject's willingness to respect a court order, and that in the absence of the ability to effectively monitor a person's compliance with the terms of a control order, there is no guarantee that a person will not breach the order or go on to commit a terrorist offence.

These comments acknowledge the limitation of existing Commonwealth coercive powers such as physical searches, telecommunication interception and surveillance devices, which are only available for the purposes of investigating an offence that has already been committed or where there is information that an offence about to be committed.

The proposed new monitoring powers respond to the former INSLM's concerns by creating targeted monitoring regimes that apply only to a person in relation to whom a superior court has already decided the relevant threshold for issue of a control order have been met and who therefore, by definition, is of security concern. These targeted regimes will facilitate monitoring of the person's conduct to mitigate the risk of breaches of control orders and, consequently, to mitigate the risk of the person engaging in preparatory acts, planning and terrorist acts.

It is imperative that our law enforcement agencies have adequate powers to monitor a person's compliance with the conditions of the control order. Without sufficient powers to monitor compliance, community safety may be put at risk if the person does not choose to comply with the conditions of the order and breaches go undetected.

Legitimate objective, rationally connected and proportionate

Currently, law enforcement agencies can only apply for a search warrant, or a warrant to use telecommunications interception or a surveillance device, if it is suspected that an offence has occurred or there is information indicating an offence is about to occur. These traditional powers do not fit the changing environment in which we live. The ability to use search, telecommunications interception and surveillance powers only after an offence is suspected of being committed undermines the preventative and protective purposes of control orders. The breach of the conditions of a control order may mean a person has been able to plan, prepare for, progress, or provide support to, terrorist plots or related activity, regardless of whether a terrorist act has occurred.

Physical search, telecommunications interception and surveillance powers are particularly relevant to monitoring a person's compliance with obligations, prohibitions and restrictions in relation to:

- the possession of specified articles or substances
- communication or association with specified individuals
- access or use of specified telecommunications or technology, including the internet, and
- the carrying out of specified activities.

Clearly, these obligations, prohibitions and restrictions can be critical to reducing the ability of a person to commit an offence and separating them from others who may encourage, or be involved in, terrorist activity. Where a person seeks to conceal their contravention of such conditions, search, telecommunications interception and surveillance powers are the most effective and efficient means of detecting breaches.

The Bill strikes an appropriate balance between enabling search, telecommunications interception and surveillance powers to be used to monitor compliance with control orders conditions, and ensuring there is sufficient accountability and oversight of the use of these powers.

However, recommendations nine, ten and eleven of the PJCIS report consider a number of aspects of the proposed monitoring warrant regime, including additional safeguards and accountability mechanisms. The Department is presently considering the PJCIS report and its recommendations.

Schedules 9 and 10—Monitoring compliance with control orders

The Committee has specifically asked for information to assist in determining that the limitation on the right to privacy is proportionate to the objective.

The objective of the proposed new monitoring warrant framework is to ensure that a person who is subject to a control order is prevented from engaging in any activity related to terrorist acts and terrorism offences.

The monitoring warrant powers are subject to appropriate restrictions which guarantee that the use of power is a proportionate limitation on the right to privacy.

The Bill requires the issuing authority to balance a number of different considerations, including whether there are any alternative methods that would be likely to assist the agency, in making the decision to issue the warrant. The warrants can only be issued once a number of thresholds are met. These thresholds include a requirement that the issuing authority must have regard to the possibility that the person:

- has engaged, is engaging, or will engage, in a terrorist act
- has provided, is providing, or will provide, support for a terrorist act
- has facilitated, is facilitating, or will facilitate, a terrorist act
- has provided, is providing, or will provide, support for the engagement in a hostile activity in a foreign country
- has facilitated, is facilitating, or will facilitate, the engagement in a hostile activity in a foreign country
- has contravened, is contravening, or will contravene, the control order, or
- will contravene a succeeding control order.

This threshold is designed to ensure that the issuing authority has regard to evidence of both a specific risk or propensity of the person engaging in such conduct or breaching the order, as well as evidence that there is a general risk or propensity that the person will engage in such conduct or breach the control order. In making this decision, the issuing authority may consider a range of information, potentially including:

- whether there specific or general evidence indicating that there is a possibility that the person may engage in the conduct the control order is intended to prevent, or may breach the control order
- evidence pre-dating the issuing or service of the control order, including the grounds on which the control order was issued, that may indicate such a possibility, notwithstanding the fact that the control order has subsequently been issued and/or served, and
- evidence about whether other persons subject to control orders have engaged in conduct the control order is intended to prevent, or have breached their control order, to the extent such evidence may indicate whether there is a possibility of the person in question may engage in such conduct or breach the extant control order.

In essence, these cumulative factors require the issuing authority to balance privacy concerns with the extent to which monitoring would assist in preventing terrorist and related acts. This test constrains the use of the monitoring warrant powers to ensure that it is only used in circumstances where it would be reasonable and necessary.

In addition to this proportionately test, B-Party warrants are subject to further requirements to those that apply to other interception warrants:

- the person subject to the control order must be likely to communicate with the person whose service is to be intercepted
- the issuing authority must be satisfied that the agency has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the person subject to the control order, or that interception of the service used by the person subject to the control order would not otherwise be practicable, and
- the maximum period of 45 days for B-Party warrants is half that of the period applicable for other interception warrants, which acknowledges that B-Party interception involves a potential for greater privacy intrusion of persons who, though in contact with persons of interest, may not be involved in the commission of an offence.

The option for agencies to defer reporting maintains a level of transparency that is not at the expense of operational effectiveness. Due to the generally small number of control orders likely to be in force at any one time, immediate public reporting may enable an individual to determine or speculate as to whether they are subject to covert surveillance. However, if the Minister determines not to include the information in the Annual Report, then the chief officer of an agency is under a positive obligation to request the Minister to include the information in the next report if appropriate. All information must still be reported to the Minister, and the Minister must decide whether to report.

The Government notes the Committee's observation that the control order warrants under the SD Act can impact on third parties. The Government will amend the Statement of Compatibility to ensure this is appropriately reflected.

Further, recommendations nine to thirteen of the PJCIS report consider a number of aspects of the proposed monitoring warrant regime, including telecommunication inception and surveillance device warrants. The Department is presently considering the PJCIS report and its recommendations.[57]

Committee response

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

2.468 The committee welcomes the Attorney-General's commitment to consider the recommendations of the PJCIS, including whether to incorporate additional safeguards and accountability mechanisms. The committee believes that

57 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 8-10.

Recommendations 9 to 13 are important safeguards and would welcome their introduction into the bill. However, the committee must consider the bill as it currently stands.

2.469 The committee notes that the current INSLM considered that while 'monitoring compliance seems a reasonable concept', reading Schedules 8 to 10 'brings home forcibly the extent of intrusion into life and liberty by the making of a control order'.[58] According to the current INSLM, these schedules 'blur, if not eliminate, the line between monitoring and investigation'.[59] In light of the significant intrusion into a person's right to privacy, the presence of appropriate and sufficient safeguards is particularly necessary.

2.470 This is all the more true when it is recalled that control orders are granted following a civil hearing determined on the civil standard of proof and the subject of the order need not have been charged, let alone convicted, of any offence. Further, as noted above, a control order breach can be of a minor kind, including breaching a curfew by 30 minutes.

Monitoring warrants

2.471 The bill requires the issuing authority to balance a number of different considerations when making the decision to issue a monitoring warrant, and that such a warrant can only be issued once a number of thresholds have been met. The Attorney-General's response states that these thresholds are designed to ensure that the issuing authority has regard to evidence of both a general and a specific risk or propensity of the person engaging in the relevant conduct or breaching the control order.

2.472 The committee is concerned that these thresholds are not a sufficient safeguard to ensure that the intrusive powers of the bill will be used solely in respect of terrorism offences and not in relation to potentially minor breaches of a control order.

2.473 In particular, it is unclear how privacy considerations will be 'balanced' against the extent to which monitoring would assist in preventing terrorist and related acts, as it is not clear whether the individual circumstances of a person subject to a control order are required to be considered at all. For example, the minister notes that 'general' evidence indicating that there is a 'possibility' that a person may breach their control order, or evidence that 'other persons' subject to control orders have breached their control orders is sufficient for the issuing authority to issue a warrant.

2.474 This does not require any reasonable suspicion that the person subject to the control order is doing anything suspicious or unlawful, but merely that the exercise

58 Independent National Security Legislation Monitor, *Control Order Safeguards (INSLM) Report Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) 3.

59 Independent National Security Legislation Monitor, *Control Order Safeguards (INSLM) Report Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) 3.

of the powers is reasonably necessary to ensure that the person is not engaged in such behaviour. It will provide a blanket authorisation for police officers to conduct searches (including frisks and entering private premises) for the purpose of monitoring whether a person is complying with their control order—a significant intrusion into a person's privacy.

2.475 In addition, the committee is concerned about an issuing authority's reliance on propensity evidence. Under common law and statute, the admissibility of propensity (or tendency) evidence is severely limited. At common law, propensity evidence is admissible only if its probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused.[60] This is a very stringent test. The uniform Evidence Acts contain a similar high standard: tendency evidence is admissible only if it has significant probative value which substantially outweighs any prejudicial effect it may have on the defendant.[61] In considering the propensity that a person may have towards breaching their control order, it is not clear whether the issuing authority must satisfy the same stringent test. If not, a person may be subject to intrusive powers on the basis of evidence that would be declared inadmissible by a court.

2.476 Finally, as noted above at paragraph [2.463], monitoring warrants have the potential to infringe the privacy rights of innocent third parties. The committee welcomes the Attorney-General's commitment to amending the Statement of Compatibility of the bill to ensure that this limitation is appropriately reflected. Any such interference can only be justified where the measure achieves a legitimate objective, and is both rationally connected to that objective and proportionate.

B-Party warrants

2.477 The committee acknowledges that B-Party warrants are subject to further requirements to those that apply to other telecommunications interception warrants. In particular, as the Attorney-General highlights, the person subject to the control order must be likely to communicate with the person whose service is to be intercepted, the issuing authority must be satisfied that all other practicable methods of identifying the telecommunications services used have been exhausted, and the maximum period is half that of other interception warrants.

2.478 However, given the breadth of control order conditions and that the purpose of such interception is simply to monitor compliance, the availability of B-Party warrants remains concerning. B-Party warrants involve a serious intrusion into a non-suspect person's right to privacy. This interference is all the more concerning when it is recalled that the measures in the bill could be applied for minor breaches of a control order. In these cases, the Attorney-General's response does not provide

60 *Pfennig v The Queen* (1995) 182 CLR 461, 485; *HML v The Queen* (2008) 235 CLR 334.

61 *Evidence Act 1995* (Cth) ss 97, 101. See also *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); and *Evidence (National Uniform Legislation) Act 2011* (NT).

evidence explaining why the ability to issue B-Party warrants is appropriate or necessary.

Deferred reporting arrangements

2.479 The Attorney-General justifies the deferred reporting arrangements on the basis that subjects of control orders should not be notified that they are being surveyed. While this would likely assist operational effectiveness, it is not clear that the bill is rationally connected with this objective. Given that a person who is the subject of a control order will be subject to intensive electronic and other surveillance, limiting their right to privacy, it is unlikely that such a person will be unaware.

2.480 In any case, the committee reiterates its concerns over the deferred reporting arrangements. Transparency is an important safeguard that is relevant to the assessment of the proportionality of the measures in this bill. In light of the significant intrusion into a person's right to privacy, limited and after the fact transparency measures, such as reporting to parliament are insufficient.

2.481 **The committee's assessment of the bill against the right to privacy under article 17 of the International Covenant of Civil and Political Rights is that the measures may be incompatible. The committee remains concerned that insufficient safeguards exist to protect the right to privacy. In particular, monitoring warrants can be issued without any reasonable suspicion that the relevant person is doing anything suspicious or unlawful; B-Party warrants involve a significant intrusion into non-suspect's right to privacy; and the deferred reporting arrangements limit the transparency surrounding the use of such intrusive measures.**

Schedules 9 and 10—Use of information obtained under warrant if interim control declared void

2.482 Schedules 9 and 10 of the bill seek to include new provisions in the TIA Act and the SD Act to allow for the use of information intercepted or accessed under a warrant relating to an interim control order that is subsequently declared to be void.[62] This relates to the proposed new interception and surveillance warrants as described at paragraphs [2.448] to [2.449] above.

2.483 The bill would ensure that, where a warrant was issued on the basis that an interim control order was in force, and a court subsequently declares that order to be void, any information obtained under the warrant (while in force) can be used, recorded or given as evidence. The information can only be used if the person using it reasonably believes that doing so is necessary to prevent or reduce the risk of the

62 See item 53 of Schedule 9 (proposed new section 299) and item 39 of Schedule 10 (proposed new section 65B).

commission of a terrorist act, serious harm to a person or serious damage to property, and only for purposes relating to a PDO.[63]

2.484 The committee previously considered that the use of information obtained under a warrant relating to an interim control order that is subsequently declared void engages and may limit the right to a fair hearing and fair trial, in particular the right to equality of arms.

Right to a fair trial and fair hearing

2.485 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. The right is concerned with procedural fairness and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.486 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial and fair hearing

2.487 The right to a fair trial encompasses the right to equality of arms, which is an essential component of the right to a fair trial. It requires that a defendant must not be placed at a substantial disadvantage to the prosecution.

2.488 Allowing one party in an application for a PDO to rely on evidence or information obtained under a warrant for an interim control order that is subsequently declared to be void engages and may limit the rights of a person subject to that order to equality of arms.

2.489 However, the statement of compatibility has not addressed this right specifically.

2.490 The committee notes that the stated objective of preventing serious harm to the public is a legitimate objective for the purposes of international human rights law. It is also clear that the measures are likely to be rationally connected to this objective (that is, they are likely to be capable of achieving that objective). However, further information would assist in clarifying that the measures are proportionate to that objective.

2.491 The committee therefore sought the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

63 See item 53 of Schedule 9 (proposed new section 299) and item 39 of Schedule 10 (proposed new section 65B).

Attorney-General's response

The provisions, inserted into the *Surveillance Devices Act 2004* (the SD Act) and *Telecommunications (Interception and Access) Act 1979* (the TIA Act) are intended to address the unlikely scenario where:

- an interim control order has been issued in respect of a person
- a law enforcement agency has duly obtained a monitoring warrant in relation to that person
- under that monitoring warrant, the agency has obtained information that indicates that the person is likely to engage in a terrorist act, cause serious harm to a person, or cause serious damage to property, and
- before the agency can act on that information, the interim control order is considered by a court at a confirmation hearing and declared void *ab initio* pursuant to subsection 104.14(6) of the Criminal Code on the grounds that, at the time of making the interim control order, there were no grounds on which to make the order.

As the existence of a valid control order is a condition for the issuing of a monitoring warrant, the likely effect of a court declaring an interim control order void ab initio pursuant to subsection 104.14(6) of the Criminal Code would be that any monitoring warrants predicated on that control order would also likely be void *ab initio*.

It is a fundamental principle of the Australian legal system that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. As an example, the *Bunning v Cross*[64] discretion places the onus on the accused to prove misconduct in obtaining certain evidence and to justify the exclusion of the evidence. This provision is expanded on in Commonwealth statute,[65] where there is an onus on the party seeking admission of certain evidence to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. This fundamental principle reflects the need to balance the public interest in the full availability of relevant information in the administration of justice against competing public interests, and demonstrates the role the court plays in determining admissibility of evidence.

However, the SD Act and TIA Act depart from these fundamental principles, by imposing strict prohibitions on when material under those Acts may be used, communicated or admitted into evidence.[66] Under

64 (1978) 141 CLR 54.

65 Section 138 of the *Evidence Act 1995* (Cth).

66 Sees 63 of the TIA Act and s 45 of the SD Act.

these Acts, it is a criminal offence for a person to deal in information obtained under these Acts for any purpose, unless the dealing is expressly permitted under one or more of the enumerated and exhaustive exceptions to the general prohibition. These provisions expressly override the discretion of the judiciary, both at common law and under the *Evidence Act 1995*, to admit information into evidence where the public interest in admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. There is also a risk that these specific provisions might be interpreted, either by a court considering the matter after the fact, or by an agency considering the question *in extremis*, to override the general defence to criminal responsibility under the Criminal Code.

For this reason, the Bill would insert new section 658 to the SD Act and section 299 to the TIA Act, which would expressly permit agencies to rely on such information to prevent, or lessen the risk, of a terrorist act, serious harm to a person, or serious damage to property. These provisions would also permit such information to be used to apply for, and in connection with, a preventative detention order.

These amendments do not infringe on the right to a fair trial and fair hearing as protected by article 14 of the ICCPR. 'Equality of arms' requires that each party be afforded a reasonable opportunity to present their case under the conditions that do not place them at a substantial disadvantage vis-a-vis another party.[67] This principle essentially denotes equal procedural ability to state the case. These amendments do not engage the 'equality of arms' principle. This is because the amendments do not derogate from, or abridge, existing procedural rights of parties to litigation and would not result in actual disadvantage or other unfairness to the defendant. That is, the amendments do not impact upon opportunities to adduce or challenge evidence or present arguments on the matters at issue.[68]

Accordingly, the provisions are a reasonable and proportionate limitation on the right to a fair trial and fair hearing in article 14 of the ICCPR.[69]

Committee response

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

2.493 The committee notes that it is a fundamental principle of the Australian legal system that courts retain a discretion as to whether or not to admit improperly

67 *Brandstetter v Austria*, Application No: 11170/84; 12876/87; 13468/87, Strasbourg judgment 28 August 1991 §§41-69.

68 *H. v Belgium*, Application No: 8950/80, Strasbourg judgment 30 November 1987 §§49-55.

69 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 11-12.

obtained evidence into proceedings. The right to a fair trial and a fair hearing does not require a strict exclusionary stance towards improperly obtained evidence.

2.494 Nonetheless, the committee acknowledges and accepts that the SD Act and the TIA depart from the fundamental principle concerning admissibility of improperly obtained evidence by imposing strict prohibitions on when material under those Acts may be used, communicated or admitted into evidence, and enumerating a list of exceptions to this general prohibition. In these circumstances the committee accepts that amending the SD and TIA Act to expressly permit agencies to rely on evidence indicating that a person is likely to engage in a terrorist act, cause serious harm to a person, or cause serious damage to property, and obtained under a monitoring warrant where the interim control order is subsequently declared void ab initio is likely compatible with Australia's obligations under international human rights law.

2.495 The restriction of admissible evidence is an important safeguard. That such evidence will only be admissible if it relates to the commission of a terrorist act, serious harm to a person or serious damage to property is significant for it excludes the admission of evidence of minor criminality. In these cases, the court will not have discretion to admit such evidence into the proceedings.

2.496 **The committee's assessment of the bill against the right to a fair trial (equality of arms) under article 14 of the International Covenant of Civil and Political Rights is that the measures are likely to be compatible. The measures seek to achieve a legitimate objective, are rationally connected to that objective and are proportionate.**

Schedule 15—Non-disclosure of information to the subjects of control orders and their legal representatives

2.497 Currently, the NSI Act allows a court to prevent the disclosure of information in federal criminal and civil proceedings where it would be likely to prejudice national security (except where this would seriously interfere with the administration of justice). A range of protections for sensitive information is available, including allowing such information to be redacted or summarised, and preventing a witness from being required to give evidence.

2.498 Schedule 15 of the bill would amend the NSI Act to allow a court to make the new types of orders restricting or preventing the disclosure of information in control order proceedings such that:

- the subject of the control order and their legal representative may be provided with a redacted or summarised form of national security information (although the court may consider all of the information contained in the original source document);[70]

70 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(2).

- the subject of the control order and their legal representative may not be provided with any information contained in the original source document (although the court may consider all of that information);[71] or
- the subject of the control order and their legal representative may not be provided with evidence from a witness in the proceedings (although the court may consider all of the information provided by the witness).[72]

2.499 The court may make such orders where it is satisfied that the subject of the control order has been given sufficient notice of the allegations on which the control order request was based, even if they have not been given notice of the information supporting those allegations.[73]

2.500 In addition, currently under the NSI Act a court can hold a closed hearing to decide whether information potentially prejudicial to national security may be disclosed (and, if so, in what form); and whether to allow a witness to be called.[74] The court has the discretion to exclude non-security cleared persons from the hearing if their presence would be likely to prejudice national security.

2.501 The bill would further provide that a court may order, on the application of the Attorney-General, that one or more specified parties to the control order proceeding and their legal representative cannot be present during closed hearing proceedings. This would apply even where the legal representative has security clearance;[75] and prevent any record of the closed hearing being made available to the legal representative.[76]

2.502 Excluding the subject of the control order and their legal representative from accessing information and evidence that supports the making of a control order, and from hearings to decide whether to restrict such information, engages and limits the right to a fair hearing.

Right to a fair trial and fair hearing

2.503 The right to a fair trial and fair hearing is described above at paragraphs [2.485] to [2.486].

Compatibility of the measure with the right to a fair trial and fair hearing

2.504 The statement of compatibility acknowledges that the measures in Schedule 15 limit the right to a fair hearing and particularly the principle of equality

71 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(3).

72 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(4).

73 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(1).

74 See section 38I of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act).

75 See item 12 of Schedule 15 to the bill.

76 See item 15 of Schedule 15 to the bill.

of arms, which requires that all parties have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties to the proceedings.

2.505 The statement of compatibility states that the objective of the measure is to protect national security information where disclosure may be likely to prejudice national security.[77] The committee previously noted that protecting national security is a legitimate objective for the purposes of international human rights law.

2.506 However, it is unclear why the existing arrangements for protecting information on national security grounds are insufficient.

2.507 The committee therefore sought the advice of the Attorney-General as to the legitimate objective of the measure (particularly whether there is evidence demonstrating that the existing powers under the NSI Act and the Criminal Code to redact or summarise information or exclude witnesses are insufficient); and whether the limitation is a reasonable and proportionate measure for the achievement of that objective (particularly whether it is proportionate to exclude a security-cleared legal representative from a hearing as to whether information should be withheld from the subject of a control order; and for allegations on which a control order request is based to be provided to the subject of a control order, without a requirement that sufficient information is provided to allow a real opportunity to rebut those allegations).

Attorney-General's response

Legitimate objective, reasonable and proportionate

The Committee notes at paragraph 1-186 that the main purpose of the bill appears to be to provide for circumstances where the subject of a control order and their legal representative may not be provided with any details at all about the information being relied on, but which can still be considered by a court, in control order proceedings. However, this is not the purpose of the amendments.

There are specific provisions in Division 104 of the Criminal Code which set out what information needs to be provided to the controlee, subject to national security redactions. As the Committee notes, subsection 104.5(2A) provides that the interim control order must set out a summary of the grounds on which the order is made, but does not need to include information that would likely prejudice national security. If the AFP elects to confirm the interim control order, under section 104.12A the AFP must provide to the subject of the control order the statement of facts relating to why the order should or should not be made, and an explanation as to why each of the proposed obligations, prohibitions or restrictions should be imposed on the person, that were used in the AFP's application for the interim control order. Paragraph 104.12A(2)(a)(iii) also requires the AFP to

77 EM, SOC 24.

serve personally on the person any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the control order.

However, these provisions do not require the AFP to provide information that the AFP may seek to protect for reasons of national security.

These specific disclosure provisions operate as protections for the subject of the control order, as they ensure the controlee is provided with timely access to the information used in support of the control order application. The provisions operate in addition to any other applicable procedural rights in federal civil proceedings, such as the normal processes of discovery, in which a party to a proceeding is entitled to obtain much of the material relied upon by the other party. At any stage where disclosure obligations arise, it is up to the AFP to either make a public interest immunity claim or seek to use the protections under the NSI Act to withhold any national security information. Wherever the AFP does so, it must satisfy the court that the nondisclosure of the information is appropriate. Neither the existing Division 104 Criminal Code provisions, nor the NSI Act provisions, permit evidence which a court considers ought to be subject to national security exceptions to be relied upon by the court in making its decision to confirm a control order.

Under the NSI Act, there are existing provisions that enable a court to consider, in a closed hearing, whether national security information may be disclosed and if so, in what form. The court has the discretion to exclude non-security cleared parties, their non-security cleared legal representatives and non-security cleared court officials from the hearing where the court considers that disclosing the relevant information to these persons would likely prejudice national security. If a party's legal representative is not security cleared, does not wish to apply for a security clearance, or a clearance is unable to be obtained in sufficient time before the closed hearing, then the court may still hold the closed hearing and determine the matter without the assistance of a legal representative of the party. Alternatively, the court could decide to appoint a security cleared special counsel to represent the interests of the party during the closed hearing (although there has been no need for a security cleared special counsel to be appointed under the NSI Act to date). However, any information the court decides should not be disclosed under the NSI Act cannot be used in the substantive proceeding.

The purpose of the proposed amendments to the NSI Act is it to provide the court with two further options when the NSI Act has been invoked in a control order proceeding. First, the option to exclude a respondent's legal representative, even if they are security cleared, at the closed hearing to determine if or how the information should be disclosed in the substantive control order proceeding. Second, it provides the option for the court to still consider that evidence in the substantive control order proceeding,

even if it cannot be disclosed to the party or their lawyer (whether security cleared or not). The rationale for these amendments is that the evidence may be so sensitive that even a security cleared legal representative cannot see the information.

The AFP's submission to the PJCIS inquiry into the Bill explains the importance of protecting sensitive information, not only to maintain the confidentiality and integrity of law enforcement and intelligence operations and methodologies, but also to maintain the trust with which law enforcement has been provided this information. It also explains that in the current threat environment, it is increasingly likely that law enforcement will need to rely on evidence that is extremely sensitive, such that its disclosure, even to a security-cleared lawyer, could jeopardise the safety of sources and the integrity of investigations. There is a substantial risk that the inability to rely on sensitive information may mean that control orders are unable to be obtained in relation to a person posing a high risk to the safety of the community. Accordingly, the purpose of the amendments is aimed at achieving the legitimate objective of protecting national security information in control order proceedings, the disclosure of which may be likely to prejudice national security.

The amendments to the NSI Act will provide the court with the ability to make three new types of orders to protect national security information that may result in the court being able to consider information in a control order proceeding that the person the subject of the control order proceeding (or their legal representative) may not see. Prior to making one of these new orders, under paragraph 38J(l)(c), the court must be satisfied that the subject of the control order proceeding has been provided sufficient notice of the allegation on which the control order request is based (even if the person has not been given notice of the information supporting those allegations).

When considering the effect of the proposed amendments to the NSI Act, it is important to consider the proposed amendments as a whole rather than considering the sections in isolation. There are several protections built into the legislation that mitigate any procedural unfairness. Prior to making one of the new orders, the court must consider whether the order would have a substantial adverse effect on the substantive control order proceeding (subsection 38J(5)). This requires the court to contemplate the effect that withholding the information from the respondent or their legal representative will have on procedural fairness for the subject of the control order proceeding. Furthermore, the proposed amendment to subsection 19(4) will confirm that the court has discretion to later order a stay of a control order proceeding, if one of the new orders has been made and later in the proceedings it becomes evident that the order would have a substantial adverse effect on the substantive control order proceeding.

Importantly, the court also has discretion to decide which order to make and the form the order should take. For example, if the AFP proposes to

withhold an entire document from the subject of a control order, but use it in support of the control order application, the court may decide that only part of the document may be withheld and used, or that the entire document can be withheld and used but the person must be provided with a summary of the information it contains. This is often referred to as 'gisting'.

Furthermore, the normal rules of evidence apply to evidence sought to be introduced under these new orders, in accordance with the express terms of section 38J and the existing Criminal Code provisions (section 104.28A). The effect of those provisions is that if any material is withheld from the respondent but used in the proceeding, that material must otherwise be admissible as evidence under the normal rules of evidence applicable in control order proceedings. There is also nothing in the new provisions that would dictate to the court what weight it should give to any evidence that is withheld (either in full or in part) from the respondent in the substantive control order proceeding.

Accordingly, the amendments provide an appropriate balance between the need to protect national security information in control order proceedings, and procedural fairness to the person to whom the control order relates. It preserves the independence and discretion of the court and instils it with the powers needed to mitigate unfairness to the subject of a control order proceeding. Further, the court retains its inherit discretion to appoint a special advocate if it is assessed as necessary and appropriate to the circumstances. The amendments are therefore reasonable and proportionate for the achievement of the objective of protecting national security information in control order proceedings.

Recommendations four to six of the PJCIS report consider various aspects of the proposed amendments to the NSI Act. The Government is presently considering the PJCIS report and its recommendations.[78]

Committee response

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

2.509 In its initial analysis the committee noted that protecting national security is a legitimate objective for the purposes of international human rights law.

2.510 However, the committee noted that it would be useful to have additional evidence and reasoning that explains why the existing NSI Act provisions are insufficient, and examples as to when information cannot currently be provided in support of a control order application.

2.511 The NSI Act currently allows the Attorney-General to issue a non-disclosure certificate or witness exclusion certificate, which requires the court to hold a closed

78 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (received 25 February 2016) 12-14.

hearing to determine whether the information should be excluded, disclosed in full or disclosed only as a summary or statement of the facts.[79] This means that the subject of the control order and their legal representative can already be excluded from a hearing, unless the legal representative has security clearance.

2.512 In addition, the existing definition of 'information' under the NSI Act is drafted broadly, and includes 'information of any kind, whether true or false and whether in a material form or not'; and an opinion and a report of a conversation, whether or not in the public domain.[80] This allows scope for different types of information to be prescribed as protected and sensitive, and on that basis to be withheld from persons subject to civil proceedings (which includes control order proceedings).

2.513 Further, the Criminal Code also currently allows information to be withheld from the subject of a control order. Specifically, an interim order must set out a summary of the grounds on which the order is made, but not if that information is likely to prejudice national security.[81] When confirmation of an interim control order is sought, the affected person must be served with such details as to allow them 'to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'. However, information is not required to be served or given if it would prejudice national security (or carry other, broader risks).[82]

2.514 The Attorney-General's response states that there is a substantial risk that the inability to rely on sensitive information may mean that control orders are unable to be obtained in relation to a person posing a high risk to the safety of the community. This contrasts with information provided by the current INSLM who has noted that:

> It is worth remarking that no information was withheld by the applicant for a control order from the respondent in any of the four recent control order cases and that no proposal for an application for a control order has been abandoned by the Australian Federal Police because of the prospect of the need to deal with sensitive information. Indeed, it appears that over recent years there have been no contested NSI Act hearings in any context, as agreements pursuant to s 22 of the Act have been entered into [agreements between the defendant and the prosecutor].[83]

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79 See Part 3A of the NSI Act.

80 See section 7 of the NSI Act which states that 'information' means that which is defined in the section 90.1 of the Criminal Code.

81 See section 104.5(2A) of the Criminal Code.

82 See subsections 104.12A(2) and (3) of the Criminal Code.

83 Independent National Security Legislation Monitor, *Control Order Safeguards (INSLM) Report Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) 4.

2.515 The Attorney-General's response states that in the current threat environment, it is increasingly likely that law enforcement will need to rely on evidence that is extremely sensitive, such that its disclosure, even to a security-cleared lawyer, could jeopardise the safety of sources and the integrity of investigations. Without information as to the nature of the information it is unclear how such information that is to be disclosed to a judge cannot also be disclosed to a security cleared lawyer—a lawyer cleared by the intelligence agencies to receive sensitive information—and who is bound by professional obligations not to disclose such information.

2.516 The idea that it is possible to have criminal trials that comply with article 14 of the ICCPR in the context of law enforcement agencies claiming that they have information that is so secret and sensitive that it cannot be disclosed to a lawyer is highly questionable. In jurisdictions such as Canada and the United Kingdom, this problem is sought to be addressed by appointing special advocates who are able to access sensitive information and seek instructions from an affected person (albeit without disclosing the full information to the person).

2.517 The Attorney-General's response states that the amendments to the NSI Act will provide the court with the ability to make additional orders to protect national security information that may result in the court being able to consider information in a control order proceeding that the person the subject of the control order proceeding (or their legal representative) may not see. Prior to making one of these new orders, the court must be satisfied that the subject of the control order proceeding has been provided sufficient notice of the allegation on which the control order request is based (even if the person has not been given notice of the information supporting those allegations).

2.518 However, providing a person with 'notice of the allegations' on which a control order request is based may not give sufficient detail to a person to be able to dispute the allegations against them. For example, under the bill it would be sufficient for a person to be told of the allegation that they had attended 'a terrorist training camp' without any detail of when or where the camp was held. In the absence of such information, the person may not be able to provide exonerating evidence (for example an alibi or alternative explanation for their presence at the camp) to effectively challenge the allegation.

2.519 The European Court of Human Rights has held that it is permissible to place restrictions on the right to a fully adversarial procedure if there are strong national security grounds that require certain information to be kept secret.[84] However, while information can be withheld from a person, sufficient information about the allegations against the person must be provided to enable them to give effective

84 See *A and Others v the United Kingdom*, European Court of Human Rights, Application no. 3455/05, 19 February 2009, 205.

instructions in relation to those allegations.[85] The UK courts have said in relation to control orders that the standard of disclosure is relatively high, and 'where detail matters, as it often will, detail must be met with detail'; and there must be 'a real opportunity for rebuttal'.[86] A bare allegation without detail of what, when and where an act is said to have occurred (for example, that a person was involved in 'a terrorist act'), may not enable a person to lead evidence to refute that allegation.

2.520 The committee acknowledges that the changes proposed in the bill preserve the inherent independence and discretion of the court to consider whether any order to exclude information from the accused and their lawyer would have a substantial adverse effect on the substantive hearing in the proceeding. However, in these circumstances, the defendant is at a distinct disadvantage to the prosecution in making submissions as to the effect of the non-disclosure of information on the substantive hearing in the proceedings. Accordingly, the equality of arms in the proceedings is seriously undermined.

2.521 The Attorney-General notes that the PJCIS has made three recommendations in relation to this schedule. Those recommendations are:

> **Recommendation 4** The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended such that the minimum standard of information disclosure outlined in proposed paragraph 38J(1)(c) of the National Security Information (Criminal and Civil Proceedings Act) 2004 reflects the intent of Recommendation 31 of the Council of Australian Governments Review of Counter-Terrorism Legislation, namely that the subject of the control order proceeding be provided 'sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.
>
> **Recommendation 5** The Committee recommends that a system of special advocates be introduced to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded under the proposed amendments to the National Security Information (Criminal and Civil Proceedings) Act 2004 contained in Schedule 15 of the Counter-Terrorism
>
> Legislation Amendment Bill (No. 1) 2015. Legislation to introduce a special advocates system should be introduced to the Parliament as soon as practicable and no later than the end of 2016. The Committee accepts that

85 See *A and Others v the United Kingdom*, European Court of Human Rights, Application no. 3455/05, 19 February 2009, 220. See also the recent judgment of Sher and Others v the United Kingdom, European Court of Human Rights, Application no. 520/11, 20 October 2015, which states, at 149, that 'the authorities must disclose adequate information to enable the applicant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able effectively to participate in court proceedings concerning continued detention'.

86 See *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28 per Lord Hope at paragraph 87 and per Lord Scott at paragraph 96.

there is an increasing need to rely on and protect sensitive national security information in control order proceedings. Accordingly, the Committee supports the amendments proposed in Schedule 15 and considers they should proceed without delay. The Committee notes that this approach does not preclude the court from exercising its existing discretion to appoint special advocates on an ad hoc basis.

Recommendation 6 The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require that, as part of the Attorney-General's annual reporting obligations to the Parliament under section 47 of the National Security Information (Criminal and Civil Proceedings) Act 2004, the Attorney-General must also annually report on:

- the number of orders under proposed section 38J that were granted by the court, and
- the control order proceedings to which the orders granted by the court under proposed section 38J relate.[87]

2.522 **The committee supports each recommendation subject to the special advocates regime being in place before the amendments in schedule 15 come into force. These amendments would address the committee's concerns as to the compatibility of schedule 15 of the bill with the right to fair trial.**

87 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (15 February 2016) xiv-xv.

Crimes Legislation Amendment (Harming Australians) Bill 2015

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

Purpose

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

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

Background

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

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

2.527 The bill included a number of amendments to the previous bill, including amended penalty provisions, extension of absolute liability to the new offences, and safeguards relating to double jeopardy. It also provided that in order for an offence to have occurred under the new laws, the conduct constituting the offence must have also constituted an offence against the law of the country in which it occurred, at the time that it occurred.

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

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

2.528 The committee first commented on the bill in its *Thirtieth Report of the 44th Parliament* (previous report), and requested further information from the Attorney-General as to whether the bill was compatible with the right to a fair trial (presumption of innocence) and the prohibition against retrospective criminal laws.[3]

2.529 The bill passed both Houses of Parliament on 23 November 2015 and achieved Royal Assent on 30 November 2015, and became the *Crimes Legislation (Harming Australians) Act 2015* (the Act).

Extended application of absolute liability

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

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

Right to a fair trial (presumption of innocence)

2.532 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.533 As set out in the committee's Guidance Note 2, absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.[4] However, absolute liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, the application of absolute liability must be reasonable, necessary and proportionate to that aim of the measure.

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3 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 4-10.

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

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

2.534 As set out above, absolute liability offences engage the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault.

2.535 The statement of compatibility for the bill did not acknowledge that the presumption of innocence is engaged by these measures.

2.536 The committee therefore sought the advice of the legislation proponents as to the legitimate objective, rational connection, and proportionality of the measure in relation to the right to a fair trial.

Attorney-General's response

> As the Committee has noted, the Bill will apply absolute liability to the new elements of the offence provisions, concerning the murder or manslaughter of an Australian citizen or resident of Australia in a foreign country before 1 October 2002. Absolute liability currently applies to elements of the existing offences, which apply to conduct occurring on or after 1 October 2002.
>
> The effect of the Bill's provisions will be that, for a prosecution under section 115.1 (murder of an Australian citizen or resident of Australia) in respect of conduct occurring before 1 October 2002, the prosecution will not need to establish a fault element for the following elements of the offences:
>
> - the victim was an Australian citizen or resident, and
> - at the time the conduct was engaged in, the conduct constituted an offence against a law of the foreign country, or the part of the foreign country, in which the conduct was engaged. [5]
>
> For a prosecution of the manslaughter offence in section 115.2 in respect of conduct occurring before 1 October 2002, the prosecution will not need to establish a fault element for the two elements described above, as well as the element 'that the conduct caused the death of another person'.
>
> The Committee has noted that the extended application of absolute liability raises questions as to whether the proposed measures limit a defendant's right to a fair trial. The Committee has queried whether
>
> - the measures are aimed at achieving a legitimate objective
> - there is a rational connection between the limitation and that objective, and
> - the limitation is a reasonable and proportionate measure for the achievement of that objective.

5 See Appendix 1, Letter from the Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated and received 11 February 2016) 1-2.

The measures are aimed at achieving a legitimate objective. The purpose of the amendments is to ensure that crimes of murder and manslaughter of Australians can be prosecuted, whenever and wherever they occur. The measures in the Bill will ensure that Australia has every legal tool available to seek justice for Australian victims of the most serious crimes by applying Australian criminal law to those responsible for these offences where they occurred before 1 October 2002. The Bill will rectify a gap in our laws and in doing so, address a significant community concern.

There is a rational connection between this objective and the extended application of absolute liability. The measures go directly to achieving the purpose of the Bill. The application of absolute liability is appropriate and required to ensure the effective operation of the offences.

If recklessness was the requisite fault element applying to the particular elements above, it is possible the offences would not capture conduct which should be criminalised, for instance where an offender does not turn their mind to the possibility that the victim of their conduct is an Australian citizen or resident, or that their conduct may constitute an offence in the foreign jurisdiction. These are effectively jurisdictional elements which provide the circumstances in which the offences will apply, rather than elements which go to the essence of the offending.

There are safeguards in the Bill which help ensure that the application of absolute liability is a reasonable and proportionate approach to achieving the Bill's objective. The prosecution will still need to prove other elements of the offence beyond a reasonable doubt, including that the defendant intentionally or recklessly engaged in conduct and that there was a causal connection between that conduct and the victim's death. The Bill also contains a safeguard against double jeopardy and applies the existing requirement of Attorney-General's consent for a prosecution to commence.

Finally, as noted above, absolute liability applies in respect of the existing murder and manslaughter offences in section 115 of the Criminal Code. To not apply the same standard for the application of the offences to conduct occurring before 1 October 2002 would create an undesirable inconsistency in the law. For these reasons, the application of absolute liability is an appropriate measure and is necessary to achieve the Bill's legitimate objective.[6]

Committee response

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

6 See Appendix 1, Letter from the Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated and received 11 February 2016) 1-2.

2.538 As set out in the response absolute liability applies to two elements of the offence:

- the victim was an Australian citizen or resident; and
- at the time the conduct was engaged in, the conduct constituted an offence against a law of the foreign country, or the part of the foreign country, in which the conduct was engaged.

2.539 In relation to the latter, the committee agrees with the analysis by the Attorney-General that the limitation on the presumption of innocence is justified. Lack of knowledge of the law is typically not a defence and this element of the offence is clearly jurisdictional.

2.540 In relation to the element of the offence that the victim was an Australian, the committee agrees with the analysis provided by the Attorney-General that the limitation on the presumption of innocence imposed by absolute liability is for the legitimate objective of ensuring that crimes of murder and manslaughter of Australians can be prosecuted and the measure is rationally connected to that objective.

2.541 Further, the committee agrees that the nationality of the victim can be considered to be jurisdictional, insofar as Australia's jurisdiction over the offence is reliant on passive personality jurisdiction under international law (that is, criminal jurisdiction based on the victim's nationality).

2.542 However, the committee notes that passive personality jurisdiction is a ground of jurisdiction attended by some doubt (and controversy) under international law. Insofar as it has been accepted, it is in relation to crimes of terrorism and other international crimes.[7] Outside of this particular context, it is unusual for countries to apply extraterritorial criminal jurisdiction solely on the basis that their nationals are the victim of crimes of murder and manslaughter. It is even more unusual to do so *retrospectively*, as this bill does.

2.543 In light of these factors, it would seem reasonable to consider the victim's nationality as an element of the offence, and require the prosecution to prove that the accused knew that the victim was Australian or was reckless to that fact.

2.544 The Attorney-General's response does not provide any reasoning or evidence as to why it is necessary and appropriate to apply absolute liability to an ordinary criminal offence in a foreign country, retrospectively applied to events prior to 1 October 2002, where the accused did not know the victim was an Australian citizen or resident, did not target the individual because they were an Australian citizen or resident, and was not reckless to that fact. No evidence is provided as to how this is the least rights restrictive approach to achieve the objective of prosecuting the murder and manslaughter of Australians.

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7 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment) [2002] ICJ Rep 3, 76-7.

2.545 The response notes that the element of absolute liability applies in respect of the existing murder and manslaughter offences in section 115 of the Criminal Code. Maintaining consistency in the law is a desirable objective, however, in order to justify an interference with the presumption of innocence, the legitimate objective must be a pressing and substantial concern.

2.546 **The committee's assessment of the application of absolute liability against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial (presumption of innocence)) is that applying absolute liability to the element of the offence that the victim was an Australian citizen or resident may be incompatible with international human rights law.**

Retrospective application of culpability for offences committed overseas

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

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

2.549 The committee considered in its previous report that the retrospective application of culpability for offences committed overseas in relation to the nature of the offence and the relevant penalty provisions engages and may limit the prohibition against retrospective criminal laws.

Prohibition against retrospective criminal laws (nature of the offence)

2.550 Article 15 of the ICCPR prohibits retrospective criminal laws. This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

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

2.552 Article 15 confers an absolute right and it can never be justifiably limited.

2.553 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised as an international crime even if

it was not a crime under Australian law. This relates to crimes such as genocide, war crimes and crimes against humanity.

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

2.554 The statement of compatibility for the bill acknowledged that the prohibition against retrospective criminal laws is engaged, and stated that it is justifiable as 'the conduct which is being criminalised—murder and manslaughter—is conduct which is universally known to be conduct which is criminal in nature'.[8]

2.555 However, the committee had stated in its previous analysis that while murder, manslaughter and the infliction of serious harm are crimes under the ordinary criminal law of most, if not all, countries, they are not the sort of international crimes understood as falling within the exception in article 15(2) (which applies to breaches of international humanitarian law, such as genocide, war crimes or crimes against humanity).[9]

2.556 Accordingly, the test for compatibility with article 15 is whether the conduct was criminal under national law at the time it was committed. However, the Act does not require that the conduct was an offence of manslaughter or murder (or its equivalents) in the third country—merely that it is 'an offence'. While it may be that in many cases the construction of the offence provision in the third country is equivalent to that under Australian law, there are also likely to be differences between countries as to what constitutes the offence of murder compared to manslaughter and the specific fault elements that apply to each offence. There are also likely to be differences between countries as to the liability of an individual where a person is killed as part of a joint criminal enterprise, or where death is the consequence of an accident. It is possible that under the Act a person who committed acts constituting a lesser offence (such as burglary) in their home country could be subsequently subject to the charge of murder in Australia.

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

2.558 The committee therefore sought the advice of the legislation proponents as to how the retrospective application of culpability could be compatible with the absolute prohibition against retrospective criminal laws.

8 Explanatory memorandum (EM), statement of compatibility (SOC) 4.

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

Attorney-General's response

The Committee has also raised questions about the retrospective operation of the measures in the Bill. These are legitimate queries, as retrospective offences challenge a key element of the rule of law - that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. The Parliament does not make such offences lightly.

Murder and manslaughter are two of the most serious crimes a person can commit and involve conduct which is universally known to be criminal in nature. Although the Bill would create a criminal law which has a retrospective operation, it only has retrospective operation in a technical sense because there is no jurisdiction in the world which does not recognise within its domestic criminal law a crime of murder or manslaughter, however described.

The provisions have been formulated in this way noting that there are differences in other countries as to what constitutes the offence of murder compared to manslaughter and the fault elements that apply to each offence. It is not possible to take account of the different constructions of murder and manslaughter offences in each country. The Bill's provisions are not intended to apply to conduct that is not classified as murder or manslaughter in the foreign country.

The Bill provides protections to ensure the retrospective operation of the provisions does not apply unfairly, including dual criminality protections in proposed paragraphs 115.1(1)(e) and 115.2(1)(e). The effect of these provisions is that a person will only be liable for an offence of murder or manslaughter in relation to conduct occurring before 1 October 2002 if, at the time they engaged in the conduct, it also constituted an offence against the law of the foreign country. The provisions ensure that a person cannot be prosecuted for conduct that was not otherwise a criminal offence at the time of its commission.

The Committee has observed that the proposed provisions would not require that the conduct constitute manslaughter or murder (or equivalent offences) in the foreign jurisdiction merely that it is 'an offence'. The Committee raised the possible situation where a person is involved in a joint criminal enterprise (such as burglary) in a foreign country, where an

Australian citizen is killed as a result. In such a case, the Committee notes that a person may be subject to a charge of burglary in the foreign jurisdiction, and subsequently face a charge of murder in Australia under the Criminal Code.

I disagree that this situation would occur. For the Australian offences to apply, the conduct would need to satisfy all elements of both the Australian and the foreign offence. This would require the accused's conduct to have caused the death of an Australian citizen or resident, and for the accused to have had intended that the conduct would cause the

death of the Australian citizen (or be reckless as to causing that outcome). It is unlikely that the elements of the Australian offence could be made out without that same conduct constituting some form of culpable homicide in the foreign jurisdiction.

If such a situation transpired, the operation of proposed subsections 115.1(1A) and 115.2(1A) would mean that the maximum applicable penalty would be lessened to penalty which applies for the relevant offence in the foreign jurisdiction. This means that, if the relevant offence in the foreign jurisdiction was something less than murder (for instance, manslaughter or some other lesser form of culpable homicide), the maximum applicable penalty would be accordingly set at the level for the foreign offence. Further, the consent of the Attorney-General would be required before a prosecution under these provisions could be commenced.[10]

Committee response

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

2.560 The response explains that the offence provision in the Act has been drafted noting that there are differences in other countries as to what constitutes the offence of murder compared to manslaughter and the fault elements that apply to each offence. The response also notes that it is not possible to take account of the different constructions of murder and manslaughter offences in each country.

2.561 The response states that it is not the government's intention to apply the offence provision to conduct that is not classified as murder or manslaughter in the foreign country. The committee is grateful for this clarification, but notes that this is not included in the Act, or the explanatory memorandum to the bill, which would be a preferable means of demonstrating Parliament's intent in enacting these offences.

2.562 The response also states that it is unlikely that the elements of the Australian offence could be made out without that same conduct constituting some form of culpable homicide in the foreign jurisdiction. While this may be unlikely, it is not impossible. There are significant differences between countries as to what constitutes the offence of murder compared to manslaughter and the specific fault elements that apply to each offence. There are also differences between countries as to the liability of an individual where a person is killed as part of a joint criminal enterprise.

2.563 **The committee's assessment of the retrospective application of culpability for offences committed overseas against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective criminal laws in relation to penalty provisions) is that as the Act does not require that the conduct was an offence of manslaughter or murder (or its equivalents) in the third**

10 See Appendix 1, Letter from the Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated and received 11 February 2016) 3.

country—merely that it is 'an offence'—that the Act may be incompatible with the absolute prohibition against retrospective criminal laws.

Prohibition against retrospective criminal laws (penalty provisions)

2.564 The prohibition against retrospective criminal laws is contained within article 15 of the ICCPR. More information is set out above at paragraphs [2.550] to [2.553].

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

2.565 Items 5 and 12 of the Act amend the penalties that would apply to persons convicted of the new offences (relating to murder and manslaughter respectively). If the conduct occurred before 1 October 2002 and is punishable in the country in which the conduct occurred by a term of imprisonment, the maximum sentence that may be handed down by an Australian court may not exceed the maximum imprisonment that would apply in the other country. However, if the conduct is punishable in the other country other than by a term of imprisonment of 25 years or less, the maximum penalty under the Criminal Code will apply.

2.566 As noted above at [2.551], article 15 of the ICCPR provides that laws must not impose greater punishments than those which would have been available at the time the acts were done. While the Act does not seek to impose a higher custodial penalty than that which would apply in the country where the offence was committed, it is possible that a non-custodial sentence would be applicable to the offence in that foreign country, for instance, in relation to a manslaughter offence. It is therefore possible under the measure that an individual may receive a more severe penalty under the proposed new law than that which applied at the time the conduct was committed.

2.567 The statement of compatibility for the bill acknowledged that the measure engages retrospective criminal laws, and stated:

> …Where a foreign law would impose a non-custodial punishment…these punishments will not be considered lower penalties for the purpose of these offences.
>
> …As not all possible punishments can be foreshadowed and prescribed, this [the maximum imprisonment penalty] provides a mechanism to ensure that it will be open to the court to impose a term of imprisonment commensurate with the penalty applicable in the foreign jurisdiction.[11]

2.568 The statement of compatibility did not deal with the situation where a person would, in the third country, be liable for a fine, to pay requisite compensation, or community service, yet by the retrospective application of this Act may be liable for a substantial custodial sentence under Australian law. Article 15 of

11 EM, SOC 5.

the ICCPR provides that laws must not impose greater punishments than those which would have been available at the time the acts were done, which is an absolute right that can never be justifiably limited.

2.569 The committee therefore sought the advice of the legislation proponents as to how the imposition of higher penalties than previously existed could be compatible with the absolute prohibition against retrospective criminal laws.

Attorney-General's response

> The Bill provides that the maximum penalties for the extended offences of murder and manslaughter are life imprisonment and 25 years' imprisonment respectively. This is consistent with the maximum penalties for the existing murder and manslaughter offences in section 115 of the Criminal Code.
>
> Consistent with Australia's requirements under article 15(1) of the ICCPR, the Bill provides that where the conduct occurred before 1 October 2002, if the conduct was punishable in the foreign jurisdiction by a term of imprisonment less than life (for offences against section 115.1) or 25 years (for offences against section 115.2), the defendant is entitled to the benefit of that lower penalty. Where the conduct is punishable by a non-custodial sentence in the foreign jurisdiction, the court may impose a term of imprisonment of up to the maximum under the Australian provisions (life and 25 years respectively).
>
> The Committee has noted that, if the conduct is punishable in the other country by a 'lesser' non-custodial sentence (such as a fine, compensation or community service order), the maximum penalty under the Criminal Code will apply.
>
> The seriousness of the offences of murder and manslaughter are such that these offences are always appropriately punished by a period of imprisonment. It is highly unlikely that a person would receive a lesser non-custodial sentence in matters where their conduct caused the death of another person.
>
> Should such circumstances transpire, under the existing sentencing provisions for Commonwealth offences in subsection 16A(2) of the *Crimes Act 1914*, it will be open to a court to consider any possible 'lighter' punishment than imprisonment which would have otherwise been available in the foreign jurisdiction. A court would not be obliged to do so. I believe that this is an appropriate approach, due to the difficulty of anticipating all possible punishments which may be applied in foreign jurisdictions.[12]

12 See Appendix 1, Letter from the Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated and received 11 February 2016) 4.

Committee response

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

2.571 Article 15 of the ICCPR places an absolute prohibition on the imposition of a heavier penalty than that which would have been available at the time the acts were done. The Act allows for a higher penalty to be imposed where the accused may be liable for a non-custodial sentence.

2.572 The response states that it is unlikely that a lesser custodial sentence will be the penalty under foreign law for an offence occasioning death but does not provide any evidence to support this statement. It is indeed difficult to assess this reason given the breadth of countries and legal systems, and the time period that the Act extends over.

2.573 The response further states that should this occur, the court imposing a penalty would be able to consider a lighter sentence under its general sentencing discretion, though recognises that a court would not be obliged to do so. However, the legislation itself does not provide for any such consideration, and Australia has not implemented Article 15 elsewhere into its domestic legislation. The committee considers that the legislation is drafted with insufficient safeguards given the absolute nature of the prohibition on a higher penalty being imposed.

2.574 **The committee's assessment of the retrospective application of culpability for offences committed overseas against article 15 of the International Covenant on Civil and Political Rights (prohibition against retrospective criminal laws in relation to penalty provisions) is that the Act may have insufficient safeguards to guarantee against the imposition of higher penalties than previously existed, and risks the imposition of penalties in a manner incompatible with the absolute prohibition against retrospective criminal laws.**

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 25 September 2014

Purpose

2.575 The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the bill) amends the *Migration Act 1958* (the Migration Act), the Migration Regulations 1994 (the migration regulations); the *Maritime Powers Act 2013* (the Maritime Powers Act), the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

2.576 The bill amends the Maritime Powers Act to:

- expand the existing powers in sections 69 and 72 to move vessels and persons and related provisions;
- explicitly provide the minister with a power to give specific and general directions about the exercise of powers under sections 69, 71 and 72;
- allow maritime powers to be exercised between Australia and another country, provided the minister administering the Maritime Powers Act has determined this should be the case;
- provide that the rules of natural justice do not apply to a range of powers in the Maritime Powers Act, including the power to authorise the exercise of maritime powers, the new ministerial powers and the exercise of powers to hold and move vessels and persons;
- ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;
- amend provisions to allow a vessel or a person to be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons for the purposes of sections 69 and 72;
- amend sections 69 and 72 to provide a 'place' is not limited to another country or a place in another country;
- amend the time during which a vessel or person may be dealt with under sections 69, 71 and 72;
- amend the Maritime Powers Act to provide that the section 69, 71 and 72 powers (and a range of related provisions) operate in their own right, and

that no implication is to be drawn from the Migration Act, particularly from the existence of the regional processing provisions in that Act;

- provide an explicit power exempting certain vessels involved in maritime enforcement operations from the application of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, the *Navigation Act 2012* and the *Shipping Registration Act 1981*;
- make a number of minor consequential and clarifying amendments to the Maritime Powers Act, Migration Act and ICOG Act; and
- ensure that decisions relating to operational matters cannot be subjected to the provisions of the *Legislative Instruments Act 2003*, the *Judiciary Act 1903* and the ADJR Act.

2.577 The bill amends the Migration Act to:

- introduce Temporary Protection Visas (TPVs) as a visa product for unauthorised arrivals, whether by air or by sea, who are found to engage Australia's protection obligations;
- create a new visa class to be known as a Safe Haven Enterprise Visa (SHEV);
- explicitly authorise the making of regulations that deem an application for one type of visa to be an application for a different type of visa;
- amend the application bars in sections 48, 48A and 501E of the Migration Act to apply also in relation to persons in the migration zone who have been refused a visa, or held a visa that was cancelled, in circumstances where the refused application, or the application in relation to which the cancelled visa was previously granted, was an application that was taken to have been made by the person;
- allow for multiple classes of protection visas;
- include a definition of 'protection visas';
- create an express link between certain classes of visas provided for under the Migration Act (including Permanent Protection Visas (PPVs) and TPVs) and the criteria prescribed in the migration regulations in relation to those visas;
- create a new fast-track assessment process and remove access to the Refugee Review Tribunal (RRT) for fast-track applicants, defined as unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and made a valid application for a protection visa, and other cohorts specified by legislative instrument;
- require the minister to refer fast-track reviewable decisions to the Immigration Assessment Authority (the IAA), which will conduct a limited merits review on the papers and either affirm the fast-track reviewable

decision or remit the decision for reconsideration in accordance with prescribed directions or recommendations;

- create discretionary powers for the IAA to get new information and permit the IAA to consider new information only in exceptional circumstances;
- provide the manner in which the IAA is to exercise its functions, notify persons of its decisions, give and receive review documents, disclose and publish certain information and enable the Principal Member of the RRT to issue practice directions and guidance decisions to the IAA;
- establish the IAA within the RRT and provide that the Principal Member of the RRT is to be responsible for its overall operation and administration, and specify delegation powers and employment arrangements for the Senior Reviewer and Reviewers of the IAA;
- amend the Migration Act to authorise removal powers independent of assessments of Australia's non-refoulement obligations;
- remove most references to the Refugee Convention from the Migration Act and replace them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations;
- amend the Migration Act, with retrospective effect, to provide that children born to UMAs under the Migration Act, either in Australia or in a regional processing country, are also UMAs for the purposes of the Migration Act;
- amend the Migration Act, with retrospective effect, to provide that children born to transitory persons, either in Australia or in a regional processing country, are also transitory persons for the purposes of the Migration Act;
- allow children born in Australia to a parent who is a transitory person to be taken to a regional processing country;
- amend the Migration Act, with retrospective effect, to provide that any visa application of the child of a UMA or transitory person is invalid, unless the minister has allowed the application, or the application of that child's parent, to be made; and
- amend the provisions governing the government's ability to place a statutory limit on the number of protection visas granted in a program year, including repealing sections 65A and 414A of the Migration Act (which require applications for protection visas to be decided in 90 days) and the associated reporting requirements in sections 91Y and 440A, and providing that the requirement for the minister to grant or refuse to grant a visa in section 65 is subject to sections 84 and 86.

Background

2.578 The committee previously considered the bill in its *Fourteenth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Immigration and Border Protection as to whether a number of measures in the bill were compatible with human rights.[1] The committee also concluded that certain measures in Schedule 1 of the bill were incompatible with Australia's non-refoulement obligations under international law.

2.579 The bill passed both Houses of Parliament on 5 December 2014 and received Royal Assent on 15 December 2014, and became the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Act).

Schedules 1 and 5—incorporation of international law into Australian domestic law and expansion of powers to intercept and detain people at sea

Multiple rights

2.580 The measures in Schedules 1 and 5 of the Act engage and limit a number of human rights, including:

- non-refoulement obligations;[2]
- the right to security of the person and the right to be free from arbitrary detention;[3]
- the prohibition on torture, cruel, inhuman and degrading treatment or punishment;[4]
- the right to freedom of movement;[5]
- the right to a fair hearing;[6] and
- the obligation to consider the best interests of the child.[7]

Amendments affecting the incorporation of Australia's obligations under international law into domestic law

2.581 In its previous report the committee noted that, although the Refugee Convention and its Protocol are not included in the treaties against which the

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Article 31 of the Refugee Convention.

3 Article 9 of the ICCPR.

4 Article 7 of the ICCPR.

5 Article 12 of the ICCPR.

6 Article 14 of the ICCPR.

7 Articles 3 and 10 of the Convention on the Rights of the Child (CRC).

committee assesses the human rights compatibility of legislation,[8] many of Australia's obligations under the Refugee Convention and its Protocol overlap with Australia's obligations under the seven core human rights treaties which are within the committee's mandate. As a result, many provisions of the bill directly engage Australia's obligations under those treaties and therefore must be assessed by the committee.

2.582 In addition, decisions under, and interpretations of, the Refugee Convention form a specialised body of law which can inform an understanding of the human rights treaties. The Department of Immigration and Border Protection, for example, refers to the Refugee Convention to inform its own views as to the content of particular human rights obligations.[9] In the same way, the committee has drawn on relevant decisions under, and interpretations of, the Refugee Convention in its assessment of the Act.

2.583 In its previous analysis, the committee noted that the Migration Act incorporates into domestic law a number of Australia's obligations under the Refugee Convention. However, the Act removes most references to the Refugee Convention from the Migration Act and replaces them with a new statutory framework. This is done with the stated intention of codifying Australia's interpretation of its obligations under the Refugee Convention, and negating any presumption that the Migration Act should be construed to facilitate Australia's compliance with its obligations under the Refugee Convention.[10]

2.584 The intention of the Act is therefore to allow Australian domestic law to develop independently from Australia's obligations under international law.[11]

2.585 The committee acknowledged previously that Australia has sovereignty to change its domestic laws. However, the Act removes the relevant international human rights norms from a role in defining the legal framework and standards within which Australia meets its international human rights obligations, and as such engages, and is likely to significantly limit, a number of human rights protected by international law, including those set out at [2.580] above.

2.586 The committee noted that the statement of compatibility did not provide a comprehensive analysis of whether the amendments in Schedule 1 and 5 are compatible with these human rights.

2.587 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at [2.580] above, and in particular,

8 Australia acceded to the 1951 Convention Relating to the Status of Refugees on 17 January 1954, and acceded to its 1967 Protocol on 13 December 1973.

9 See, for example, Explanatory Memorandum (EM), Attachment A, 22.

10 See EM, Attachment A, 6, 28.

11 See EM, Attachment A, 6, 28.

whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, have a rational connection between the limitation and that objective, and are proportionate to achieving that objective.

Non-refoulement obligations

2.588 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[12] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[13]

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

2.590 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review, is integral to complying with non-refoulement obligations.[14]

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

Schedule 1 - Expansion of powers to intercept and detain people at sea and exclusion of court challenges based on Australia's international obligations

2.592 The amendments in Schedule 1 of the Act expand powers to intercept vessels and detain people at sea, and to transfer people to any country (or a vessel of another country) that the minister chooses.

2.593 The amendments also exclude court challenges to government actions in this context. The Act inserts new division 8A of the Maritime Powers Act to provide that a decision cannot be invalidated because a court considers there has been a failure to

12 CAT, article 3(1); ICCPR, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

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

14 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 513.

consider, properly consider, or comply with Australia's international obligations when exercising a power.[15]

2.594 The committee noted in its previous analysis that the obligation of non-refoulement is considered in international law as *jus cogens*, which means that it is a fundamental or peremptory norm of international law which applies to all nations and can never be limited.

2.595 As noted above at [2.136], the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.[16]

2.596 These amendments remove judicial review, and in particular the capacity of individuals to seek judicial review, of executive decisions that may be inconsistent with the government's stated intention to comply with international law.

2.597 The committee therefore considered that the proposed amendments in Schedule 1 were incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT.

Minister's response

> **Schedule 1 - Maritime Powers Act amendments**
>
> **1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 above are, and particularly:**
>
> - **whether the proposed changes are aimed at achieving a legitimate objective;**
> - **whether there is a rational connection between the limitation and that objective; and**
> - **whether the limitation is reasonable and proportionate for the achievement of that objective.**
>
> **1.362 The committee therefore considers that the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT.**
>
> Compliance with Australia's international obligations is to be measured by what Australia does in toto by way of legislation, policy and practice. The amendments in Schedule 1 do not change the need to give effect to Australia's international obligations, nor do they require action to be taken that is inconsistent with those obligations.

15 EM, Attachment A, 6.

16 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45, 49-51; *Fourth Report of the 44th Parliament* (18 March 2014) 51, 55-57.

However, the amendments did seek to ensure that decisions about Australia's international obligations, including how to give effect to those obligations, are made by the executive government. This is both appropriate given the operational context in which these decisions need to be made, and consistent with decision-making generally relating to Australia's sovereignty and overarching national security and national interests. The Australian Government does not seek to take action that is inconsistent with Australia's non-refoulement obligations.

Maintaining the security of Australia's borders is a legitimate objective, and it is clear that maritime operations are rationally connected to that objective. All States, as sovereign nations, are entitled to decide who may enter their territory and the means by which they do so. Maritime operations have been shown to be necessary to achieve the legitimate objective of restoring order to Australia's borders - it is the maritime enforcement operations which have played the primary role in reducing deaths at sea by deterring illegal maritime arrivals. Over the past six years, more than a thousand people have tragically lost their lives at sea while attempting the dangerous journey to Australia in flimsy vessels with the assistance of criminal people smugglers, often with inadequate supplies and equipment. Australia received over 50 000 illegal maritime arrivals in that period, placing significant strain on Australia's migration program. It is also important to note that these maritime powers are necessary to ensure the integrity of Australia's borders and maritime possessions in relation to a range of other threats, such as environmental damage and drug smuggling.

- non-refoulement obligations:
    - Noting the Committee's finding that "the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)," it is important to reiterate that these amendments do not require that action be taken which would breach Australia's non-refoulement obligations. The Government takes Australia's international obligations seriously, and does not seek to take action that is inconsistent with Australia's non-refoulement obligations. A great deal of work is done to ensure that decisions made and actions taken under the Maritime Powers Act 2013 (Maritime Powers Act) comply with Australia's international obligations. As a matter of international law, non-refoulement obligations limit the destination to which people may be sent, but do not require Australia to allow unauthorised entry.
- the right to security of the person and the right to be free from arbitrary detention; (ICCPR 9)

- These amendments do not limit the right to be free from arbitrary detention - detention under the Maritime Powers Act is not arbitrary. Arbitrariness involves elements of inappropriateness, injustice or a lack of predictability. Any limitation on the freedom of movement of persons detained or otherwise held under maritime powers is not arbitrary. The legislation clearly sets out a range of factors governing the predictability of their application. Consistent with Government policy, any deprivation of liberty will be for the shortest period practicable for the performance of functions and duties to achieve the object and purposes of the Maritime Powers Act. These amendments simply clarify the time during which persons may be detained, and related factors, for the legitimate exercise of powers under the Act, ensuring there is a clear lawful basis for detention at each stage of a maritime operation.

- the prohibition on torture, cruel, inhuman and degrading treatment or punishment; (ICCPR 7)
  - The treatment of individuals in pursuit of the legitimate objective of protecting Australia's borders is carried out in full compliance with Australia's obligations in relation to the humane and dignified treatment of persons.
- the right to freedom of movement; (ICCPR 12)
  - Article 12 of the ICCPR applies to persons "lawfully within the territory of a State". This will not apply to persons engaged in maritime operations in all but the most unusual circumstances. The right to freedom of movement does not bestow a right to enter a country of which a person is not a national.
  - Any restriction on individuals' freedom of movement while on a vessel (for example, being restricted to one part of the vessel) is based on operational necessity and the overriding interest of the safety of the crew and passengers.
- the right to a fair trial; (ICCPR 14) and
  - Where relevant, any person to be charged with a criminal offence will be tried in accordance with normal practice in Australia, and it is open to anyone wishing to challenge their treatment to pursue action in the Australian courts.
- the obligation to consider the best interests of the child. (Convention on the Rights of the Child (CRC) 3 and 10)
  - The best interests of the child are to be a primary consideration in any decision affecting the interests of that child; however, this primary consideration may be outweighed by other primary considerations, such as the maintenance of

the order of Australia's borders. The Government does not consider it to be in any child's best interests to be placed on an unseaworthy vessel by criminal people-smugglers seeking to exploit the child's vulnerability for their own ends.

- The obligation in article 10 of the CRC to deal with applications to enter Australia for the purposes of family reunification positively, humanely and expeditiously does not provide a right to enter a country of which a person is not a national.[17]

Committee response

2.598 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.599 The committee notes that the minister has provided a range of information regarding a number of human rights that are engaged and limited in relation to Schedule 1.

2.600 The following analysis is focused on the obligation of non-refoulement due to the serious and irreversible nature of the harm that may result from breaches of non-refoulement obligations.

2.601 The committee acknowledges and welcomes the commitment by the Australian government not to take actions which are contrary to its non-refoulement obligations under the ICCPR and CAT.

2.602 First, the committee notes that the minister's response argues that the measure pursues a legitimate objective and is rationally connected to achieving that objective.

2.603 However, as noted in its initial analysis of the measure, the obligation of non-refoulement is considered in international law as *jus cogens*, which means that it is a fundamental or peremptory norm of international law which applies to all nations, and can never be limited. Therefore, the considerations raised by the minister are not relevant to an assessment of the compatibility of the measure with the obligation of non-refoulement.

2.604 Second, the minister states that the amendments do not require that action be taken which would breach Australia's non-refoulement obligations.

2.605 However, compliance with the obligation of non-refoulement under the CAT and the ICCPR, together with the general obligation on states to provide an effective remedy for breaches of human rights under article 2 of the ICCPR, requires that sufficient procedural and substantive safeguards are in place to ensure against the risk that a person is removed in contravention of this obligation. It is therefore the risk that a person may be sent to or returned to a country where there is a real risk

17 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 21-23.

that they would face persecution, torture or other serious forms of human rights violations which may lead to a breach of the obligation.

2.606 The committee notes that even with the best of intentions, mistakes may be made in circumstances where there are insufficient safeguards in place. Rigorous scrutiny of decisions involving non-refoulement obligations is therefore required because of the irreversible nature of the harm that might occur.

2.607 The committee has consistently taken the view that in the Australian context compliance with the obligation requires access to effective and impartial review by a court or tribunal, as well as merits review, of non-refoulement decisions.[18]

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

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

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires…**an opportunity for effective, independent and impartial review of the decision to expel or remove**…The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[19]

2.610 Similarly, the UN Committee Against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[20]

2.611 In relation to the ICCPR, in *Alzery v. Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of

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18 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 513.

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

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

non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

> As to the…absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, **effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning**. The absence of any opportunity for effective, independent review of the decision to expel in…[this case] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.[21]

2.612 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[22]

2.613 With reference to the above, the committee notes that the stated intention of the measures is that decisions regarding non-refoulement are made solely by the executive government rather than being subject to judicial review. Accordingly, the measure restricts access to a form of review which is required for compliance with Australia's non-refoulement obligations.

2.614 The purported implementation of Australia's non-refoulement obligations through executive action alone, without any capacity for independent review mechanisms to guard against potential breaches of Australia's non-refoulement obligations, is a limit on a peremptory norm of international law.

2.615 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations. The committee previously concluded that the amendments in Schedule 1 of the bill (now Act) are incompatible with Australia's obligations of non-refoulement under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).**

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

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

2.616 **Schedule 1 restricts the availability of judicial review, which operates as a potential safeguard against the risk that a person is sent to or returned to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment. The provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and the CAT.**

2.617 **The committee therefore reiterates its previous conclusion that the amendments in Schedule 1 of the bill (now Act) are incompatible with Australia's non-refoulement obligations under the ICCPR and the CAT on the basis that it removes access to an impartial review of non-refoulement decisions by a court or tribunal.**

2.618 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal and the courts.

Schedule 5 - Creating a new statutory framework to declare Australia's protection obligations

2.619 Schedule 5 of the Act amends the Migration Act to create a new statutory framework articulating Australia's unilateral interpretation of its protection obligations, rather than interpreting its protection obligations by reference to their definition in international law as was the previous approach.

2.620 Specifically, the amendments remove most references to the Refugee Convention.

2.621 However, in its previous analysis the committee noted that it is not for a state to unilaterally determine its obligations under a treaty after ratification.[23] Rather, treaties such as the Refugee Convention have a meaning in international law which is separate from domestic law concepts,[24] as well as its concern that the unilateral interpretation of Australia's international obligations as proposed by the amendments is inconsistent with accepted standards of international human rights law.

2.622 In summary, while the committee acknowledged the government's stated intention to continue to comply with Australia's non-refoulement obligations,[25] it was concerned that the proposed statutory framework would limit judicial review, in particular, the ability of individuals to seek judicial review of executive decisions that

23 Articles 26, 27 31(1) of the Vienna Convention on the Law of Treaties (VCLT).

24 Article 27 3 of the VCLT.

25 EM, Attachment A, 29.

may be inconsistent with this stated intention to comply with Australia's non-refoulement obligations.

2.623 The committee therefore requested the advice of the minister as to whether the proposed amendments in Schedule 5 are compatible with Australia's non-refoulement obligations under the ICCPR and the CAT.

Minister's response

Schedule 5 Refugees Convention Codification

1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 [the right to security of the person and the right to be free from arbitrary detention; the right to freedom of movement; the right to a fair hearing; the obligation to consider the best interests of the child], and particularly:

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

As the committee has noted, the Refugees Convention and its Protocol are not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee assesses the human rights compatibility of legislation. In the context of this Act, Refugees Convention issues have been raised and addressed in my responses to other Senate Committees.[26]

1.374 The committee therefore requests the advice of the minister as to whether the proposed amendments in Schedule 5 are compatible with Australia's non-refoulement obligations under the ICCPR and the CAT.

The amendments proposed in Schedule 5 to the Act deal with Refugees Convention issues. ICCPR and CAT are dealt with through other provisions of the Act.[27]

Committee response

2.624 **The committee thanks the Minister for Immigration and Border Protection for his response.**

26 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 31.

27 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 31.

2.625 However, the committee notes that the new statutory framework articulating Australia's unilateral interpretation of its protection obligations introduced in Schedule 5, impacts on Australia's human rights obligations under the seven core human rights conventions that do form part of the committee's mandate. The committee's analysis and request for information from the minister was in relation to these obligations.

2.626 Specifically, there is significant overlap between Australia's obligations under the Refugee Convention and obligations under the seven core human rights conventions.

2.627 First, Australia has obligations under the ICCPR and CAT not to send someone to a country where they face a real risk of serious forms of human rights violations (non-refoulement obligations).

2.628 Second, the non-refoulement obligation under the ICCPR and the CAT, often referred to as complementary protection, is generally considered to be broader than the non-refoulement obligations under the Refugee Convention. This is because it is possible that a person who faces a real risk of serious forms of human rights violations, if returned to their country of origin, may also have a well-founded fear of persecution and be entitled to protection as a refugee. If a person is found to be a refugee, then a protection visa may be issued entitling an individual to reside in Australia and not be returned to their country of origin so long as the visa remains valid.

2.629 The issue of a protection visa is therefore one safeguard against the risk that a person is returned in breach of Australia's non-refoulement obligations under the ICCPR and CAT.

2.630 This is particularly relevant given that some of the other safeguards against the risk of refoulement have been removed by the Act. For example, new section 197C provides that, in order to exercise the removal powers under section 198 of the Migration Act, an officer is not bound to consider whether or not a person who is subject to removal engages Australia's non-refoulement obligations before removing that person. This means that removal to another country is permitted even where a person may face a real risk of persecution, torture or other serious forms of human rights violations. The committee previously concluded that the power to remove persons from Australia, unconstrained by assessments of Australia's non-refoulement obligations, is incompatible with Australia's obligations under the ICCPR and the CAT.

2.631 Third, a person with refugee status is entitled to a range of specific rights under the Refugee Convention. Some of these rights overlap with Australia's general human rights obligations in relation to all persons within its territory (or otherwise in its jurisdiction).

2.632 Finally, the committee notes that the Senate committees to which the minister refers have a different role and function to the Parliamentary Joint

Committee on Human Rights. In exercising its legislative scrutiny function, the committee undertakes technical assessments of bills and legislation for compatibility with Australia's obligations under the seven core human rights treaties to which it is a party. While Parliamentary committees frequently consider and report on the same legislation and issues, this does not obviate the need for each of those committees to fulfil their discrete functions in service of the Parliament.

2.633 **In light of the information provided, the committee is unable to conclude that the statutory framework to declare Australia's protection obligations under Schedule 5 is compatible with human rights.**

2.634 **Additionally, the committee considers that the statutory framework to declare Australia's protection obligations, as currently formulated, may be incompatible with Australia's obligations of non-refoulement.**

2.635 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal and the courts.

Schedules 2 and 3—Temporary Protection Visas and Safe Haven Enterprise Visas

Multiple rights

2.636 The new visa classes engage and may limit a number of human rights including:

- non-refoulement obligations;[28]
- the right to health;[29] and
- the obligation to consider the best interests of the child and the right to the protection of the family.[30]

Introduction of Temporary Protection Visas and Safe Haven Enterprise Visas—inadequate statement of compatibility

2.637 The Act establishes a framework to allow for the introduction of TPVs and SHEVs.

2.638 In its previous analysis, the committee noted that details of the SHEVS such as eligibility requirements had not been set out in either the bill (now Act) or the statement of compatibility. These criteria are critical to an assessment of the human rights compatibility of each proposed visa class.

28 Article 3(1) of the CAT; Articles 6(1) and 7 of the ICCPR; Article 31 of the Refugee Convention.

29 Article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR).

30 Articles 17 and 23 of the ICCPR; articles 3 and 10 of the CRC.

2.639 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the proposed provisions for SHEVs are compatible with human rights.

Minister's response

> **Schedules 2 and 3 - Temporary protection visas and safe-haven enterprise visas**
>
> **1.378 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the proposed provisions for safe haven enterprise visas are compatible with human rights.**
>
> The details of Safe Haven Enterprise visas will come before the committee when the Safe Haven Enterprise visa regulations are finalised.[31]

Committee response

2.640 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.641 The committee notes that the government moved amendments in the Senate which set out the criteria for the grant of a SHEV.

2.642 The committee's usual expectation is that, where amendments have been made to proposed legislation, the legislation proponent will take into account the fact of those amendments in responding to issues raised by the committee concerning the human rights compatibility of proposed legislation.

2.643 **Noting the committee's previous statement that such criteria are critical to the assessment of the human rights compatibility of each proposed visa class, the committee will consider the human rights compatibility of Safe Haven Enterprise Visas once the relevant regulations are tabled and are examined by the committee in accordance with its usual examination of instruments of delegated legislation.**

Non-refoulement obligations

2.644 Australia has non-refoulement obligations, as described at [2.588] to [2.591] above.

Introduction of Temporary Protection Visas—proving claims for protection afresh

2.645 The amendments in Schedules 2 and 3 establish a framework to allow for the reintroduction of TPVs. Under the proposed arrangements, people who are found to engage Australia's non-refoulement obligations will be granted a TPV only for a period of up to three years at one time, rather than being granted a permanent protection visa.[32]

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31 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 24.

32 EM, Attachment A, 9.

2.646 The committee noted in its previous analysis that TPVs will require refugees to prove afresh their claims for protection every three years, as was the case under the previous TPV regime. In this respect, the international legal framework does provide for the cessation of refugee status or protection obligations where, for example, the conditions in the person's country of origin have materially altered such that the reasons for a person becoming a refugee have ceased to exist.

2.647 However, as noted by the United Nations High Commissioner for Refugees, the international protection regime 'does not envisage a potential loss of status triggered by the expiration of domestic visa arrangements'.[33] This means that the expiry of a visa should not, of itself, affect a person's refugee status. The committee noted that the statement of compatibility did not address whether there will be sufficient safeguards in place to ensure that any reapplication process takes account of the risk of refoulement if the person is denied continuing protection.

2.648 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the temporary nature of the proposed protection visas complies with Australia's obligations under the ICCPR and the CAT to not place any person at risk of refoulement.

Minister's response

> **1.382 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the temporary nature of the proposed protection visas complies with Australia's obligations under the ICCPR and the CAT to not place any person at risk of refoulement.**
>
> Each time an applicant applies for a Temporary Protection Visa (TPV) they will have their protection claims re-assessed. This process includes an assessment against Australia's obligations under the ICCPR and the CAT. As there is no limit to the number of TPVs that can be granted to a person in respect of whom Australia has protection obligations, the temporary nature of these visas does not increase the risk of refoulement, under either the ICCPR or the CAT.[34]

Committee response

2.649 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.650 As noted previously, the international protection regime does not envisage a potential loss of protection status as a result of the expiration of domestic visa

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

34 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 24.

arrangements. This means that the expiry of a visa should not, of itself, affect a person's refugee status.

2.651 The committee notes the advice of the minister that the temporary nature of these visas, and the requirement that refugees prove afresh their protection claims every three years, does not increase the risk of refoulement under the ICCPR or the CAT; and welcomes the minister's advice that the reapplication process includes an assessment against Australia's obligations under the ICCPR and CAT.

2.652 However, the committee notes that no further details have been provided about this assessment process and whether there are sufficient safeguards in place to protect against the risk that an individual is not removed in contravention of Australia's non-refoulement obligations.

2.653 In particular, as a person could now be required to go through the process of proving afresh their protection claims multiple times this could, in turn, increase the risk of refoulement if there are insufficient procedural and substantive safeguards in place. The committee notes that many procedural and substantive safeguards with respect to non-refoulement obligations have been removed. For example, the committee has previously concluded that the power to remove persons from Australia, unconstrained by assessments of Australia's non-refoulement obligations, is incompatible with Australia's non-refoulement obligations under the ICCPR and the CAT.[35]

2.654 **In the absence of further information, particularly as to the existence of procedural and substantive safeguards in respect of Australia's non-refoulement obligations, and in light of the concerns previously raised in relation to assessment processes, the committee considers that the requirement to prove afresh claims for protection is likely to be incompatible with the obligation not to place any person at risk of refoulement.**

2.655 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to provide a presumption in favour of renewing a TPV application. This presumption could be defeated in circumstances where the Australian government can prove that the conditions in the person's country of origin have materially altered such that the reasons for a person becoming a refugee have ceased to exist.

35 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77 - 78: Section 198 of the Migration Act sets out the circumstances in which the mandatory removal of an 'unlawful non-citizen' is authorised. New section 197C(1) of the Migration Act provides that it is irrelevant whether Australia has non refoulement obligations in respect of such a removal. The statement of compatibility for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 states that the purpose of this amendment is to ensure that removal powers are not 'constrained by assessments of Australia's non-refoulement obligations'.

Right to health and a healthy environment

2.656 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 a person's ability to exercise 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).[36]

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

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

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

Introduction of Temporary Protection Visas

2.659 As previously noted, the amendments in Schedules 2 and 3 establish a framework to allow for the reintroduction of TPVs. Under the proposed arrangements, people who are found to engage Australia's non-refoulement obligations will be granted a TPV for a period of up to three years at one time (rather than a PPV).[37]

2.660 The statement of compatibility noted that the right to health is engaged by the amendments, and that TPV holders are entitled to access Medicare and the Australian public health system.[38]

36 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14 on the right to the highest attainable standard of health, E/C.12/2000/4 (2000).

37 EM, Attachment A, 9.

38 EM, Attachment A, 17.

2.661 However, in its previous analysis the committee noted that the practical operation and consequences of TPVs may have significant adverse consequences for the health of TPV holders. TPVs will require refugees to prove afresh their claims for protection every three years. The committee also noted research showing that TPVs lead to insecurity and uncertainty for refugees which, in turn, may cause or exacerbate existing mental health problems, or cause anxiety and psychological suffering. Such research also indicates that restrictions on family reunion places further stress on TPV holders which may lead to mental health problems.[39]

2.662 The committee noted that these issues were not addressed in the statement of compatibility.

2.663 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of TPVs is compatible with the right to health, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, have a rational connection between the limitation and that objective, and are proportionate to achieving that objective.

Minister's response

1.388 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the right to health, and particularly:

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

As outlined in the statement of compatibility with human rights the arrangements were aimed at achieving the legitimate objectives of dissuading people from taking potentially life threatening journeys to Australia, as well as the need to maintain the integrity of Australia's migration system and protect the national interest. Both permanent protection visas and family reunion may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia.

The Government notes the committee's concerns regarding possible mental health problems for TPV holders but maintains there is a rational

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

connection between any limitations this policy may place on the right to health and a healthy environment and achieving these objectives, and that these limitations are reasonable and proportionate measures. As outlined in the statement of compatibility with human rights, all applicants will have access to Medicare and mainstream medical services. In addition they will have access to:

- the Government's Programme of Assistance for Survivors of Torture and Trauma (PASTT). PASTT provides direct counselling and related support services, including advocacy and referrals to mainstream health and related services;
    - in rural areas, PASTT has established rural, regional and remote outreach services to enable survivors of torture and trauma to access services outside metropolitan areas;
- the Government's Better Access initiative to receive rebates through Medicare should they wish to access selected mental health services provided by general practitioners, psychiatrists, psychologists and eligible social workers and occupational therapists; and
- the Mental Health Services in Rural and Remote Areas programme (MHSRRA) which provides rural and remote areas with more allied and nursing mental health services. The MHSRRA enables survivors of torture and trauma to access these services in areas of low or little mental health services.

Taking into account the fact that TPV holders will have access to Medicare and mainstream medical services, as well as the additional services listed above, any limitation on TPV holders' right to health is mitigated by the availability of these services, and is reasonable and proportionate to the objective of deterring people from making dangerous boat journeys to Australia.[40]

Committee response

2.664 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.665 The committee notes that the minister's response acknowledges the committee's particular concerns regarding the potential for TPVs to cause or exacerbate existing mental health problems, or cause anxiety and psychological suffering. However, the response argues that any limitation on the right to health is justifiable.

2.666 The committee notes the minister's advice that individuals on TPVs will have access to publicly funded health care services such as Medicare. However, while access to Medicare is clearly an important aspect of protecting the right to health, it

40 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 24-25.

does not fully mitigate against the health related harm (particularly psychological harm) that may be caused to individuals through the issuing of TPVs rather than providing permanent protection.

2.667 The committee notes the minister's advice that the objective of the measures is to dissuade people from taking potentially life threatening journeys to Australia, and to maintain the integrity of Australia's migration system and protect the national interest.

2.668 In previous reports on legislation the committee has accepted that these objectives could be considered to be legitimate objectives under international human rights law. However, the response does not provide evidence as to how the measures are rationally connected to that objective—that is, whether the measures in question are likely to be effective.

2.669 This question is relevant because, for example, the measure has not previously dissuaded persons who have arrived in Australia and are seen to be in need of Australia's protection from taking the journey to Australia.

2.670 The committee also notes that, even where a measure limiting human rights addresses a legitimate objective and is rationally connected to that objective, it must also be a proportionate means of achieving that objective in the sense of being the least rights restrictive means.

2.671 In this regard, the committee notes that no evidence has been provided in the response that would support a finding that TPVs are the least rights restrictive means to achieving that stated objective, particularly as they will be applied universally, without individual considerations, to all UMAs.

2.672 **The committee considers that Temporary Protection Visas (TPVs) engage and limit the right to health. Based on the information provided, the committee considers that TPVs may be incompatible with the right to health.**

2.673 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to ensure that a presumption in favour of renewing a TPV application exists. In addition, health services specifically targeted at TPV holders may be extended.

Right to protection of the family

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

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

Obligation to consider the best interests of the child

2.676 Under the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[41]

2.677 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.[42]

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

No family reunion with Temporary Protection Visa

2.679 The committee noted in its previous analysis that the proposed temporary protection regime provides that refugees granted TPVs will not be eligible to sponsor family members.[43]

2.680 The statement of compatibility identified this as engaging and potentially limiting the right to the protection of the family and the rights of the child. However, it provided no assessment of whether the measure is reasonable, necessary and proportionate in pursuit of a legitimate objective, nor offered evidence to establish how the rights of children to have their best interests considered is outweighed by the policy objectives of preserving the 'integrity of Australia's migration system' and the 'national interest'.

2.681 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of TPVs is compatible with the obligation to consider the right to the protection of the family, and with the best interests of the child, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, have a rational connection between the limitation and that objective, and are proportionate to achieving that objective.

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40 Article 3(1).

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

42 EM, Attachment A 12.

Minister's response

1.397 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the obligation to consider the right to the protection of the family, and with the best interests of the child, and particularly:

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

As stated in the statement of compatibility with human rights, the changes were aimed, among other things, at achieving the legitimate objectives of dissuading people, including minors, from taking potentially life threatening journeys to achieve resettlement for their families in Australia, maintaining the integrity of Australia's migration system and protecting the national interest. Allowing TPV holders who are minors to sponsor family members to migrate to Australia, would likely have the unintended consequence of increasing the number of minors attempting to journey to Australia illegally.

The Government therefore notes the committee's concerns but maintains there is a rational connection between any limitation this policy places on the best interest of the child and achieving these objectives, and that, bearing in mind the potential for boat journeys to Australia to be life threatening, these limitations are a reasonable and proportionate measure for achieving these objectives.[44]

Committee response

2.682 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.683 The committee notes that the response acknowledges the committee's concerns in relation to the limitation on the obligation to consider the best interests of the child.

2.684 However, while in a previous report the committee accepted that the stated objective could be a legitimate objective for human rights purposes, the response does not provide any further evidence as to why the measure may be considered to address a legitimate objective for the purpose of permissibly limiting a human right in this particular case. Further, it not does provide reasoning as to how the measure may be regarded as rationally connected to the stated objective.

44 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 25.

2.685 Also, in addressing whether preventing access to family reunion is a proportionate means of achieving this objective, no information was provided as to whether a less rights restrictive means of achieving the stated objective was available or was tried. The committee notes that in order to be a proportionate limitation on human rights the measure should be the least rights restrictive way of achieving that objective.

2.686 **The committee considers that the measure engages and limits the obligation to consider the best interests of the child as a primary consideration and the right to the protection of the family. Based on the information provided, the committee considers that the measure may be incompatible with these rights.**

2.687 In order to address the human rights compatibility issues raised above, the Migration Act could be amended to require the department to consider, on a case by case basis, applications by children to sponsor family members to travel to Australia.

Schedule 4—'Fast-track assessment process'

Multiple rights

2.688 Schedule 4 to the Act set up a 'fast track assessment process' for asylum seekers who arrived irregularly in Australia on or after 13 August 2012,[45] and gave the minister the power to extend this process to other groups of asylum seekers.[46]

2.689 The committee noted in its previous analysis that the measures in Schedule 4 of the bill (now Act) engage and limit a number of human rights, including:

- non-refoulement obligations;[47]
- the right to a fair hearing;[48] and
- the obligation to consider the best interests of the child.[49]

2.690 The analysis focused primarily on Australia's non-refoulement obligations, given the serious and irreversible nature of the harm that may result from the breach of these obligations.

2.691 The analysis also noted that the statement of compatibility did not provide a comprehensive analysis of whether the fast-track assessment process was compatible with the right to a fair hearing and the obligation to consider the best interests of the child.

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45 EM, Attachment A, 19.

46 EM, Attachment A, 19.

47 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Article 31 of the Refugee Convention.

48 Article 14 of the ICCPR.

49 Articles 3 and 10 of the Convention on the Rights of the Child (CRC).

2.692 The committee therefore requested further advice from the Minister for Immigration and Border Protection as to whether the 'fast track assessment process' is compatible with the obligation to consider the best interests of the child and the right to a fair hearing, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, have a rational connection between the limitation and that objective, and are proportionate to achieving that objective.

Minister's response

Schedule 4 - Fast Track Assessment Process and limitation and exclusion of merits review

1.401 The committee therefore requests the further advice of the Minister for Immigration and Border Protection as to whether 'fast track assessment process' is compatible with the obligation to consider the best interests of the child and the right to a fair trial, and particularly:

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

Schedule 4 established a new fast track assessment process for 'fast track applicants', defined as protection visa applicants who entered Australia as unauthorised maritime arrivals on or after 13 August 2012. The Government's objective was to establish an efficient and cost effective process for determining protection visa applications which deters applicants from raising unmeritorious protection claims as a means to delay departure from Australia. As stated in the Explanatory Memorandum to the Act, the measures were aimed at achieving the legitimate objective of enhancing the integrity of Australia's protection status determination framework and preventing abuse of process.

Right to a fair trial

As acknowledged in the Statement of Compatibility with Human Rights, Article 14 of the ICCPR expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to the administrative assessment of non-refoulement obligations. However, to the extent that Article 14 is engaged, the Government is of the view that the amendments relating to the fast track assessment process are compatible with Article 14.

All fast track applicants, including children, will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. As part of this process, all applicants will be afforded procedural fairness and the opportunity to articulate their protection

claims, including during an interview, with the assistance of an interpreter if required.

Fast track applicants who receive a fast track reviewable decision, as defined in new section 473BB, will be automatically referred to the Immigration Assessment Authority (IAA) which will conduct a limited form of merits review and will either affirm the decision under review or remit it to my department with directions. The IAA will conduct independent and impartial reviews of decisions and will comply with the requirement to provide procedural fairness. In addition, the IAA has the discretion to consider new information and conduct an interview in exceptional circumstances, for example, where there is a change in circumstances or new information which suggests that there is an increased risk to the applicant.

It is the view of the Government that there is no express requirement under the ICCPR or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide merits review in the assessment of non-refoulement obligations. Consistent with this position, the Government considers that the obligation in Article 14, where it is engaged, would be satisfied if either merits review or judicial review is available to an applicant. As stated in the Statement of Compatibility with Human Rights, the Executive Committee of the UNHCR has expressed the view that asylum processes should satisfy basic requirements including the ability to seek a reconsideration of a protection status determination decision from either an administrative or judicial body.

It is therefore the view of the Government that the fast track assessment process is compatible with Article 14 of the ICCPR as, following a robust and fair assessment of their protection claims, all fast track applicants have the ability to seek judicial review. In addition, the fast track assessment process provides the further safeguard, for the majority of fast track applicants, of access to merits review conducted by the IAA. Finally, all applicants who are refused the grant of a protection visa on character or security grounds have access to merits review conducted by the Administrative Appeals Tribunal (AAT).

Where merits review is not provided to excluded fast track review applicants, the Government considers this to be a reasonable and proportionate measure consistent with the stated objective. This position is discussed in detail below.

Best interests of the child

Article IO of the CRC requires that where a child makes an application for family reunification, that application is dealt with positively, humanely and expeditiously. To the extent that Article 10 is engaged by the amendments relating to the fast track review process, the Government is of the view that the amendments are compatible with this obligation as all fast track applications will be dealt with positively, humanely and expeditiously.

However, the Government has focused this response on Article 3 of the CRC as the Committee's question at 1.401 relates specifically to Article 3 of the CRC and the best interests of the child.

Article 3 of the CRC requires that the best interests of the child be a primary consideration in all actions concerning children. As stated in the Statement of Compatibility with Human Rights, the Government is committed to acting in accordance with Article 3 of the CRC and has established policies and procedures for the fast track assessment process that give effect to this commitment.

First, as part of the fast track assessment process, the government is committed to providing application support through the Primary Application Information Service (PAIS) to those considered most vulnerable including all unaccompanied minors. Access to PAIS is an important safeguard, consistent with the obligation in Article 3, as it ensures that vulnerable children have the necessary support to articulate their claims for protection during the fast track assessment process.

Secondly, all fast track applicants, including children, will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. The assessment of protection claims made by, or on behalf of, a child will continue to be conducted in an age-sensitive manner that recognises the special needs of children. As noted in the Statement of Compatibility with Human Rights, this includes providing unaccompanied minors with the support of an independent observer during the protection visa interview.

Thirdly, the majority of fast track decisions will be automatically referred to the IAA which will conduct a merits review of the decision. However, in limited circumstances, a fast track application made by or on behalf of a child may be excluded from the fast track merits review process where the applicant falls within the definition of excluded fast track review applicant in amended section 5(1). Where the child is listed as a dependent on the application of his or her parent, or the child is an applicant in his or her own right but has the support of adult family members throughout the fast track process, the Government's position is that any limitation on merits review, in the limited circumstances where the child is deemed to be an excluded fast track review applicant, is reasonable and proportionate to the Government's objective of enhancing the integrity of the protection status determination process.

However, in the case of vulnerable persons such as unaccompanied minors, new section 473BC provides an important safeguard as I have the ability to determine via legislative instrument that certain coho1is of people who would otherwise be excluded fast track applicants will receive access to the IAA. It is intended that a legislative instrument ensure that all applicants receiving PAIS, which will include all unaccompanied minors, are reviewed by the IAA. This safeguard ensures that the best interests of the child are a primary consideration in determining access to merits review.

> In establishing the fast track assessment process, the Government has ensured that the best interests of the child, which include receiving a timely outcome and having their welfare sensitively and appropriately managed throughout the process, are a primary consideration. However, the Government notes the integrity, efficiency and cost effectiveness of the protection status determination framework are also primary considerations. Therefore, to the extent that Article 3 is limited by the amendments relating to the fast track assessment process, the Government is of the view that this outcome is reasonable and proportionate to the stated objective.[50]

Committee response

2.693 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.694 The committee welcomes the commitment by the minister that the fast track assessment process will still afford applicants a fair and robust assessment of their protection claims.

2.695 However, the committee considers that the response has not demonstrated that there are sufficient safeguards in this expedited process to ensure that there is a fair hearing or that the obligation to consider the best interests of a child applicant are considered as a primary consideration.

2.696 In particular, the committee notes that some applicants may be excluded from any form of external review under the expedited process.

2.697 Further, the review process provided by the new Immigration Assessment Authority (IAA) is quite limited and may not ensure the right to a fair hearing or that the best interests of the child are considered. This is because nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.

2.698 In addition, the reviewers will no longer be statutory appointments, as they will be employees under the *Public Service Act 1999.* This affects the independence of such a review and therefore the impartiality of such a review. While the committee notes that judicial review is still available in the Australian context, judicial review is limited to review of decisions as to whether the decision was lawful (that is, within the power of the decision maker) and does not consider the merits of a decision (that is, whether the decision was the correct or preferable decision).

50 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 26-28.

2.699 In light of the above, the committee does not consider that the minister's response has provided sufficient reasoning or evidence to establish the fast track assessment process is the least rights restrictive way of achieving its stated objective.

2.700 **The committee considers that the measures limit the right to a fair hearing and the obligation to consider the best interests of the child. The committee considers that the fast track assessment process may be incompatible with the rights of the child and the right to a fair hearing.**

2.701 In order to address the human rights compatibility issues raised above, the Migration Act could be amended to provide a fast track process that takes into account the best interest of the child and provide a full assessment of protection claims in accordance with the fair hearing standards set out in article 14 of the ICCPR include a right to review before the Administrative Appeals Tribunal

Non-refoulement obligations

2.702 Australia has non-refoulement obligations, described at [2.131] to [2.591] above.

Limitations on independent merits review and 'fast track assessment'

2.703 As noted above, schedule 4 to the Act set up a 'fast track assessment process' for asylum seekers who arrived irregularly in Australia on or after 13 August 2012,[51] and gave the minister the power to extend this process to other groups of asylum seekers.[52]

2.704 This class of asylum seekers no longer have access to the Refugee Review Tribunal (RRT), but instead have access to a new statutory body, the IAA, to be constituted by members of the RRT, to review their refugee claims. Reviews of decisions under this new 'fast-track' system are to be conducted on the papers rather than at a hearing before the IAA. The IAA would be unable to consider new information at the review stage unless there are exceptional circumstances.[53]

2.705 The committee noted in its previous analysis that, while there is scope for Australia to determine its own processes for refugee status determination, independent, effective and impartial review of claims to protection against non-refoulement is a fundamental aspect of its international human rights obligations.

2.706 In this regard, it is unclear whether the proposed fast-track process will ensure that genuine claims for protection are identified and is capable of ensuring that the true and correct decision is arrived at. The committee noted that compliance with the obligation of non-refoulement requires that sufficient procedural and substantive safeguards are in place to ensure a person is not

51 EM, Attachment A 19.

52 EM, Attachment A 19.

53 EM 133.

removed in contravention of this obligation, given the irreversible nature of the harm that may result.[54]

2.707 The committee therefore sought the advice of the minister as to whether the proposed limitation on merits review through the creation of the IAA is compatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review of claims to protection against non-refoulement.

Minister's response

1.408 The committee therefore seeks the advice of the minister as to whether the proposed limitation on merits review through the creation of the Immigration Assessment Authority (IAA) is compatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review of claims to protection against non-refoulement.

Right to merits review of an assessment of non-refoulement obligations

As stated earlier, the Government is of the view that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of non-refoulement obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, the Government is of the view that these obligations are satisfied where either merits review or judicial review is available. Although merits review may be an important safeguard, there is no obligation to provide merits review where judicial review is available.

Article 13 of the ICCPR states:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Government's position in relation to Article 13 is that the obligation only applies to persons considered to be lawfully in the territory of Australia. Where persons are considered to be lawfully in the territory, the obligation is satisfied by the provision of a robust, open and transparent assessment of non-refoulement obligations by the department followed in most cases by review by the IAA and in all cases by the opportunity for the applicant to seek judicial review in the case of an adverse decision.

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

To the extent that obligations relating to review under Article 2 of the ICCPR or Article 14 of the ICCPR are engaged in immigration proceedings, the Government's position is that these obligations are also satisfied where access to judicial review is available. Similarly, there is no express procedural obligation in Article 3 of the CAT to provide merits review where non-refoulement obligations have been considered and properly assessed by the department and where judicial review is available.

Where the State Party elects to provide merits review in the assessment of non-refoulement obligations, there is no express obligation to provide a full de nova review of the initial decision. Both the ICCPR and the CAT permit the State Party to determine the appropriate mechanism for merits review where sufficient safeguards are in place.

The fast track assessment process and the Immigration Assessment Authority (IAA)

All fast track applicants will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. During this process all applicants will be afforded procedural fairness and the opportunity to articulate their protection claims, including during an interview with the assistance of an interpreter if required. All fast track applicants who are refused the grant of a protection visa will receive the reasons for the decision and have the ability to seek judicial review of the decision.

In addition, fast track review applicants who are refused the grant of a protection visa, other than those who fall within the definition of 'excluded fast track review applicant', will have automatic access to independent and impartial merits review conducted by the IAA. The IAA will conduct a limited form of merits review and will either affirm the decision under review or remit it to the department for reconsideration. Although the merits review model of the IAA differs from that of the RRT, the Government's position is that the IAA model is the appropriate model for processing protection claims for persons who entered Australia as unauthorised maritime arrivals on or after 13 August 2012.

In many cases review by the IAA will be limited as it will be conducted on the information provided by the applicant to the department and it will not involve an interview. However, new section 473DD allows the IAA to consider new information in exceptional circumstances and new section 473DC provides the IAA with the discretion to conduct an interview for the purposes of getting new information.

These provisions provide important safeguards which ensure that review by the IAA is effective and that all protection claims are adequately considered prior to any removal of a refused applicant from Australia. As stated in the Statement of Compatibility with Human Rights, the Government intends that the threshold of 'exceptional circumstances' will be satisfied where there is new information that indicates that the applicant may now engage Australia's protection obligations.

> The Government is of the view that the provision of a fair and robust initial assessment by the department and access to judicial review for all fast track applicants satisfies Australia's obligations under the ICCPR and the CAT relating to review of administrative decisions. The Government also considers that access to a limited form of merits review by the IAA in the majority of cases is an additional safeguard that further supports compatibility with such obligations.
>
> Finally, as stated in the Statement of Compatibility of Human Rights, the Government's objective in establishing the IAA is to improve the integrity, efficiency and cost effectiveness of merits review and to prevent abuse of process. To the extent that merits review is limited by the proposed amendments, the Government considers that the limitation is a rational, reasonable and proportionate measure to achieve the Government's stated objective. However, for the reasons provided earlier, the Government does not consider that any such limitation would be incompatible with Australia's obligations under the ICCPR or the CAT relating to review of non-refoulement assessments.[55]

Committee response

2.708 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.709 The committee notes the minister's advice that the government does not consider that the ICCPR and CAT expressly require merits review of non-refoulement decisions.

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

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

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

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55 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 28-30.

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[56].

2.713 Similarly, the UN Committee Against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[57]

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

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[58]

2.715 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the VCLT.[59]

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

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

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

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

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

2.717 Applied to the Australian context, the committee has considered numerous cases, like the present case, where legislation has provided for judicial (rather than merits) review of non-refoulement decisions. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977*, and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

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

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

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

2.721 The committee notes that the minister states that fast track review applicants who are refused the grant of a protection visa, other than those who fall within the definition of 'excluded fast track review applicant', will have automatic access to independent and impartial, effective, merits review conducted by the IAA. Thus, notwithstanding the minister's view as to the absence of a requirement for merits review under ICCPR and CAT, the minister states that limited merits review by the IAA, combined with assessment by the department and the availability of judicial review, is sufficient to satisfy any requirement under international human rights law.

2.722 However, as acknowledged in the minister's response, the merits review conducted by the IAA will be limited as it will be conducted on the information provided by the applicant to the department and will not involve an interview. Further, the IAA will only be able to reaffirm the decision or remit it to the department (rather than substitute the decision for the correct or preferable decision).

2.723 The committee considers that, as the fast track merits review is only conducted on the papers and without the affected person being able to make further

representations or be present, there are significant questions as the effectiveness of the processes. The features of the system place it substantially apart from other forms of merits review in Australia, where a tribunal member generally considers any additional material an applicant may wish to provide, comes to their own decision about the facts of the case and may substitute their own decision for the decision originally made.

2.724 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations. The committee notes that the measure restricts merits review of non-refoulement decisions through the creation of the Immigration Assessment Authority (IAA) which will only perform a limited form of merits review. The committee considers that the measure is therefore likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.**

2.725 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal and the courts.

Exclusion from independent merits review

2.726 Under the system, of 'fast track assessment', a person can be designated by the minister as an 'excluded fast track review applicant' because they are said to 'present baseless or unmeritorious claims, or have protection elsewhere'.[60] The minister is able to specify a person or class of persons to fall within the definition of an excluded fast track review applicant.[61] 'Excluded fast track applicants' include persons:

- considered to have the right to enter or reside in a third country;
- considered to have made a 'manifestly unfounded claim for protection';
- who were previously refused protection in Australia or elsewhere by UNHCR or another country; or
- considered to have arrived on a 'bogus' document 'without reasonable explanation'.[62]

2.727 Under the amendments, an excluded fast track review applicant would not have access to any form of merits review of the minister's decision.[63]

60 EM, Attachment A, 19.

61 EM, Attachment A, 21.

62 EM, Attachment A, 19 - 21.

2.728 However, as set out above at paragraphs [2.709] to [2.720] the provision of 'independent, effective and impartial' merits review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.[64] An internal departmental review system, by its nature, lacks the requisite degree of independence required under international human rights law to provide a sufficient safeguard.

2.729 The committee therefore considered that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement.

Minister's response

1.412 **The committee therefore considers that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement.**

Excluded fast track review applicants

The Government is of the view that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of non-refoulement obligations, nor does lack of merits review amount to refoulement.

Clarification regarding internal departmental review

At paragraph 1.411 of the Committee's report, the Committee refers to an internal departmental review system in the excluded fast track review context. I would like to take this opportunity to clarify the internal processes that will apply to excluded fast track review applicants.

Prior to finalising a case involving a possible excluded fast track review applicant and in addition to the department's ordinary quality control checks, such cases will undergo a further legal check of the process within the department. The legal process check will form part of the department's quality control procedures and will be conducted prior to the decision being finalised by the delegate. The legal process check will ensure that draft decisions have adhered to basic administrative law requirements; it will not undertake a 'review' by considering any new

63 EM 8.

64 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45, at 49-51, paragraphs [1.188] to [1.199] (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament* (18 March 2014) 51, at 55-57, paragraphs [3.41] to [3.47] (comments on minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

information against the previous assessment of the fast track applicant's protection claims.[65]

Committee response

2.730 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.731 The committee notes the minister's response that the government does not consider that the ICCPR and CAT expressly require merits review of non-refoulement decisions.

2.732 However, the committee also notes that it has consistently taken the contrary view that merits review is required as a matter of international law.

2.733 As explained at [2.709] to [2.720] above, international jurisprudence requires that there is 'effective review' of non-refoulement decisions. Given that judicial review in the Australian context is only able to consider whether a decision was lawful, merits review is also required in order for review to be 'effective' as required under international human rights law. As the measure removes independent merits review, it follows that the measure is incompatible with Australia's obligations of non-refoulement.

2.734 The committee further notes that the minister has provided some information to clarify internal review processes.

2.735 However, the fact that such internal processes are limited to a 'legal check' and will not consider new information may limit the effectiveness of such processes as an internal departmental safeguard. This is particularly of concern given that external merits review is removed through this provision.

2.736 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations. The committee has previously concluded that the exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement.**

2.737 **The committee notes that the measure removes merits review for excluded fast track review applicants. The committee therefore reiterates its conclusion that the exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations to ensure effective and impartial review by courts or tribunals, including merits review, of non-refoulement decisions.**

2.738 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal and the courts.

65 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 30.

Schedule 6 – unauthorised maritime arrivals and new born children

Obligation to consider the best interests of the child

2.739 Under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration; see [2.676] to [2.678] above.[66]

The right to nationality

2.740 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the ICCPR.[67] Accordingly Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born.

2.741 This is consistent with Australia's obligations under article 1(1) of the Convention on the Reduction of Statelessness 1961 which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless.[68]

Legal status of children born to asylum seekers – designating children as unauthorised maritime arrivals

2.742 Schedule 6 designates children born to parents who arrived by sea after 13 August 2012 as 'unauthorised maritime arrivals' (UMAs), the same designation under the Migration Act as their parents, and could allow them to be subject to transfer or continued detention at an offshore processing country. The statement of compatibility assesses the proposed measure as compatible with the obligation to consider the best interests of the child.

2.743 In its previous analysis the committee noted that designating a child as an UMA has implications for the rights of a child beyond issues of family unification, and considered that the proposed measure potentially limits the obligation to consider the best interests of the child as a primary consideration. This is because it allows such children to be treated as an UMA and accordingly be subject to offshore detention and processing. In this regard, the committee has previously raised serious human rights concerns in relation to the offshore detention and processing regime.[69]

2.744 Further, the committee had concerns that the proposed measure may result in some of these children becoming stateless, depending on the laws relating to nationality in their parents' country of origin.

2.745 The committee therefore requested advice from the Minister for Immigration and Border Protection as to whether the designation of children as

66 Article 3(1) of the CRC.

67 Article 24(3) of the ICCPR.

68 Article 1 of the Convention on the Reduction of Statelessness 1961.

69 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation* (June 2013).

'unauthorised maritime arrivals' is compatible with the obligation to consider the best interests of the child and the right to acquire a nationality, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, have a rational connection between the limitation and that objective, and are proportionate to achieving that objective.

Minister's response

Schedule 6 - Children of unauthorised maritime arrivals

1.421 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the designation of children as 'unauthorised maritime arrivals' is compatible with the obligation to consider the best interests of the child and the right to acquire a nationality, and particularly:

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

Best Interests of the Child

The amendments proposed in the Bill clarify that children born to an unauthorised maritime arrival (UMA) in Australia or a Regional Processing Country (RPC) are also UMAs. However, they do not alter the need to conduct a case-by-case assessment of a child's best interests for each child liable for transfer to a RPC, nor do they impose a limitation on the obligation to consider the best interests of the child in ensuing processes. By clarifying that children have a status which is consistent with that of their parents, the proposed amendments recognise the central importance of family in considering a child's best interests, so reducing the prospect of family separation, as in most cases both parents are also UMAs.

The best interests of each UMA child are considered prior to any action to transfer the child to a RPC through a Pre-Transfer Assessment and an additional Best Interests Assessment for Transferring Minors to a RPC (Best Interests Assessment). These assessments support the application of sections 198AD and 198AE of the Act, that is, they are used to consider whether it is reasonably practicable to transfer a minor or whether they should be referred to me for possible consideration of my public interest discretion to exclude the minor from being transferred to a RPC. In particular, the Best Interests Assessment is used to consider whether appropriate support and services are available in the RPC to meet the needs of the individual child. The assessment identifies whether there are barriers to the minor being transferred to a RPC, and, if it is considered not reasonably practicable at that time, the minor may be recommended for consideration for transfer at a later date.

The amendments achieve a legitimate objective of strengthening the government's existing IMA policies, which are aimed at deterring IMAs from seeking to enter Australia illegally. They do this by clarifying that the children of UMAs, born in Australia or in a RPC, have a migration status consistent with their UMA parent(s). It is the government's view that the amendments do not impose limitations in respect of the best interests of the child.

Right to a nationality

The proposed amendments in the Bill do not affect Australian citizenship law. In particular, a UMA born in Australia will continue to have access to Australian citizenship if they would otherwise be stateless.

If a UMA child born in Australia has never been a citizen or national of any country, and is not entitled to the citizenship or nationality of a foreign country, he or she is eligible for Australian citizenship by conferral under the statelessness provision [subsection 21(8) of the Australian Citizenship Act 2007 (the Citizenship Act)]. Applications made pursuant to subsection 21(8) are fee-free. A person does not need to be in Australia to lodge an application for Australian citizenship, nor when an application made under subsection 21(8) is decided. Furthermore, the general residence requirement (Section 22 of the Citizenship Act) has no application to such applications under subsection 21(8). Stateless children born in Australia to UMAs who wish to apply for Australian citizenship are required to follow the same application processes and meet the same eligibility requirements as any other stateless person born in Australia.

Not all children born to UMA parents in Australia will be eligible for Australian citizenship under the statelessness provisions, because not all UMAs are stateless. In many cases, a child born in Australia or a RPC to a UMA parent who does have a nationality will be eligible for the same citizenship held by their father and/or mother.[70]

Committee response

2.746 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.747 The committee notes that the minister's response does not consider that the measure limits the obligation to consider the best interests of the child.

2.748 However, the committee is of the view that the designation of the child as a UMA limits the obligation to consider their best interests as the primary consideration. This is because designation as a UMA allows children to be subject to offshore detention and processing.

70 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 32.

2.749 The committee further notes that credible reports have emerged regarding the harsh conditions in regional processing countries (RPCs), including allegations of serious abuse against children as well as the negative psychological impact on children in such detention. This context renders it more problematic to assert that being designated as an UMA and accordingly being liable to transfer to a RPC does not limit the obligation to consider the best interests of the child as a primary consideration.[71]

2.750 The committee notes that, following from the view that the right is not limited, the response does not provide any evidence to establish that the measure is nevertheless a justifiable limitation on the obligation to consider the best interests of the child. However, it notes that the measure does not alter the need to conduct a case-by-case assessment of a child's best interests for each child liable for transfer to a RPC.

2.751 However, such an assessment is a matter of administrative discretion and not a statutory requirement. There is no requirement that a child not be transferred to a RPC if it is not in their best interests, or that the minister exercise his discretion not to transfer a child to a RPC. As such, the committee considers that this is an insufficient safeguard for the purpose of international human rights law.

2.752 **In relation to the right of a child to a nationality, the committee notes the minister's advice that children would still be able to acquire Australian citizenship under the Citizenship Act if they would otherwise be stateless. The committee considers accordingly that the measure is likely to be compatible with the right of the child to a nationality.**

2.753 **In relation to the obligation to consider the best interests of the child, the committee considers that the designation of children born in Australia or in a Regional Processing Country as an Unauthorised Maritime Arrival limits the obligation to consider the best interests of the child as a primary consideration.**

2.754 **The committee considers that the measure may be incompatible with this obligation.**

2.755 In order to address the human rights compatibility issues raised above, the Migration Act could be amended, to require that a child born in Australia is not subject to transfer to offshore processing and detention.

71 See Senate Standing Committees on Legal and Constitutional Affairs, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (11 December 2014). See also submissions to the Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, from the Office of the United Nations High Commissioner for Refugees (UNHCR) and Save the Children Australia, at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions.

Schedule 7—cap on protection visas

Right to security of the person and freedom from arbitrary detention

2.756 Article 9 of the ICCPR provides for the right to security of the person and freedom from arbitrary detention. This includes the right of a person:

- to liberty and not to be subjected to arbitrary arrest or detention;
- to security;
- to be informed of the reason for arrest and any charges;
- to be brought promptly before a court and tried within a reasonable period, or to be released from detention; and
- to challenge the lawfulness of detention.

2.757 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those that are in accordance with procedures established by law, provided that the law itself and the enforcement of it are not arbitrary.

Ministerial power to cap protection visas

2.758 Schedule 7 enables the minister to cap the number of protection visas that can be issued in any year. The statement of compatibility noted that the measure is in response to the recent High Court decision in *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24,[72] in which the court held that the minister did not have the power, under section 85 of the Migration Act, to limit the number of protection visas that may be granted in a specified financial year. The statement of compatibility stated that the cap is consistent with the right not to be arbitrarily detained because the protection claim will continue to be processed (notwithstanding that it will be denied due to the cap), and the '[m]inister can consider alternative ways to release someone from detention if they are found to engage Australia's protection obligations but cannot be granted a protection visa because of a cap'.[73]

2.759 In its previous analysis the committee noted its concern that the cap may result in a breach of the prohibition against arbitrary detention if a discretion to issue another visa type and to release a person found to engage Australia's protection obligation is not exercised. In this respect, the committee considered that the ministerial power to cap protection visas is a limitation on the right to freedom from arbitrary detention. The statement of compatibility did not assess any such limitation.

2.760 The committee therefore sought the further advice of the Minister for Immigration and Border Protection as to whether the cap is compatible with the

72 EM, Attachment A, 31.

73 EM, Attachment A, 32.

right to freedom from arbitrary detention, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, have a rational connection between the limitation and that objective, and are proportionate to achieving that objective.

Minister's response

Schedule 7 - Capping protection visas

Right to security of the person and freedom from arbitrary detention

1.427 The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to whether the cap is compatible with the right to freedom from arbitrary detention, and particularly:

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

It is the view of the Government that a person would not be kept in detention simply because a cap on certain visa grants was in place, accordingly there is no incompatibility between the capping provision and the right to freedom from arbitrary detention.

The proposed amendment to ensure that I am able to place a statutory cap on the Onshore component of the Humanitarian programme is aimed at achieving the legitimate objective of appropriately managing the Humanitarian programme. In the past, when more Protection visas than the Humanitarian programme allowed for were granted, it meant that there were fewer visa grants in the Special Humanitarian programme. This reduced places available from those people who waited offshore, and provided an incentive for IMAs to use people smugglers to get to Australia. It is appropriate for the Government to be able to manage the proportion of visas granted onshore and offshore, noting that the proposed amendments do not require me to place a cap, nor do they impose a cap, rather they ensure that I am able to should I so choose.[74]

Committee response

2.761 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.762 The committee notes that the government moved amendments in the Senate to provide that the ministerial power to determine the maximum number of

74 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 16 April 2015) 34.

visas that may be granted in a specified financial year is not to be applied in respect of TPVs or SHEVs.

2.763 The committee notes that the amendments are directly relevant to the committee's consideration of whether the cap on visas is compatible with the right to freedom from arbitrary detention. As noted above, the committee was concerned that the cap on the issue of protection visas may result in a breach of the prohibition against arbitrary detention, if a discretion to issue another visa type and to release a person found to engage Australia's protection obligations were not exercised.

2.764 The committee's usual expectation is that, where amendments have been made to proposed legislation, the legislation proponent will take into account the fact of those amendments in responding to issues raised by the committee concerning the human rights compatibility of proposed legislation.

2.765 **Given the amendments moved by the government in relation to the visa cap, the committee considers the measure capping the amount of protection visas that can be issued is likely to be compatible with the right not to be arbitrarily detained.**

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 24 September 2014

Purpose

2.766 The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the bill) made amendments to the *Migration Act 1958* (the Migration Act), including to:

- strengthen existing powers to grant or cancel a visa on character grounds under section 501 of the Migration Act by:
    - adding additional grounds on which a person will be taken to fail the character test;
    - amending the existing definition of 'substantial criminal record' to provide that a person will be taken to have a substantial criminal record (and therefore fail the character test) if they have received two or more sentences of imprisonment that, served concurrently or cumulatively, total 12 months or more (down from the current two years);
    - broadening existing powers to allow refusal to grant or cancellation of a visa where the minister reasonably suspects a person has been, or is involved or associated with, a group, organisation or person that the minister reasonably suspects is involved in criminal conduct;
    - inserting a new power to make cancellation of a visa mandatory where the visa holder is in prison and fails the character test on specified grounds;
    - providing that where a person has been pardoned for a conviction and the effect of the pardon is that the person is taken never to have been convicted of the offence, the person will fail the character test; and
    - providing that a person will be considered to have a substantial criminal record (and fail the character test) if they have been found by a court to be not fit to plead but the court nonetheless found that the person committed the offence, and as a result they have been detained in a facility or institution.

2.767 The bill also added to the existing general cancellation powers in sections 109 and 116 of the Migration Act, including:

- introducing a new ground for visa cancellation if:
    - the minister is not satisfied as to a person's identity; or

- incorrect information was given by, or on behalf of, the visa holder at any time (whether it was in relation to this visa or another visa) to any person involved in the visa grant. Incorrect information is not defined;

- strengthening the minister's personal powers to cancel a visa;
- enabling the minister to personally set aside the decision of a review tribunal and substitute his or her own decision to cancel a visa; and
- strengthening provisions to make it clear that if the minister exercises a personal power to cancel a visa, that decision is not merits reviewable.

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

Background

2.769 The committee previously considered the bill in its *Nineteenth Report of the 44th Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether a number of measures in the bill were compatible with human rights.[1]

2.770 The bill finally passed both Houses of Parliament on 26 November 2014 and received Royal Assent on 10 December 2014, and became the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (the Act).

Expansion of visa cancellation powers

2.771 The committee considers that the expansion of visa cancellation powers engages a number of human rights and related obligations including non-refoulement obligations, the right to liberty and the right to freedom of movement.

Non-refoulement obligations and the right to an effective remedy

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

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

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

the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

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

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

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

2.776 In its previous analysis, the committee noted that a consequence of a visa being refused or cancelled is that the person is an unlawful non-citizen and is subject to removal from Australia. A person whose visa is refused or cancelled on character grounds (including under the expanded powers introduced by this bill) is prohibited from applying for another visa.[5] Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

2.777 The committee noted that there is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia. While the committee welcomed the minister's stated commitment to ensuring no one who is found to engage our non-refoulement

3 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

4 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 201, 513.

5 A person may apply for a protection visa or a Removal Pending Bridging Visa. However, the visa is temporary and applies so long as the minister is satisfied that the person's removal is not reasonable practicable. In addition, if the visa that was cancelled was a protection visa, the person will be prevented from applying for another protection visa unless the minister exercises a personable, non-compellable power to do so. A person is also not entitled to apply for a Removal Pending Bridging Visa—the minister may invite the person to apply for the visa and this is a personal, non-compellable power.

obligations will be removed, this will depend solely on the minister's personal non-compellable discretion. Additionally, the committee noted that Australia may have non-refoulement obligations even in circumstances where the visa holder has not made a claim for protection or the person is not covered by the Refugee Convention.[6]

2.778 The obligation of non-refoulement and the right to an effective remedy require an opportunity for effective, independent and impartial review of the decision to expel or remove.[7] In this regard, the committee noted that there is no right to merits review of a decision that is made personally by the minister.

2.779 As the committee noted previously, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[8] The committee noted that review mechanisms are important in guarding against the irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

2.780 The committee therefore considered that, to the extent that 'independent, effective and impartial' review, including merits review, is not provided in relation to non-refoulement decisions, the proposed expansion of visa cancellation powers may be incompatible with Australia's non-refoulement obligations.

2.781 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the expanded visa cancellation powers or decisions to remove a person once a visa has been cancelled are subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

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6 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

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

8 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament* (11 February 2014), paragraphs [1.89] to [1.99]. See also *Fourth Report of the 44th Parliament* (18 March 2014) paragraphs [3.55] to [3.66] (both relating to the Migration Amendment (regaining Control Over Australia's Protection Obligations) Bill 2013).

Minister's response

> Whilst noting the committee's concerns, it is the Government's position that while merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of non-refoulement obligations.
>
> As stated previously, Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. Expanded cancellation powers do not alter the framework within which decisions are made. Where a delegate of the Minister makes a decision to cancel or refuse a visa under section 501 of the *Migration Act 1958* (Act), that decision is merits reviewable through the Administrative Appeals Tribunal (AAT). At either the primary decision or review stage, non-refoulement obligations must be considered as part of the requirement to exercise the discretion to refuse or cancel a visa. Further, both departmental delegates and AAT members are bound by Ministerial Direction 65, which in part requires non-refoulement obligations to be considered. While personal decisions of the Minister are not merits reviewable, such decisions can be appealed to the Federal Court on the basis the Minister has made an error of law when making the decision. Further, there are other mechanisms within the Act which provide the Government with the ability to address non-refoulement obligations before removal. This occurs through the protection visa process or the Minister's personal public interest powers in the Act.
>
> The amendment does not, and is not intended to, affect opportunities set out elsewhere in the Act which enable the Government to be satisfied that a person's removal will not breach Australia's non-refoulement obligations. These Act amendments are not incompatible with Australia's non-refoulement obligations.[9]

Committee response

2.782 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.783 The committee notes the minister's view that the ICCPR and CAT do not expressly require merits review of non-refoulement decisions.

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

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9 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 April 2015) 2.

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

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

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

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

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

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[12]

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

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

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

2.789 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[13]

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

2.791 Applied to the Australian context, the committee has considered numerous cases, like the present case, where legislation has provided for judicial (rather than merits) review of non-refoulement decisions. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977*, and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

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

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

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

2.795 The committee also notes that the minister's response points to a range of other mechanisms in the Act which provide the ability to consider non-refoulement obligations before removal of a person, such as the protection visa process or the minister's personal public interest powers in the Act. However, the minister's response has not explained how these administrative and discretionary mechanisms

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

are sufficient to meet the requirement for effective and impartial review of such decisions under international law.

2.796 **The committee's assessment of the proposed expansion of visa cancellation powers is that, to the extent that 'independent, effective and impartial' review is not provided in relation to non-refoulement decisions, the expansion of visa cancellation powers provided under the bill is incompatible with Australia's non-refoulement obligations.**

2.797 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Right to liberty

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

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

2.800 Article 9 applies to all forms of deprivations of liberty, including immigration detention.

Compatibility of the measures with the right to liberty

2.801 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia on character grounds results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation. In cases where it is not possible to remove a person because, for example, they may be subject to persecution if returned to their home country or no country will accept them, that person may be subject to indefinite detention. On this basis, the expanded visa cancellation powers engage the prohibition against arbitrary detention.

2.802 The detention of a non-citizen on cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory detention, in which individual circumstances are not taken into

account, and where there is no right to periodic judicial review of the detention, the committee noted in its previous analysis that there may be situations where the detention could become arbitrary under international human rights law.[14] This is most likely to apply in cases where the person cannot be returned to their home country on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person).

2.803 The statement of compatibility stated that the changes do not limit the right to liberty because they merely 'add to a number of existing laws that are well-established, generally applicable and predictable'.[15]

2.804 In its previous analysis the committee considered that ensuring the safety of Australians is likely to be considered a legitimate objective for the purpose of international human rights law. However, it was not clear that each of the measures is rationally connected to achieving that aim and whether a number of measures may be regarded as proportionate. In particular, it was unclear whether there are sufficient safeguards to ensure that the detention of persons after the exercise of the visa cancellation powers will not lead to cases of arbitrary detention.

2.805 The committee therefore considered that the expansion of visa cancellation powers, in the context of Australia's mandatory immigration detention policy, limited the right to liberty. The statement of compatibility did not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore sought the advice of the Minister for Immigration and Border Protection as to the legitimate objective, rational connection, and proportionality of the measure.

Minister's response

> The amendments introduced strengthen the visa cancellation provisions; they do not alter the detention powers or framework already established in the Act. The Statement of Compatibility (SOC) outlined the Government's position that the detention of unlawful non-citizens as the result of visa cancellation is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. The amendments widen the scope of people being considered for visa cancellation or refusal, and the Government's position is that these amendments present a reasonable response to achieving a legitimate purpose under the Covenant - the safety of the Australian community.

14 For example, see *A v Australia* (Human Rights Committee Communication No. 560/1993) and *C v Australia* (Human Rights Committee Communication No. 900/1999). See also *F.K.A.G et al v Australia* (Human Rights Committee Communication No. 2094/2011) and *M.M.M et al v Australia* (Human Rights Committee Communication No. 2136/2012).

15 EM, Attachment A, 6.

> The SOC further stated that the character and cancellation provisions were amended in order to address the risk to the Australian community posed by non-citizens of character, integrity or security concern. The safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective. The cancellation of a non-citizen's visa in circumstances where they present a risk to the Australian community, and their subsequent detention prior to removal, follows a well-established process within the legislative framework. I would reiterate, as stated in the SOC, the amendments do not limit a person's right to security of the person and freedom from arbitrary detention. However to the extent that it may be interpreted as limiting the obligations in Article 9 of the ICCPR, there is clearly a rational connection between ensuring non-citizens who present a risk to the Australian community can be considered for visa cancellation or refusal and the legitimate objective of protecting the safety of the Australian community from those who pose a risk to it. Further, people who are affected by these measures will still continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4).[16]

Committee response

2.806 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.807 The committee notes that, notwithstanding the minister's view that the measures do not alter the existing detention powers or framework under the Migration Act, the amendments strengthen the visa cancellation provisions with the result that more people may be subject to mandatory detention as a result of having their visa cancelled or rejected.

2.808 As noted in the committee's initial analysis, the detention of a non-citizen or cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation.

2.809 However, there may be cases where a person cannot be returned to their home country on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). As noted by the minister in his response to the committee, such circumstances of continuing detention can give rise to instances of arbitrary detention:

> Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

16 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 April 2015) 3.

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

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.[17]

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

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

2.813 **The committee's assessment of the proposed expansion of visa cancellation powers against article 9 of the International Covenant on Civil and Political Rights (right to liberty) is that the measure is likely to be incompatible with Australia's obligations under international human rights law. As set out above, the response does not sufficiently justify that limitation. The committee considers that it has not been demonstrated that the measure is a proportionate means of achieving the objective of national security (i.e. the least rights restrictive approach)..**

2.814 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to:

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

- provide an individual assessment of the necessity of detention in each individual case;
- provide each individual subject to immigration detention a statutory right of review of the necessity of that detention;[18] and
- in the case of individuals detained for a lengthy period of time, provide a periodic statutory right of review of the necessity of continued detention.

Right to freedom of movement

2.815 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country. The right may be restricted in certain circumstances.

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

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

Compatibility of the measures with the right to freedom of movement

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

2.819 While the statement of compatibility stated that freedom of movement is engaged by the measures, it did not address the broader issue of whether using any of the expanded visa cancellation powers to cancel the visa of a permanent resident, who has lived for many years in Australia and has strong ties with Australia, is consistent with the right to freedom of movement. The committee noted that the UN Human Rights Committee has found that the deportation of a person with strong ties to Australia, following cancellation of their visa on character grounds, may constitute a breach of the right of a permanent resident to remain in their own country'.[19]

2.820 The committee therefore considered that the expansion of visa cancellation powers may limit the right to freedom of movement and specifically the right of a

18 Any statutory right of review would need to ensure the appropriate protection of national security sources as provided for in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

19 See *Nystrom v Australia* (Human Rights Committee, Communication No. 1557/07).

permanent resident to remain in their 'own country'. The statement of compatibility did not justify that limitation for the purposes of international human rights law. The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> I disagree with the committee's view that the reference to a person's own country is not necessarily restricted to the country of one's citizenship. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. In any event, the enhanced cancellation and refusal powers are limited to visa cancellation and refusals only and therefore do not fall within article 12(4). Further, the non-citizen's ties to the Australian community, including their length of residence is taken into account when considering the cancellation or refusal of their visa. The amendment is therefore compatible with human rights because it is consistent with Australia's human rights obligations.[20]

Committee response

2.821 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.822 The committee notes the minister's advice that non-citizen's ties to the Australian community, including their length of residence, are taken into account when considering the cancellation or refusal of their visa. The committee welcomes this approach but notes that such a consideration is a matter of administrative discretion and not a statutory requirement. As such, this is an insufficient safeguard for the purposes of international human rights law.

2.823 The committee notes the statement by the minister that article 12(4) (the right to enter one's own country) applies only to citizens of Australia.

2.824 The committee notes that this is inconsistent with recent views expressed by the UN Human Rights Committee (HRC), including in relation to Australia. In *Nystrom v. Australia* the HRC interpreted the right to freedom of movement under article 12(4) of the ICCPR as applying to non-citizens where they had sufficient ties to a country, and indeed noted that 'close and enduring connections' with a country 'may

20 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 April 2015) 4.

be stronger than those of nationality'.[21] The HRC subsequently affirmed this view in *Warsame.*[22]

2.825 In both cases, the HRC found violations of ICCPR article 12(4) where a person had clear, ongoing and longstanding connections to the resident state and also no connection with the ostensible state of their nationality. Thus, the HRC has now issued two views confirming a broader interpretation of art 12(4) than one simply based on nationality or citizenship.

2.826 The committee notes that HRC views are not binding on Australia as a matter of international law and that the minister's response reflects the Australian government's response to the *Nystrom* decision, which was essentially to disagree with the decision. Nevertheless, the HRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. However, the minister's response does not include any evidence or analysis as to why the views of the Australian government should be preferred to the HRC in the interpretation of article 12(4).

2.827 Further, as noted above at [2.789], these statements of the HRC in relation to article 12(4) are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[23]

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

2.829 Article 32 of the VCLT provides that in the interpretation of treaties recourse may be had to supplementary means of interpretation in circumstances where the meaning is ambiguous or unreasonable. Supplementary means of interpretation include the preparatory work of a treaty, such as the negotiating record or *travaux préparatoires*. The committee notes that the *travaux préparatoires* for article 12(4)

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21 Views: Communications No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('Nystrom').

22 *Warsame,* UN Doc CCPR/C/102/D/1959/2010.

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

show that the terms 'national' and 'right to return to a country of which he is a national' was expressly considered and rejected by states during the negotiation of the ICCPR.

2.830 The *travaux préparatoires* for article 12(4) also show that Australia expressed concern during the negotiations about a right of return for persons who were not nationals of a country but who had established their home in that country (such as permanent residents in the Australian context). Accordingly, the phrase 'own country' was proposed by Australia as a compromise, and the right to enter one's 'own country' rather than the right to return to a country of which one is a 'national' was agreed in the final text of the ICCPR.[24]

2.831 In this context, the committee considers that the correct interpretation of 'own country' is clearly one that imports a significantly broader meaning to the phrase than the term 'citizenship'. In fact, the phrase 'own country' appears to have been proposed by Australia specifically to allow for a right of return for persons who are not nationals but have strong links with Australia.

2.832 **The committee's assessment of the proposed expansion of visa cancellation powers against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) is that the measures are likely to be incompatible. The committee considers that this limitation has not been sufficiently justified for the purposes of international human rights law.**

2.833 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require that any person who has lived for many years in Australia and has such strong ties with Australia that they consider Australia to be their 'own country' be only subject to visa cancellation if the minister is satisfied that there is no other way to protect the security of the Australian community.

Failure to pass character test on basis of group membership or association

2.834 The Act amended section 501 of the Migration Act to provide that a person will not pass the character test if the minister reasonably suspects that the person has been, or is, a member of a group or organisation, or has had an association with a group, organisation or person which has been involved in criminal conduct. A person who fails to pass the character test is ineligible for the grant of a visa or may have their visa cancelled.

2.835 The committee noted the potential for the measure to restrict a person's ability to freely associate, and considered that the measure may limit the right to freedom of association.

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

Freedom of association

2.836 The right to freedom of association is protected by article 22 of the ICCPR. It provides that all people have the right to freedom of association with others; that is to join with others in a group to pursue common interests.

2.837 Limitations on this right are permissible only where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.

Compatibility of the measure with the right to freedom of association

2.838 The statement of compatibility stated that the measure is compatible with the right to freedom of association.

2.839 However, in its previous analysis the committee noted that the amendment does not, as the statement of compatibility indicated, target specific groups such as gangs or terrorist organisations. Rather, the amendment is broadly framed to apply to any association with a group, organisation or person that has been or is involved in criminal conduct, and could presumably include minor criminal conduct. The committee was concerned that under this measure a person could fail the character test on the basis of, for example, having friends or family who have engaged in even relatively minor criminal conduct, without the person themselves having been engaged in such conduct.

2.840 The committee previously acknowledged the importance of protecting the Australian community from risks associated with organised criminal activity and that this is likely to be a legitimate objective for the purpose of international human rights law.

2.841 However, the committee was concerned that lowering the threshold to include those who have had an association with a group, organisation or person involved in criminal conduct may not be rationally connected to or a proportionate way to achieve that objective. In this respect, the committee also noted that the ministerial discretion whether or not to exercise the power is unlikely, in and of itself, to offer sufficient protection such that the measure may be regarded as proportionate to its stated objective.

2.842 The committee therefore considered that the amendment providing that a person will not pass the character test on the basis of group membership or association limits the right to freedom of association, and noted that the statement of compatibility does not sufficiently justify this limitation for the purposes of international human rights law.

2.843 The committee therefore sought the advice of the Minister for Immigration and Border protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern, or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and

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

Minister's response

> A finding that a person does not pass the character test based on an association with a specific person, group or association is not in itself a decision to refuse or cancel a visa. Rather, it then enlivens the discretion whether or not to cancel a visa. As articulated in the SOC this amendment is targeted specifically at non-citizens who have associations to criminal motorcycle gangs, terrorist organisations, organised criminal groups, people smuggling, people trafficking, or involvement in war crimes, genocide or human rights abuses. It is the Government's position that these types of associations or memberships may present a risk to the Australian community or represent a national security risk. The Government therefore considers it reasonable that non-citizens with these types of memberships or associations are thoroughly scrutinised and assessed in order to determine the level of risk these associations might pose to the Australian community. There is no intention that this new association ground will be used to cancel or refuse the visas of non-citizens who do not pose a risk to the Australian community. As stated in the SOC, creating a disincentive for non-citizens to associate with criminal organisations, or other people involved in criminal activity is seen as reasonable, proportionate and necessary, and has a rational connection to the legitimate objective of protecting the Australian community.[25]

Committee response

2.844 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.845 The committee welcomes the intention that the new association ground for cancelling (or refusing) a visa will be used only in relation to those who pose a risk to the Australian community.

2.846 However, as confirmed in the minister's response, it will be entirely at the discretion of the minister. The committee's primary concern is that, in granting such a broad executive discretion, the power of visa cancellation in relation to a person who fails to pass the character test could be used in circumstances where a person poses no threat to Australians.

2.847 Where broad discretions are granted to decision-makers, statutory safeguards are important in demonstrating that any limitation on the right to freedom of association is proportionate. The absence of statutory safeguards in relation to this broad executive power means that the power could be used beyond

25 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 April 2015) 4-5.

the stated purposes set out in the minister's response. Accordingly, the committee considers that the measure is not proportionate to its stated objective.

2.848 **The committee's assessment of the proposed strengthening of the character test requirements against article 22 of the International Covenant on Civil and Political Rights (right to freedom of association), is that the measure may be incompatible. As set out above, the statement of compatibility and the minister's response do not sufficiently justify the limitation as proportionate (that is, as the least rights restrictive approach to achieve the stated objective).**

2.849 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Lower threshold for the character test if there is a risk that a person would incite discord in the community

2.850 Previously, paragraph 501(6)(d) of the Migration Act provided that a person would fail the character test for a visa if there is a 'significant risk' that they may engage in certain conduct, including a significant risk they would 'incite discord in the Australian community or in a segment of that community'. The Act amended this provision to lower the threshold for this test from a 'significant risk' to simply a 'risk'.

2.851 As this lower threshold for the cancellation of a person's visa may be applied in respect of a person's expression, the committee considered that the measure engages and may limit the right to freedom of expression.

Right to freedom of opinion and expression

2.852 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

2.853 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),[26] or public health or morals.[27]

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26 'The expression 'public order (*ordre public*) 'may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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

Compatibility of the measure with the right to freedom of expression

2.854 The committee's initial analysis noted that the ability for a person's visa to be cancelled on the basis of a risk that they would incite discord through their opinions or expressions could have a discouraging or 'chilling' effect on their willingness to publicly discuss or otherwise make known their views, particularly in relation to contentious issues.

2.855 The committee therefore considered that the lowering of the threshold for the character test where there is a 'risk' that a person would incite discord in the community limits the right to freedom of expression and opinion.

2.856 However, the statement of compatibility assessed the bill as being compatible with human rights, but provided no assessment of the measure or its potential to limit the right to freedom of expression.

2.857 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to the legitimate objective, the rational connection, and the proportionality of the measure.

Minister's response

> A finding that a person does not pass the character test based on the risk a person would incite discord in the community is not in itself a decision to refuse or cancel a visa. Rather, it then enlivens the discretion whether or not to cancel a visa. It is the Government's position that lowering the existing risk threshold in this provision of the character test is an appropriate response to the current security climate as the right to freedom of expression may have an express limitation for the purposes of national security, public order, public safety, public health or morals and the respect of the rights or reputation of others. In any event, lowering the risk threshold in this way does not regulate a person's ability to express certain views.
>
> Departmental delegates are instructed to consider these grounds against Australia's well established tradition of free expression. However, where a non-citizen's opinions may attract strong expressions of disagreement or condemnation from the Australian community, the views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.
>
> The Australian Government will not tolerate public statements from non-citizens that encourage or advocate violence against other people, or violence as a legitimate form of political expression. It is the Government's position that lowering this risk threshold is entirely appropriate and aimed as the legitimate objective of protecting public safety. Lowering the risk threshold will ensure non-citizens who may pose a risk to the Australian community by advocating violence are thoroughly scrutinised and the risk they pose is properly assessed. As such, to the extent that there may be any limitation on the right to freedom of expression, there is a clear and

rational connection between allowing a thorough assessment of risk and the legitimate aim of protecting public safety. The Government believes this limitation is a reasonable and proportionate measure to ensure public safety, particularly in the current security environment.[28]

Committee response

2.858 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.859 The committee agrees that public statements that encourage or advocate violence against other people is not a legitimate form of expression.

2.860 However, the committee notes that in most cases the making of such statements is a criminal offence under Australian law and, as such, people who made such statements could have their visa cancelled or refused on the grounds that they are not of good character. In such circumstances, it appears unlikely that a person's visa would be cancelled or refused instead on the lesser ground of inciting discord in the community.

2.861 The committee notes that departmental delegates are instructed to consider the ground of there being a risk that a person would incite discord in the community against Australia's well established tradition of free expression.

2.862 However, where a non-citizen's opinions may attract strong expressions of disagreement or condemnation from the Australian community, the views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest. As confirmed in the minister's response, it will be entirely at the discretion of the minister and the department whether to use this ground to cancel or refuse a visa.

2.863 The committee's initial analysis raised a concern not with the aim of protecting public safety, but with the granting of an apparently broad executive discretion that could be used in circumstances where a person poses no threat to the public and are simply exercising a right to free speech.

2.864 Where broad discretions are granted to decision-makers, statutory safeguards are important in demonstrating that any limitation on the right to freedom of association is proportionate. The absence of statutory safeguards in relation to this broad executive power means that the power could be used beyond the stated purposes set out in the minister's response. Accordingly, the committee considers that the measure is not proportionate.

2.865 **The committee's assessment of the proposed lowering of the threshold for the character test where there is a 'risk' that a person would incite discord in the community against article 19 of the International Covenant on Civil and Political**

28 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 April 2015) 5-6.

Rights (right to freedom of expression), is that the measure may be incompatible. As set out above, the statement of compatibility and the minister's response do not sufficiently justify the limitation as proportionate (that is, as the least rights restrictive approach to achieve the stated objective).

2.866 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Requirement to provide personal information for the purposes of the character test

2.867 The Act introduced a new section to the Migration Act that compels the head of a state or territory agency to provide personal information in relation to a specified person relevant to the passing of the character test under section 501 of the Migration Act. Although the Act does not specify the type of information that could be required to be made available, the statement of compatibility explains that it would include:

- bio-data of persons entering Australian correctional institutions;
- information on persons who have received suspended sentences;
- information on persons sentenced but released by a courts due to 'time served';
- information on persons directed to be held in mental health institutions, or transferred from prison to mental health institutions within the period of their sentence; and
- any information that can be considered relevant to the assessment of a person's character in the ordinary sense.[29]

2.868 The Act specifically provides that the head of a relevant state or territory agency is not excused from complying with a notice on the ground that disclosing the information would contravene a law of the Commonwealth, state or territory that (a) primarily relates to the protection of the privacy of individuals and (b) prohibits or regulates the use or disclosure of personal information.[30]

2.869 The committee previously considered that requiring the mandatory provision of personal information for the purposes of the character test under section 501 of the Migration Act, engages and may limit the right to privacy.

29 EM, Attachment A, 12.

30 See item 25 of the bill (new subsection 501L(5)).

Right to privacy

2.870 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.871 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

2.872 The committee's initial analysis noted that that, while ensuring the availability of information necessary to support the identification and assessment of visa holders of character concern is likely to be a legitimate objective for the purpose of international human rights law, it is unclear whether the measure may be regarded as a proportionate way to achieve that objective.

2.873 The statement of compatibility acknowledged that the requirement to provide personal information for the purposes of the character test may be seen as limiting a person's right to privacy, but assessed the measure as being compatible with the right.

2.874 The committee noted that the statement of compatibility did not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether there is a rational connection between the limitation and the stated objective, and whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective.

Minister's response

> Section 501 of the Act sets out the basis upon which a person could be found to not pass the character test. Section 501L of the Act is clearly limited to the Minister requesting information from a State or Territory agency, that the agency can reasonably acquire, and where the information is relevant to the assessment of whether or not a non-citizen passes the character test. In this regard, I do not agree with the committee's view that this represents a broad and unconstrained requirement to share personal information.
>
> I would reiterate that this legislative provision puts beyond doubt that my department has a legislative basis upon which to obtain information relevant to a non-citizen's character. To the extent that this is a limitation of person's right to privacy, there is rational connection between this

limitation and the Government's objective of protecting the Australian community from the risk of harm by a non-citizen who is suspected of not passing the character test. It is reasonable and proportionate that State, Territory and Federal Government departments are able to share information about non-citizens who may do harm or engage in criminal activity where that information is relevant to the assessment of that person against the character test.

This amendment does not alter the way in which information received by the Government in relation to non-citizens is used, disclosed and stored. My department has in place a Privacy Policy to address its obligations regarding collection, use and disclosure of personal information, and sets out how the department complies with its obligations under the Privacy Act 1988. All personal information held by my department is stored in compliance with Australian Government security requirements and includes the department's processes being the subject of mandatory reporting processes and protocols in accordance with guidelines issued by the Privacy Commissioner.[31]

Committee response

2.875 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.876 The committee notes in particular the minister's advice that information will only be shared to the extent that it is relevant to the assessment of whether or not a non-citizen passes the character test and any information received by the government is used, disclosed and stored in accordance with the department's privacy policy and its compliance with the *Privacy Act 1988*.

2.877 **The committee therefore considers that the measure is likely to be compatible with the right to privacy.**

31 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 April 2015) 6.

Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696]

Portfolio: Immigration and Border Protection

Authorising legislation: Migration Act 1958

Last day to disallow: 26 March 2015

Purpose

2.878 The Migration Amendment (2014 Measures No. 2) Regulation 2014 (the regulation) amends the Migration Regulations 1994 (the Migration Regulations) to:

- remove the prescribed period of time that an applicant outside Australia must be given to respond to a request for information or to an invitation to comment, so that the 'reasonable time' period set out in the *Migration Act 1958* (Migration Act) will apply instead;
- broaden the definition of 'managed fund' to allow the minister to specify investment products as eligible investment products for visa applicants seeking a business visa;
- make changes to the character and general visa cancellation provisions in the Migration Regulations 1994, as a consequence of the introduction of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

Background

2.879 The committee considered the regulation in its *Twenty-first Report of the 44th Parliament*.[1]

Criteria for grant of visa requires a statement from appropriate authority

2.880 Item 3 of Schedule 3 of the regulation prescribes additional criteria for the grant of a visa. For those visa applicants that are required to satisfy public interest criteria 4001 or 4002, if the minister requests it, an applicant must provide a statement from an appropriate authority in a country where the person resides, or used to reside, that provides evidence about whether the person has a criminal history.

2.881 The committee considered that this measure engages and may limit Australia's non-refoulement obligations and the right to liberty.

Non-refoulement obligations

2.882 Australia has non-refoulement obligations under the Refugee Convention, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

1 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) 12-19.

Punishment (CAT).[2] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

2.884 Independent, effective and impartial review of decisions to deport or remove a person, including merits review, is integral to complying with non-refoulement obligations.[4]

2.885 Australia gives effect to its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa, which includes being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

Compatibility of the measure with non-refoulement obligations

2.886 Under the Migration Regulations, applicants for all visas, including protection visas,[5] are required to pass the character test (criteria 4001) and to not be assessed as a security risk by the Australian Security Intelligence Organisation (criteria 4002). This means that, while a person may engage Australia's protection obligations under the Refugee Convention, the ICCPR and CAT, they might nonetheless be denied a visa on character grounds. This regulation introduces an additional criterion, which is that the person provides evidence about whether they have a criminal history from an appropriate authority in a country where the person resides or has resided.[6] The minister can exercise his or her personal non-compellable discretion to waive this requirement if satisfied it is not reasonable to require the applicant to provide the statement.

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

3 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

4 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 201, 513.

5 See clause 866.225 of the Migration Regulations 1994.

6 See item 3 of Schedule 3, proposed new regulation 2.03AA.

2.887 The statement of compatibility acknowledged that this provision 'may result in a greater number of visa refusal decisions for non-citizens who are in Australia'.[7] It stated that the amendments do not engage Australia's non-refoulement obligations.

2.888 The committee considered in its previous analysis that the measure engages and limits the obligation of non-refoulement, as it imposes an additional condition which must be met before a visa can be granted, including a protection visa. A person may be found to be one to whom Australia owes protection obligations but, because they cannot provide evidence of whether they have a criminal history from an appropriate authority, they may not be granted a protection visa.

2.889 The requirement that a person provide evidence about whether they have a criminal history from an appropriate authority in a country they may have fled could effectively provide notice to that country that the person is seeking asylum in Australia. If the person is not granted a protection visa and is returned to that country, this could itself become a basis for persecution in that country.

2.890 While the committee acknowledged the minister's commitment to ensuring no one who is found to engage our non-refoulement obligations will be removed in breach of that obligation, this will depend solely on the minister's personal non-compellable discretion. Further, 'independent, effective and impartial' review, including merits review, is not provided in relation to non-refoulement decisions.

2.891 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether imposing additional criteria to be satisfied before a visa can be granted, including a protection visa, complies with Australia's non-refoulement obligations under the ICCPR and the CAT.

Minister's response

> Regulation 2.03AA provides that, where a person is required to satisfy either or both of Public Interest Criterion (PIC) 4001 or 4002 for grant of a visa, the person must provide a statement from an appropriate authority about his or her criminal history and a completed approved Form 80 (*Personal particulars for assessment including character assessment*), if requested by the Minister. A waiver of the requirement to provide the criminal history statement is available where the Minister is satisfied that it is not reasonable for the applicant to provide it.
>
> Regulation 2.03AA made no change to the requirement for existing visa applicants to be assessed against either or both of PIC 4001 or PIC 4002 where applicable. Historically, there have been numbers of visa applicants who have not completed the Form 80, or have not provided the information requested about their criminal history. Within the previous statutory framework, there was no mechanism to compel an applicant to provide the requested information, thus limiting the ability of the Department of Immigration and Border Protection (the Department) to

7 Explanatory statement (ES), Attachment A, 6.

comprehensively assess whether a visa applicant presented a character or security risk. The amendment ensures that a visa applicant who is required to satisfy PIC 4001 and/or PIC 4002 is also required to provide the documentation required to assess these PICs if requested by the Minister, with a waiver of the request available in certain circumstances.

This amendment has not changed the long-standing practice in relation to people seeking protection, being that protection visa applicants will not be required to obtain a criminal history statement from an authority in a country from which protection is sought. It is important to note that under existing and long-established policy guidelines, there are already waiver provisions in place to this effect.

It is also the case that the amendments have no impact on the independent, effective and impartial review of visa decisions. Whether or not merits review is available to a visa applicant of a Departmental decision depends on other provisions in the *Migration Act 1958* (the Migration Act). This means that merits review may be available to a visa applicant refused a visa due to a failure to satisfy either regulation 2.03AA or the applicable clause in Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations) that requires satisfaction of PIC 4001 and/or PIC 4002, as has always been the case. As part of the review process, the merits review body will be able to consider whether it was reasonable for the applicant to be required to provide evidence of their criminal history from an appropriate authority in their home country.

As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, whilst noting the committee's concerns, it is the Government's position that while merits review can be an important safeguard, there is no express requirement under the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for merits review in the assessment of non-refoulement obligations. Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. Further, there are other mechanisms under the Migration Act which provide the Government with the ability to address non-refoulement obligations. These include through the protection visa application process, the Minister's personal public interest powers in the Migration Act, and International Treaties Obligation Assessments that take place prior to a person's involuntary removal from Australia to confirm compliance with Australia's non-refoulement obligations, if such an assessment has not previously occurred.

It is the Government's view that this regulation amendment is not incompatible with Australia's non-refoulement obligations.[8]

8 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 8 May 2015) 2-3.

Committee response

2.892 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.893 The committee welcomes the minister's advice that the minister may waive the requirement to provide a criminal history statement where the minister is satisfied that it is not reasonable for the applicant to provide it. The committee notes, however, that such a consideration is a matter of administrative discretion and not a statutory requirement. As such, this is an insufficient safeguard for the purposes of international human rights law.

2.894 The committee also welcomes advice that the department has a longstanding practice in relation to people seeking protection, being that protection visa applicants will not be required to obtain a criminal history statement from an authority in a country from which protection is sought.

2.895 However, the committee notes that legislative safeguards provide a stronger level of protection than that provided by guidance material or policy safeguards. The committee's longstanding view has been that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended at any time.

2.896 The committee further notes the minister's advice that merits review will be available for some decisions relating to the grant of a visa depending on other provisions in the Migration Act. Accordingly, merits review will not be available in every case in which a protection visa is sought. As set out in the committee analysis of the minister's response to the *Migration Amendment (Character and General Visa Cancellation) Bill 2014,* the committee is of the view that the international case law establishes the proposition that, while merits review is not expressly required, there is strict requirement for 'effective review' of non-refoulement decisions.

2.897 Applied to the Australian context, the committee has considered numerous cases, like the present case, where legislation has provided for judicial (rather than merits) review of non-refoulement decisions. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977*, and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

2.898 Accordingly, in the Australian context, the committee considers that judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision. The ineffectiveness of judicial review is particularly apparent when considered against

the purpose of effective review of non-refoulement decisions under international law, which is to 'avoid irreparable harm to the individual'.

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

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

2.901 **The committee's assessment of the requirement that an applicant may be compelled to provide a statement from an appropriate authority that offers evidence about whether the person has a criminal history, is that it may be incompatible with Australia's non-refoulement obligations.**

2.902 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to:

- expressly preclude a person from being compelled to obtain a criminal history statement from an authority in a country from which protection is sought; and
- require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Right to liberty

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

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

2.905 The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

Compatibility of the measure with the right to liberty

2.906 The statement of compatibility stated that the amendments do not limit the right to freedom from arbitrary detention.[9]

2.907 However, in its previous analysis the committee considered that, imposing additional criteria for the grant of a visa such that a person recognised as a refugee may still not be granted a visa, engages and limits the prohibition against arbitrary detention. This is because a person whose visa is refused if they have not been able to provide evidence of whether they have a criminal history from an appropriate authority in their home country will be subject to mandatory immigration detention pending their removal or deportation. Where it is not possible to remove a person because, for example, they may be subject to persecution if returned to their home country or no country will accept them, that person may be subject to indefinite detention.

2.908 While the committee considered that ensuring the safety of the Australian community and the integrity of the migration program is likely to be considered a legitimate objective for the purposes of international human rights law, it is not clear that each of the measures is rationally connected to achieving that aim and whether a number of measures may be regarded as proportionate. In particular, it is unclear whether there are sufficient safeguards to ensure that the detention of persons who have not been granted a visa for failure to provide a statement from an appropriate authority about whether the person has a criminal history will not lead to cases of arbitrary detention.

2.909 The committee therefore considered that imposing additional criteria to be satisfied before a visa can be granted, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. The statement of compatibility did not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore sought the advice of the Minister for Immigration and Border protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The Government is of the view that the imposition of the additional criteria in regulation 2.03AA does not engage or limit the prohibition against arbitrary detention. This amendment is aimed at the minority of non-protection visa applicants who do not provide the required documents, and is applicable where a visa applicant does not comply with

9 ES, Attachment A, 9.

reasonable requests made by the Department for the purposes of assessing them against PIC 4001 or PIC 4002. The amendment ensures that a visa applicant who is required to satisfy PIC 4001 and/or PIC 4002 is also required to provide the documentation required to assess these PICs if requested by the Minister, with a waiver of the requirement available in certain circumstances.

This amendment is not intended to change long standing practices in relation to people seeking protection from Australia. It is important to note that under existing and long-established policy guidelines, there are already provisions in place to provide that a protection visa applicant is not required to obtain a statement from an appropriate authority, such as a penal certificate, in relation to a country from which they are claiming protection.

Regulation 2.03AA made no change to the requirement for existing visa applicants upon whom PIC 4001 and/or PIC 4002 are imposed, to be assessed against those PICs in order for character and security risks to be assessed. As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, the safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective. The refusal to grant a visa in circumstances where the applicant presents a risk to the Australian community, and their subsequent detention as an unlawful non-citizen prior to removal from Australia, is undertaken within a well-established legislative process. I would reiterate, and as previously stated in the Regulation's Statement of Compatibility with human rights, that the amendments do not limit a person's right to security of the person and freedom from arbitrary detention. To the extent that it may be interpreted as limiting the obligations in Article 9 of the ICCPR, there is a clearly rational connection between ensuring that non-citizens in Australia who present a risk to the Australian community can be considered for visa refusal on character grounds, and the legitimate objective of protecting the safety of the Australian community from those who may pose a risk to it. Further, people who are affected by these measures will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4). As noted above, the amendments also have no effect on the availability of review of visa refusal decisions.

This regulation amendment does not alter the detention powers or framework already established in the Migration Act. The Statement of Compatibility which accompanied the Explanatory Statement to the Regulation outlined the Government's position that the detention of unlawful non-citizens as the result of visa refusal is neither unlawful nor arbitrary under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. While the amendments provide that a small number of visa applicants may be considered for visa

> refusal, it is the Government's position that these amendments present a reasonable response to achieving a legitimate purpose- being the safety of the Australian community.[10]

Committee response

2.910 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.911 The committee notes that, notwithstanding the minister's view that the measures do not alter the existing detention powers or framework under the Migration Act, imposing additional criteria for the grant of a visa, such that a person recognised as one to whom Australia owes protection may still not be granted a visa, may result in more people being subject to mandatory immigration detention. The committee also notes the minister's advice that the measure is 'aimed at' the minority of non-protection visa applicants who do not provide the required documents. In this regard, the regulation permits a much broader application of the requirement to provide a criminal history check including in relation to protection visas.

2.912 As noted in the committee's initial analysis, the detention of a non-citizen or cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation.

2.913 However, there may be cases where a person cannot be returned to their home country on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). As noted by the minister in his response to the committee, such circumstances of continuing detention can give rise to instances of arbitrary detention:

> Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

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

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10 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 8 May 2015) 3-4.

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.[11]

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

2.916 While the committee accepts that the safety of the Australian community, particularly in the current security environment, may be considered to be both a pressing and substantial concern and a legitimate objective, the mandatory detention regime does not allow for an individual assessment of whether detention of an individual is necessary to protect Australian community. On the same facts, the measure is also not proportionate because it is not the least rights restrictive approach to achieve the legitimate objective.

2.917 **The committee's assessment of the requirement that an applicant may be compelled to provide a statement from an appropriate authority that offers evidence about whether the person has a criminal history, is that it may be incompatible with article 9 of the International Covenant on Civil and Political Rights (right to liberty).**

2.918 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to:

- provide an individual assessment of the necessity of detention in each individual case;
- provide each individual subject to immigration detention a statutory right of review of the necessity of that detention;[12] and

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

12 Any statutory right of review would need to ensure the appropriate protection of national security sources as provided for in the National Security Information (Criminal and Civil Proceedings) Act 2004.

- in the case of individuals detained for a lengthy period of time, provide a periodic statutory right of review of the necessity of continued detention.

Imposition of special return criteria—visa cannot be granted if had previously held a visa that was cancelled on character grounds

2.919 Special Return Criterion (SRC) 5001 of Schedule 5 to the Migration Regulations previously provided that a person could not be granted a visa if they were deported from Australia or held a visa that was cancelled on certain character grounds. The regulation amends this to refer to new grounds on which a visa has been cancelled, to reflect the amendments introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*. The provision provides that such exclusion will continue to apply unless the minister personally grants a permanent visa to the person.

2.920 As this amendment expands the basis on which a person can be permanently excluded from Australia, the committee considers that this engages and limits the right to freedom of movement (own country) and the obligation to consider the best interests of the child.

Right to freedom of movement (right to return to Australia)

2.921 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country. The right may be restricted in certain circumstances.

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

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

Compatibility of the measures with the right to freedom of movement (right to return to Australia)

2.924 The statement of compatibility did not address the compatibility of the measure with the right to freedom of movement.

2.925 In its previous analysis the committee noted that the expanded basis on which a person is excluded from the grant of a further visa may lead to a permanent resident whose visa is cancelled being excluded from ever returning from Australia, unless the minister exercises a personal, non-compellable discretion to grant a permanent visa to the person.

2.926 The committee also noted that the UN Human Rights Committee has found that the deportation of a person with strong ties to Australia, following cancellation of their visa on character grounds, may constitute a breach of the right of a permanent resident to remain in their own country.[13] The statement of compatibility provided no assessment of whether the expanded exclusion criteria are compatible with the right to freedom of movement.

2.927 The committee therefore considered that the expansion of the exclusion criteria may limit the right to freedom of movement and specifically the right of a permanent resident to return to their 'own country'. The statement of compatibility did not justify that limitation for the purpose of international human rights law. The committee therefore sought the advice of the Minister for Immigration and Border protection as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, I respectfully disagree with the committee's view that the reference to a person's own country is not necessarily restricted to the country of one's citizenship. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. The expansion of the 'exclusion criteria' to include all character cancellation decisions is limited to visa cancellations only. It is the Government's view that this does not fall within article 12(4) of the ICCPR because the legislation has not been extended to matters of Australian citizenship. In deciding whether or not to cancel a non-citizen's visa, a decision-maker will take into account the non-citizen's ties to the Australian community, including their length of residence. The amendment is therefore compatible with human rights because it is consistent with Australia's international human rights obligations.[14]

Committee response

2.928 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.929 The committee notes the minister's advice that non-citizen's ties to the Australian community, including their length of residence, are taken into account

13 *Nystrom v Australia* (Human Rights Committee, Communication No. 1557/07).

14 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 8 May 2015) 5.

when considering the cancellation of their visa. The committee welcomes this approach but notes that such a consideration is a matter of administrative discretion and not a statutory requirement. As such, this is an insufficient safeguard for the purposes of international human rights law.

2.930 The committee notes the unequivocal statement by the minister that article 12(4) (the right to enter one's own country) applies only to citizens of Australia. The committee notes that this is inconsistent with recent views expressed by the UN Human Rights Committee (HRC), in *Nystrom v. Australia* and in *Warsame.*[15] In both cases, the HRC found violations of ICCPR article 12(4) where a person had clear, ongoing and longstanding connections to the resident state and also no connection with the ostensible state by reason of their nationality. Thus, the HRC has now issued two views confirming a broader interpretation of art 12(4) than one simply based on nationality or citizenship.

2.931 The committee notes that HRC views are not binding on Australia as a matter of international law and that the minister's response reflects the Australian government's response to the *Nystrom* decision, which was essentially to disagree with the decision. Nevertheless, the HRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. However, the minister's response does not include any evidence or analysis as to why the views of the Australian government should be preferred to the HRC in the interpretation of article 12(4).

2.932 Further, these statements of the HRC in relation to article 12(4) are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[16]

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

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15 *Warsame,* UN Doc CCPR/C/102/D/1959/2010.

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

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

2.935 The *travaux préparatoires* for article 12(4) also show that Australia expressed concern during the negotiations about a right of return for persons who were not nationals of a country but who had established their home in that country (such as permanent residents in the Australian context). Accordingly, the phrase 'own country' was proposed by Australia as a compromise, and the right to enter one's 'own country' rather than the right to return to a country of which one is a 'national' was agreed in the final text of the ICCPR.[17]

2.936 In this context, the committee considers that the correct interpretation of 'own country' is clearly one that imports a significantly broader meaning to the phrase than the term 'citizenship'. In fact, the phrase 'own country' appears to have been proposed by Australia specifically to allow for a right of return for persons who are not nationals but have strong links with Australia.

2.937 **The committee's assessment of the expanded basis on which a person can be permanently excluded from Australia, including those who have lived for many years in Australia and have strong ties with Australia, is that it is likely to be incompatible with article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement). The committee considers that this limitation has not been sufficiently justified for the purposes of international human rights law.**

2.938 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require that any person who has lived for many years in Australia and has such strong ties with Australia that they consider Australia to be their 'own country' be only subject to visa cancellation if the minister is satisfied that there is no other way to protect the security of the Australian community.

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

Obligation to consider the best interests of the child

2.939 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.

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

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

2.941 The statement of compatibility noted that various measures in the regulation could result in the separation of the family unit.[18] It did not, however, set out the compatibility of these measures with the obligation to consider the best interests of the child, in the context where a child, who may have had their visa cancelled as a minor, may, as a result of these amendments, never be able to be granted another visa to Australia.

2.942 Where a person's visa is being considered for cancellation, the decision to waive the exception and grant a permanent visa is a personal, non-compellable discretion of the minister. As the committee has previously noted in its analysis, administrative and discretionary process are less stringent than the protection of statutory processes. In the absence of a statutory requirement to consider the best interests of a child when deciding whether or not the child will be excluded from the grant of another visa, it is unclear whether the regulation may be considered as being compatible with the obligation to consider the best interests of the child.

2.943 The committee considered that the regulation engages and limits the obligation to consider the best interests of the child. The statement of compatibility for the bill did not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.

Minister's response

> It is possible that a minor could have his or her visa cancelled under section 501, 501A or 501B of the Migration Act, however, it would be rare that a person under the age of 18 would be considered against the character test in subsection 501(6) of the Migration Act. Policy guidelines

18 ES, Attachment A, 7.

on minors who may not pass the character test in subsection 501(6) of the Migration Act relevantly state:

> The fact that the person is under 18 must be given significant consideration. Therefore, the whereabouts of the minor's parents will be crucial in deciding whether to pursue visa cancellation or refusal for the minor. Under policy, cancellation or refusal should not be pursued if that decision would result in the minor being separated from their parents or legal guardians, unless the minor does not pass the character test because of an extremely serious offence.
>
> Cancellation or refusal may be considered appropriate in cases involving less serious offences where the decision would not result in the minor being separated from their parents or legal guardians. An example would be a 16 year old who is in Australia as the holder of a student visa and whose parents live in the home country.

In circumstances where a minor is being considered for visa cancellation under section 501 of the Migration Act (or sections 501A or 5018), the individual's legal guardians would also be included in any procedural fairness process, and the person's age when they committed the act(s) that brought them within the scope of the character test would be a relevant factor to consider when exercising the discretion to cancel their visa. As stated in the Statement of Compatibility for this Regulation, the Minister's delegates and Administrative Appeals Tribunal members making a decision under section 501 are bound by a Ministerial Direction made under section 499 of the Migration Act which requires a balancing exercise of countervailing considerations.

In all visa cancellation decisions based on the character test, the best interests of the child are a primary consideration. While rights relating to children generally weigh heavily against visa cancellation, there will be circumstances where this may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.

The decision to cancel a non-citizen's visa under section 501 of the Migration Act relates only to the individual who has been found to not pass the character test. Any associated visa holder of a non-citizen who has had their visa cancelled under the character provisions, such as a spouse or child, would continue to hold their visa, and would not be subject to consequential visa cancellation under any provision of section 501. Therefore, a minor would not be subject to an exclusion period under SRC 5001 due to imposition of the character provisions in section 501 on an associated visa holder.[19]

19 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 8 May 2015) 5-6.

Committee response

2.944 **The committee thanks the Minister for Immigration and Border Protection for his response. On the basis of the minister's advice that:**

- **a minor would not be subject to an exclusion period because a family member (as the associated visa holder) failed the character test; and**
- **in circumstances where a minor is being considered for visa cancellation the individual's legal guardians would also be included in any procedural fairness process,**

the committee concludes that the measure is likely to be compatible with the obligations to consider the best interests of the child.

Social Security Legislation Amendment (Community Development Program) Bill 2015

Portfolio: Indigenous Affairs
Introduced: Senate, 2 December 2015

Purpose

2.945 The Social Security Legislation Amendment (Community Development Program) Bill 2015 (the bill) creates a new income support payment and compliance arrangements for people living in remote Australia who are eligible for certain income support payments.

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

Background

2.947 The committee first reported on the bill in its *Thirty-third Report of the 44th Parliament* (previous report) and requested further information from the minister as to the compatibility of the bill with the rights to social security and the right to equality and non-discrimination. The committee also recommended that the government release an exposure draft of the legislative instrument which would set out the compliance obligations and penalty regime for remote income support recipients.[1]

New obligations and penalty arrangements for remote income support recipients

2.948 The bill exempts eligible remote income support recipients from existing compliance obligations and penalty arrangements and enables the minister to determine these requirements in a legislative instrument. The explanatory memorandum (EM) states that the intention of the bill 'is that the legislative instrument will provide for consequences where obligations are not complied with, in order to provide incentives for remote income support recipients to engage in work or activities'.[2]

2.949 The bill does not set out the intended content of the obligations to be determined by legislative instrument. The EM states that the bill enables the minister to 'determine appropriate participation activities and compliance arrangements in consultation with communities, ensuring that they are tailored to the individual needs of remote job seekers'.[3]

1 Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016) 7-12.

2 Explanatory memorandum (EM) 4.

3 EM ii.

2.950 The new 'simplified arrangements' also enable payments to remote income support recipients to be made on a weekly basis, and for payments to be made by service providers rather than the Department of Human Services (the department). Under these 'simplified arrangements', remote job seekers will be subject to immediate 'No Show No Pay' penalties for non-compliance with activity requirements. These penalties will also be applied by service providers rather than the department.

2.951 The committee considered in its previous report that by enabling the creation of a different system of obligations and penalty arrangements for remote job seekers, the bill engages and may limit the right to social security and the right to an adequate standard of living, and the right to equality and non-discrimination.

Right to social security

2.952 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

2.953 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

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

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

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

Right to an adequate standard of living

2.956 The right to an adequate standard of living is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

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

Right to equality and non-discrimination

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

2.959 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.

2.960 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[4] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[5] 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.[6]

Compatibility of the measure with the right to social security and the right to an adequate standard of living

2.961 The imposition of new obligations and immediate penalties may result in some remote job seekers having their payments reduced or losing their payments altogether, and therefore the measures may limit the recipient's right to social security. Further, the imposition of immediate penalties for non-attendance appears to have the effect that any appeal by a social security recipient will occur after the imposition of a penalty, reducing the ability of a social security recipient to avoid a penalty before it is imposed.

4 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.

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

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

2.962 The bill does not set out the content of the obligations which are to be determined by legislative instrument. Given that currently social security legislation includes extensive mutual obligations, it is unclear why it is necessary to leave the content of the obligations which will apply to remote Australians, to delegated legislation rather than being set out in primary legislation.

2.963 The statement does not address the effect of the new compliance obligations or penalty arrangements on recipients' rights to social security and an adequate standard of living. The statement therefore does not provide any information as to the legitimate objective of the measures, how the measures are rationally connected to that objective and how the measures are otherwise proportionate.

2.964 The committee noted that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility 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'.[7] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, as the precise obligations and compliance regime will be left to subordinate legislation it will be difficult for the committee to assess the bill as compatible with human rights without reviewing the proposed legislative instrument.

2.965 The committee therefore sought the advice of the minister as to the objective to which the proposed changes are aimed, 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. The committee also recommended that the government release an exposure draft of the legislative instrument which would set out the compliance obligations and penalty regime for remote income support recipients to enable the committee to assess the human rights compatibility of the bill.

Minister's response

> As outlined in the Explanatory Memorandum, the changes proposed in the CDP Bill promote rights to social security, an adequate standard of living, to work and are consistent with the right to equality and non-discrimination. To the extent (if any) that they may limit human rights,

7 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

those limitations are reasonable, necessary and proportionate to support job seekers in remote Australia, by strengthening the existing incentives for remote job seekers to actively engage with their income support activity requirements and opportunities to participate and remain in paid work. Please see Attachment A for further information on the Bill's compatibility with human rights.

There has been significant interest in participation in phase one of the reforms and I have met with providers in Queensland, New South Wales, Western Australia, South Australia and the Northern Territory to explain the proposed model, as has the Department of the Prime Minister and Cabinet. All CDP service providers have attended a two-day meeting with Departmental staff and myself in February 2016 as part of ongoing engagement with providers. The meeting included consultation on the proposed reforms and the feedback and input that I received during this meeting will inform the design of the legislative instrument. My Department will continue to work closely with CDP providers over the coming months.

The measures in the CDP Bill are reasonable and proportionate to achieve its objectives. They apply equally to all job seekers who reside in remote income support regions in Australia, the measures in the CDP Bill are non-discriminatory and are not a special measure.

Please note that I have committed to making further information in relation to the detail of the scheme available to members of Parliament before debate of the CDP Bill and expect to circulate consultation papers on the proposed CDP penalties scheme and compliance framework by mid-March. I will also make these papers available to the committee at this time.

Attachment A: Further information on the compatibility of the CDP Bill

The new obligation and penalty arrangements promote the right to social security by helping job seekers avoid future compliance action and therefore, receive income support payments to a greater extent.

The current national job seeker compliance framework is not well suited to the needs of remote job seekers. The Department of the Prime Minister and Cabinet (PM&C) receives consistent feedback from communities and provider organisations that:

- Current arrangements are not easily understood by remote job seekers which means that behavioural change happens slowly, if at all.
- The current compliance system arrangements mean jobseekers experience long delays. Having to interact with a compliance system that is run from major cities potentially thousands of kilometres away makes it difficult to apply the necessary agility and immediacy to overcome the pervasive welfare reliance in remote Australia.

- Communities want arrangements that better combine income support with employment opportunities and community development projects, with sufficient community control to ensure participation can be maximised.

As a result of current compliance arrangements, job seekers do not understand the link between attending activities and receiving income support. Therefore, behaviour is not changing. This is indicative of a historically high trend in non-attendance and disengagement with employment services in remote Australia. At end of June 2015, 22 per cent of all financial penalties nationally were applied to CDP participants. In early July 2015, less than 5 percent of the CDP caseload attended their activity. By the end of December 2015 attendance had improved but was still tracking low, at just under 25 per cent. Despite the increase in application of penalties under CDP, attendance in activities remains disproportionately low.

The changes proposed in the CDP Bill will simplify the system and make it easier for job seekers in remote Australia to understand the link between attendance at CDP activities and income support payments. These changes will also enable, through legislative instruments, the application of a simpler compliance framework that is tailored to the unique social and labour market conditions in remote Australia. Ultimately, these changes will make it easier for these job seekers to understand their obligations and also help them to avoid compliance penalties.

In addition, the CDP Bill makes it possible for penalties to be applied in the same week by a locally based decision maker with direct and more immediate access to job seekers. This more immediate relationship between payments and attendance is designed to encourage job seekers to attend more of their activities so that they incur fewer penalties.

It is also worth noting that the arrangements do not limit the right to social security as the changes proposed in the CDP Bill do not reduce the general entitlements of job seekers or make their obligations more onerous. For instance, the reforms will not change the amount a job seeker is entitled to receive (their maximum basic rate) or their hours of obligation.

The protections afforded to job seekers in relation to review and appeals processes will remain substantively the same as existing arrangements under the social security law. Review processes will be in place, with PM&C responsible for reviewing provider decision making on payments and compliance (similar to review processes within the Department of Human Services (DHS)). Other protections with respect to reviews of payment decisions and financial penalties, including recourse to the Administrative Appeals Tribunal, will be retained.

Appropriate safeguards against unnecessarily limiting a person's right to social security such as clear, consistent guidelines for providers and robust external review processes will be in place to ensure that decision-making does not lead to inconsistent treatment of job seekers. In addition,

> section 1061ZAAZ(2)(ii) of the CDP Bill requires the Minister to consider whether there is social and economic disadvantage within the proposed region prior to determining a remote income support region. A limitation (if any) is reasonable, proportionate and necessary to achieve the legitimate objectives of the CDP Bill in addressing entrenched welfare and disadvantage in the relevant region.
>
> In addition, any limitation is proportionate to achieve the Bill's objective, as the reforms are designed to overcome the inherent imbalance in employment opportunities and consequential disadvantage experienced in parts of remote Australia.[8]

Committee response

2.966 **The committee thanks the Minister for Indigenous Affairs for his response.**

2.967 The committee welcomes the minister's commitment to making further information in relation to the detail of the CDP scheme, including the proposed penalties and compliance framework, available to members of Parliament and the committee before debate of the bill. However, in the absence of that further information the committee is unable to conclude whether the bill is compatible with Australia's obligations under international human rights law.

2.968 The committee accepts that reforming the national job seeker compliance framework to assist remote job seekers avoid future compliance action and therefore, receive income support payments to a greater extent, pursues a worthy objective. However, as noted above at paragraphs [2.948] to [2.951], the bill does not set out the intended content of the obligations to be determined by legislative instrument, and therefore the committee is unable to assess whether the measures chosen are rationally connected, or proportionate, to the objective sought.

2.969 **The committee is unable to conclude whether the bill is compatible with Australia's international human rights law obligations. The committee will be in a position to assess the compatibility of the bill once the proposed penalties and compliance framework is released.**

The Hon Philip Ruddock MP
Chair

8 See Appendix 1, Letter from the Hon Nigel Scullion, Minister for Indigenous Affairs, to the Hon Philip Ruddock MP (received 23 February 2016) 1-2 and Attachment A.

Appendix 1

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MC15-219778

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

Dear ~~Mr~~ Philip, Ruddock

Thank you for your letter of 11 August 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

The committee's remarks in relation to that Bill are contained in its *Twenty-fifth Report of the 44th Parliament*. My response addressing those remarks is attached.

I note that many of the committee's concerns will have been alleviated by the amendments moved by the Government to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 while it was before Parliament. The Parliament has now passed the Bill and the Act came into operation upon receiving the Royal Assent on 12 December 2015.

Thank you for bringing the committee's views to my attention. I trust the attached information is of assistance.

Yours sincerely

PETER DUTTON 11/01/16

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Introduction

On 24 June 2015, the Government introduced an initial version of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 to Parliament. On 30 November 2015, the Government tabled amendments to the Bill, which flowed from the recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which reported on 4 September 2015. The amendments introduce additional accountability measures and further strengthen safeguards in relation to provisions of the Allegiance Act. The Bill was passed by the Senate on 3 December 2015 and as such, is referenced to as the 'Allegiance Act' in this response.

The purpose clause in the Bill did not change. It declared that Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared valued of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.

As the basic requisite for participation in and adherence to the values and institutions of Australia's secular democracy, citizenship does not simply bestow privileges or rights, but entails fundamental responsibilities. As set out in the preamble to the current Citizenship Act, Australian citizenship gives full and formal membership of the Australian community and is a common bond, involving reciprocal rights and obligations, uniting all Australians while respecting their diversity. Those who are citizens owe their loyalty to Australia and its people. This applies to those who acquire citizenship automatically through birth in Australia and to those who acquire it through application.

When people engage in terrorism-related behaviour which seeks to advance the ideology of a terrorist organisation and threatens arms of the Australian Government or people, they themselves have renounced their own citizenship by not acting and sharing in the same values and interests as form the fundamental aspects of Australian citizenship.

As stated in the Revised Explanatory Memorandum to the Allegiance Act, a citizen's duty of allegiance is not created by the Citizenship Act but rather, is recognised by it. The Government is of the view that the Allegiance Act is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Rather than respond in detail to the comments of the Parliamentary Joint Committee on Human Rights relating to human rights considered to be engaged by the previous version of the Bill, this response addresses the comments of the Committee which are relevant to the amended Allegiance Act as passed by the Senate, and refers the Committee to the Statement of Compatibility in the Explanatory Memorandum to the amended Bill.

Australian Citizenship Amendment (Allegiance to Australia) Act 2015

1.50 As set out above, the automatic cessation of citizenship engages and limits the right to freedom of movement. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective. In particular, how many people are likely to be affected by these measures and why existing laws and powers are insufficient to protect national security and the safety of the Australian community;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to effectively decide that a person's citizenship has ceased and whether this is the least rights restrictive approach. In addition, specific advice is sought in relation to each of the following offences or conduct, as to how each offence operates in practice and whether it is proportionate that citizenship should cease on the basis of each offence or conduct:**
  - **engaging in foreign incursions and recruitment as defined in Division 119 of the Criminal Code (with specific information given in relation to each offence provision in Division 119);**
  - **sections 80.1(2), 80.2, 80.2A, 80.2B, 80.2C, 91.1, 102.6(2), 102.7(2), 103.1, 103.2 of the Criminal Code; and**
  - **sections 24AB, 27 and 29 of the Crimes Act.**

1.51 The committee also seeks the minister's advice on these questions regarding each of the human rights set out in Part 1 below (articles 9, 12, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights ['ICCPR'] and article 10 of the International Covenant on Economic, Social and Cultural Rights ['ICESCR']).

I respectfully refer the Committee to the detailed information in the Statement of Compatibility in the Explanatory Memorandum which accompanied the revised Bill, which comprehensively addresses the human rights set out in articles 12, 13, 14, 15, 17, 23, 24 and 26 of the ICCPR and Article 3 of the Convention on the Rights of the Child ('CRC').

As a general statement, any measures restricting freedom of movement in relation to a person in Australia will have a lawful domestic basis. In circumstances where a person has been convicted and sentenced to imprisonment for a specified crime/s such that their continued citizenship is not in the public interest, such measures will be necessary to protect national security, public order, and the rights and freedoms of the Australian community at large. This is consistent with the ICCPR, being explicitly contemplated by Article 12(3) and being proportionate, in the Government's judgement, to the existing and emerging threats to national security which Australia faces.

With regard to a person who is outside Australia when their citizenship has ceased, it is the Government's view that, where a person has objectively demonstrated through their conduct that they have repudiated their allegiance to Australia, any ties they have to Australia for the purposes of Articular 12(4) have been voluntarily severed. Depriving such a person of the right to enter Australia would not be arbitrary, as it would be based on a genuine threat to Australia's security posed by a person.

In response to the Committee's questions regarding how decisions will be made by the Minister that a person's citizenship has ceased, I offer the following advice:

- Subsection 33AA provides that if a person has engaged in a form of conduct with the requisite intention, they will have acted contrary to their allegiance to Australia and renounced their citizenship, thus causing it to automatically cease by operation of law. Subsection 33AA(2) provides a list of relevant conduct which mirrors the terrorism-related offences listed under the *Criminal Code Act 1995 (Cth)*. Subsection 33AA(3) outlines 'intention' to mean where the person undertakes one of the listed forms of conduct to advance a political, religious or ideological cause and to coerce or influence by intimidation an arm of the Australian Government or a foreign government or the public (or a section of the public).

- In considering whether a person has engaged in conduct with the requisite intention, these terms have the same meaning as defined under the Criminal Code and draw only on the factual elements contained in those definitions. As such, conduct will be made out if there is factual evidence which demonstrates that the person has engaged in one of the actions listed at subsection 33AA(2) such as engaged in a terrorist act, recruited for a terrorist organisation or financed a terrorist. Factual evidence will also be drawn on to identify the expressed motivation of the person when engaging in the relevant conduct.

- A similar approach will be adopted under section 35 where a dual national or citizen has acted contrary to their allegiance to Australia by fighting for or being in the service of a declared terrorist organisation and the person's citizenship has ceased automatically by operation of law. Again, factual evidence will also be drawn upon to identify whether a person has undertaken combat with regular forces of a country at war with Australia or has taken up arms for or is in the service of a declared terrorist organisation.

- For both these streams, the Minister will be supported by existing whole-of-government and law enforcement coordination mechanisms that will provide information and intelligence about persons of interest who may be engaging in relevant conduct or fighting for or in the service of a declared terrorist organisation for the purposes of the Allegiance Act.

Upon becoming aware of information indicating that a dual national or citizen has engaged in conduct or is fighting for or is in the service of a declared terrorist organisation which has resulted in the automatic loss of their citizenship, I am required to provide (or make reasonable attempts to provide) written notice to the person that I have become aware of such conduct which has caused the person's citizenship to cease. The notice must also include a basic description of the conduct and the person's rights of review.

Furthermore and at any time after a person has ceased to be a citizen under sections 33AA or 35, I may consider whether to make a determination to rescind the notice and exempt the person from the effect of the section, thus providing for the person's citizenship to be restored. In considering whether to make a determination, I must have regard to:

- the severity of the matters that were the basis of the notice;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18 – the best interests of the child as a primary consideration;
- whether the person is being or likely to be prosecuted in relation to the matters that were the basis of the notice;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations; and
- any other matters of public interest.

The Allegiance Act also requires that natural justice be applied in instances where I decide to consider exercising my power in relation to the making of a determination to rescind a notice or not. Where I make such a determination, I must table a statement to both Houses of Parliament.

Under section 35A and where a dual national or citizen is convicted of a terrorism-related offence, the courts (through trial processes, sentencing and conviction of the individual) will have identified the factual evidence and intention which went to the person's level of engagement and conduct in committing the terrorism-related offence.

Additional parliamentary scrutiny measures and review rights have also been incorporated into the Allegiance Act as a result of recommendations of the PJCIS.

Upon receiving my written notice that their citizenship has ceased due to their conduct, a person will have the right to seek judicial review of the basis on which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen/national at the time of the conduct. For those individuals convicted of and sentenced in relation to a terrorism-related offence in Australia, I am required to revoke my determination if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.

The Government is also required to publicly report, every six months, the number of times a notice for loss or revocation of citizenship has been issued under each of the grounds contained in the Allegiance Act, and provide a brief statement of reasons. I will also be required to notify the PJCIS on the issuing of a notice for the loss of citizenship under the Allegiance Act. The PJCIS will also be required to review, by 1 December 2019, on the operation, effectiveness and implications of the application of the provisions under the Allegiance Act.

These oversight mechanisms achieve an appropriate balance between protecting the basic human rights of individuals while ensuring that dual national and citizens who do not demonstrate their allegiance to Australia do not retain the privilege and benefits of Australian citizenship.

1.101 The committee's assessment of the automatic cessation of citizenship powers against articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) (obligations of non-refoulement) raises questions as to whether depriving a person of citizenship, and therefore potentially exposing them to deportation, is compatible with Australia's non-refoulement obligations, given the lack of statutory protection and lack of 'independent, effective and impartial' review of decisions to remove a person.

1.102 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the cessation of citizenship provisions and decisions to remove an ex-citizen will be subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

The provisions of the Allegiance Act are compatible with Australia's non-refoulement obligations.

The Minister's discretionary power to cease a person's citizenship where the person is in Australia will not result directly in them being liable for removal from Australia. Any such liability would come only after the person's lawful status in Australia was rescinded and the person was detained under the *Migration Act 1958* (Migration Act) as an unlawful non-citizen.

Upon my determination to cease a person's citizenship under section 35A of the Allegiance Act, the person will be granted an ex-citizen visa under section 35 of the Migration Act. The ex-citizen visa is a permanent visa allowing the holder to remain in, but not re-enter Australia. The grant of this visa is an automatic process. Any action in relation to the cancellation of this visa on character grounds involves a separate process under the Migration Act. Whether the person engages one of Australia's non-refoulement obligations can be considered as part of deciding whether or not a person should hold a visa. A visa cancellation decision by a delegate of mine will be subject to merits review, and my personal visa cancellation decisions are subject to judicial review. I consider both merits and judicial review to be 'independent, effective and impartial', and where relevant, the review may consider non-refoulement obligations claimed to be owed by Australia.

Should there be cases of individuals convicted of terrorism-related offences who may also engage Australia's non-refoulement obligations, such obligations do not extend to an obligation to grant permanent residency or any particular type of visa in Australia. Rather, for people who are found to be owed a non-refoulement obligation but are ineligible for the grant of a visa on character or national security grounds, Australia will put in place appropriate measures to ensure the protection of the person's human rights while balancing the protection and security of the Australian community. Australia does not intend to resile from its non-refoulement obligations.

PROCEDURAL AND PROCESS RIGHTS

1.128 The committee therefore considers that the automatic loss of citizenship through conduct engages and limits the right to a fair hearing under article 14 of the International Covenant on Civil and Political Rights. The statement of compatibility provides insufficient information to allow a full assessment of this potential limitation, particularly given the unusual construction of proposed sections 33AA and 35(1).

1.129 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the availability of judicial review and the potential for declaratory relief is sufficient for compatibility with the right to a fair hearing in light of the particular construction of sections 33AA and 35(1) (including with reference to where the burden of proof falls and the standard of proof applicable to such proceedings).

1.146 The proposed provisions are likely to be considered 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) would apply, including the right to be presumed innocent and the right not to incriminate oneself. The automatic loss of citizenship through conduct as defined by reference to the Criminal Code engages and limits criminal process rights, which form part of the right to a fair trial under article 14 of the ICCPR. This is because the measure does not contain the protection of any of these criminal process rights.

1.147 As set out above, the statement of compatibility does not acknowledge that the right to a fair trial is limited and accordingly does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

The right to an effective remedy

1.166 The committee's assessment of the automatic cessation of citizenship powers against article 2 of the International Covenant on Civil and Political Rights (right to an effective remedy) raises questions as to whether a person who has lost their citizenship will have access to an effective remedy.

1.167 As set out above, the automatic cessation of citizenship engages and limits the right to an effective remedy. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

I respectfully disagree with the views of the Committee and am of the position that the Allegiance Act does not limit a person's right to a fair hearing and a fair trial.

As outlined earlier and upon receiving my written notice to the effect that their Australian citizenship has ceased, a person will have the right to seek judicial review on the basis of which the notice was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.

For those individuals who have been convicted of a terrorism-related offence, I will also be required to revoke my determination of cessation of citizenship if the conviction is subsequently overturned or quashed by a court and no further appeals can be made in relation to the decision.

The prohibition on double punishment

1.156 The committee's assessment of the automatic cessation of citizenship powers against article 14(7) of the International Covenant on Civil and Political Rights (prohibition on double punishment) raises questions as to whether depriving a person of citizenship will act as a double punishment.

1.157 As set out above, the automatic cessation of citizenship may engage and limit the prohibition on double punishment. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 14(7).

I respectfully disagree with the views of the Committee that in considering the terrorism-related conduct of a person who is offshore, including if they are fighting for or in the service of a declared terrorist organisation, such provisions are of a criminal nature and therefore act as a double punishment.

Section 33AA of the Allegiance Act is administrative in nature and applies consequences that arise automatically in response to a person acting inconsistently with their allegiance to Australia. As explained earlier and in considering whether a person has engaged in terrorism-related conduct for the purposes of section 33AA, these terms have the same meaning as defined under the Criminal Code and draw only on the factual elements contained in those definitions. As such, conduct will be made out if there is factual evidence which demonstrates that the person has engaged in one of the actions listed at subsection 33AA(2) such as engaged in a terrorist act, recruited for a terrorist organisation or financed a terrorist. Factual evidence will also be drawn on to identify the expressed motivation of the person when engaging in the relevant conduct.

In addition, the Allegiance Act also provides for a person's right to seek judicial review of the basis on which the notice was made and which provides a further safeguard in the application of these provisions. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, whether the person engaged in that conduct with the requisite intention and whether or not the person was a dual citizen at the time of the conduct.

The prohibition on retrospective criminal laws

1.179 The committee's assessment of the automatic cessation of citizenship powers on conviction for certain offences, against article 15 of the International Covenant on Civil and Political Rights (ICCPR) (prohibition on retrospective criminal laws) raises questions as to whether the provisions should apply to conduct that occurs prior to the bill becoming law.

1.180 As set out above, the automatic cessation of citizenship on conviction may engage and limit the prohibition on retrospective criminal laws which is an absolute right. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the measures are compatible with article 15(1) of the ICCPR.

A recommendation of the PJCIS was the inclusion of amendments to provide for conviction-based provisions to apply retrospectively for relevant offences that had occurred prior to the commencement of the Allegiance Act. In supporting retrospectivity in relation to convictions, the PJCIS stated:

> *'... the Parliament has introduced legislation with retrospective effect in special circumstances, and these laws have been held to be legally valid. The Committee notes the Bill's purpose is to ensure the safety and security of Australia and its people and to ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia. ... on balance the Committee determined these to be special circumstances. The Committee formed the view that past terrorist–related conduct, to which persons have been convicted under Australian law, is conduct that all members of the Australian community would view as repugnant and a deliberate step outside of the values that define our society. ... In addition, the Minister's decision would include a current assessment of whether the person's past conviction reveals that they have breached their allegiance to Australia and whether it is contrary to the public interest for them to remain a citizen.'*

The application provisions of the Allegiance Act provide for section 35A to apply to dual nationals or citizens who, in addition to being currently convicted of a specified offence with a sentence of at least 6 years imprisonment, may also apply to dual nationals or citizens who have been convicted of a specified offence with a sentence of ten years or more and which conviction has been handed down within the last ten years. The Government accepted this amendment was necessary to ensure coverage of people recently convicted of and sentenced in relation to very serious terrorism-related offences which show a clear repudiation of allegiance to Australia.

CHILDREN

Obligation to consider the best interests of the child

1.199 The committee's assessment of the automatic cessation of citizenship powers against article 3 of the Convention on the Rights of the Child ['CRC'] (best interests of the child) raises questions as to whether the draft provisions are compatible with Australia's obligation to consider the best interests of the child in all actions concerning children.

1.200 As set out above, the automatic cessation of citizenship engages and limits the obligation to consider the best interests of the child. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

1.201 The committee also seeks the minister's advice on these questions in relation to the rights contained in articles 7, 8 and 12 of the Convention on the Rights of the Child (right to a nationality and right of the child to be heard), as set out below.

Multiple rights

1.216 The committee's assessment of the discretionary ministerial power to revoke the citizenship of a child following a parent's automatic cessation of citizenship under the bill against Australia's obligations under the International Covenant on Civil and Political Rights raises questions as to whether the limitation on rights is justifiable.

1.217 As set out above, the discretionary ministerial power to revoke the citizenship of a child engages and limits multiple rights. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective. In particular, advice is sought as to how decisions will be made by the minister or officials to remove a child's citizenship and whether this is the least rights restrictive approach.**

1.218 The committee also seeks the minister's advice on these questions in relation to the specific rights contained in articles 3, 7, 8 and 12 of the Convention on the Rights of the Child (best interests of the child, the right to a nationality and the right of the child to be heard), as set out below.

- **Obligation to consider the best interests of the child (above)**
- **The right to nationality (above)**
- **The right of the child to be heard in judicial and administrative proceedings (above)**

The Allegiance Act does not apply to a child under 10 years of age. Further, and in accordance with a recommendation of the Parliamentary Joint Committee on Intelligence and Security, a child's citizenship will not be revoked following the revocation of their parent's citizenship where the parent has been convicted of a terrorism-related offence. Where the Allegiance Act may apply to a child between the ages of 10 to 14, it does so in conformity with established norms in the Criminal Code.

Furthermore, there are a number of safeguards built into the Allegiance Act which include:

- Providing written notice to the child (including their parents or legal guardians) of the conduct which has caused their citizenship to cease. The notice must also include a basic description of the conduct and the person's rights of review;
- Providing the Minister with a discretionary power to determine whether to rescind the notice and exempt the child from the effect of the section, thus providing for their citizenship to be restored. In considering whether to make a determination, the Minister must have regard to, among other matters, the best interests of the child as a primary consideration; and
- Providing for natural justice in instances where the Minister decides to consider exercising their power in relation to the making of a determination to rescind a notice or not. Where the Minister makes such a determination, they must table a statement to both Houses of Parliament.

ATTORNEY-GENERAL

CANBERRA

MC15-009963

25 FEB 2016

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

Dear Mr Ruddock Philip

Thank you for your letter of 1 December 2015 from the Parliamentary Joint Committee on Human Rights (the Committee) concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (Bill).

In its *Thirty-second Report of the 44th Parliament* (the Report) the Committee considered the Bill, and has sought advice regarding the human rights compatibility a number of components of the Bill.

In response to the Committee's request, I enclose detailed responses to the issues raised in the Report. I trust this information is of assistance to the Committee.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Attorney-General's response to the Parliamentary Joint Committee on Human Rights

Thirty-second Report of the 44th Parliament

Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

Introduced into the Senate on 12 November 2015

Portfolio: Attorney-General

Contents

Introduction

The Counter-Terrorism Legislation Amendment Bill (No.1) 2015 (the Bill) was introduced into the Senate on 12 November 2015. On 1 December 2015, the Parliamentary Joint Committee on Human Rights (the Committee) considered the Bill in its Thirty-second Report of the 44TH Parliament (the report).

The Committee may also wish to note that on 15 February 2016 the Parliamentary Joint Committee on Intelligence and Security (PJCIS) reported on its inquiry into the Bill. The Government is presently considering the 21 recommendations made by the PJCIS.

Schedule 2—Extending control orders to 14 and 15-year-olds

Paragraphs 1.46 to 1.89 of the report consider the human rights compatibility of the extension of the control order regime to 14 and 15-year-olds.

Background

Control orders are an important element of Australia's counter-terrorism strategy and have been a protective and preventative measure available to law enforcement since 2005. The Government supports recommendation 26 of the COAG *Review of Counter-Terrorism Legislation* (COAG Review), which recommended the retention of control orders (with additional safeguards and protections).

The proposed amendments in Schedule 2 of the Bill extend the regime to 14 and 15 year olds, and also include additional safeguards in recognition of the lower age. These additional safeguards are also extended to 16 and 17-year-olds—who are already covered by the regime but without the additional safeguards.

Accordingly, the human rights compatibility statement for these amendments focuses on the extension of the existing regime to 14 to 15-year-olds.

As noted above, the PJCIS has completed its inquiry into the Bill, which included consideration of Part One of the Independent National Security Legislation Monitor's (INSLM) January 2016 report on control order safeguards. The Government is presently considering the reports of the INSLM and the PJCIS.

Legitimate objective

The availability of control orders as a measure to manage and mitigate the risk or threat of certain activities being undertaken by young people at risk of engaging in violent extremism is reasoned and supported by evidence.

Recent counter terrorism operations have unfortunately shown that people as young as 14 years of age can pose a significant risk to national security through their involvement in planning and supporting terrorist acts.

In this context, it is important that our law enforcement and national security agencies are well equipped to respond to, and prevent, terrorist acts. This is the case even where the threats are posed by people under the age of 18 years.

The Australian Federal Police (AFP) submission to the PJCIS, dated 15 December 2015, discusses the operational context for the proposed amendments:

> Recent events have clearly demonstrated the vulnerability of young people to ideologies espousing violent extremism. Law enforcement and intelligence partners have observed both the attraction of terrorist groups to minors, as well as the 'grooming' of minors by adults. With the internet providing easy access to propaganda and recruiters, both domestic and international, through social media, young people are at risk of falling prey to terrorist groups who promise a sense of purpose, belonging and excitement. Worryingly, law enforcement is also observing that adults are increasingly looking to use young people to evade law enforcement surveillance and/or attention. [1]

Control orders provide significant benefits to the community by placing limits and controls on the behaviour of a person identified as being a risk to the safety and security of the community. The amendments in the Bill that propose targeted monitoring of individuals the subject of a control order (discussed later) will contribute to these benefits by facilitating the monitoring of such individuals.

Control orders can also assist the person subject to the control order by ensuring individuals who have engaged in conduct or activities of concern can remain in the community and largely continue with their ordinary lives (for example, attend school, work, and places to participate in cultural and religious practices), while being required to discontinue or minimise activities which may enable or encourage them to participate in terrorist activity. Maintaining connection to society through participation in ordinary activities is of benefit to the individual, both in relation to their personal interests and from a remedial perspective.

The vulnerability of young people to violent extremism demands proportionate, targeted measures to divert them from extremist behaviour. It is appropriate and important that all possible measures are available to avoid a young person engaging with the formal criminal justice system to mitigate the threat posed by violent extremism. Consequently, the ability to use control orders to influence a person's movements and associations, thereby reducing the risk of future terrorist activity, addresses a substantial concern and the regime is aimed and targeted at achieving a legitimate objective.

Rationally connected

The proposed expansion of the scheme to cover 14 and 15-year-olds is rationally connected to the legitimate objective of managing and mitigating the risk posed by a young person where laying charges is not justified, appropriate or possible.

The overriding need to protect the community from harm means that law enforcement must identify emerging threats and constantly balance the need to investigate and collect evidence while a terrorist threat develops, against the need to protect the community from the impact should the threat be realised.

In the current fluid and evolving terrorism threat environment, police may have sufficient intelligence to establish serious concern regarding the threat posed by an individual or group, but may not have sufficient evidence to commence criminal prosecution. In these circumstances other mechanisms, including control orders, provide a mechanism to manage the threat in the short to medium term. Control orders should be considered as a

[1] Publicly available on the PJCIS website:
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security>

tool that can be used in conjunction with and complementary to other options, including criminal prosecution and countering violent extremism programs.

Proportionate

The control order regime, including its extension to 14 and 15 year old persons of security concern, is reasonable and proportionate to achieve the objectives mentioned above.

While a control order can be sought where there is a threat, there is no requirement that the threat be imminent. However, a control order can only be issued if the court is satisfied that each of the requested obligations, restrictions and prohibitions is reasonably necessary and reasonably adapted and appropriate to protecting the public from a terrorist act or preventing support or facilitation of a domestic terrorist act or hostile activities overseas.

A control order is a preventative measure, and is not intended to be punitive or used as a substitute for prosecution. Where a person poses a significant risk to the community and there is sufficient evidence to charge a person with an offence, criminal prosecution will be pursued.

Best interests of the child consideration

Subsection 104.4(1) of the *Criminal Code Act 1995* (Criminal Code) provides the test for making an interim control order. When deciding whether to impose a control order on a young person, the issuing court must be satisfied on the balance of probabilities that, for example, the order will substantially assist in preventing a terrorist act or the person has engaged in particular conduct, such as participating in training with a listed terrorist organisation. In addition, the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on a person by the order are reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a terrorist attack, preventing the provision of support for or the facilitation of a terrorist attack or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Proposed subsection 104.4(2) of the Criminal Code specifies matters the court must consider when determining what is "reasonably necessary, and reasonably appropriate and adapted". These matters are the impact of the particular obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age—the best interests of the person. Given the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age—the best interests of the person, are both listed as factors the court must consider, it is clear that such considerations are important and should carry weight over other possible considerations (with the exception of national security or protecting the community from terrorism). This is why the Explanatory Memorandum referred to the best interests of the person as a 'primary' consideration. However, it is appropriate that the court has the ability to consider any possible relevant factor and determine what weight it should be given.

The report expresses concern that the regime would not prevent an order being made that separates a child from their family or requires them not to attend a particular school (paragraph 1.77). While that is technically correct, in practice the court would not make an order including such restrictions unless they were in the best interests of the child, and it was reasonably necessary and reasonable appropriate to do so. It is difficult to contemplate a scenario in which that could occur, particularly given the requirement for the court to consider the impact on the child's personal circumstances and the child's best interests.

The report also considers whether the ability of the court to impose a curfew on a person amounts to a deprivation of liberty (paragraphs 1.78 to 1.81). In this context it is important to note that the Bill does not change the 'curfew' provision in any way. Indeed that provision was amended in 2014 to implement a Council of Australian Governments' Review of Counter-Terrorism Legislation recommendation to clarify the maximum period of a curfew on the face of the legislation. Accordingly, while a court could impose a curfew of up to 12 hours, the court could only do so if satisfied that such a restriction would be in the best interests of the child, and was reasonably necessary and reasonable appropriate and adapted to mitigating the risk of terrorism or foreign fighting or the support or facilitation of terrorism or foreign fighting.

Recommendation one of the PJCIS report considers the best interests of the child consideration. The Government is presently considering the PJCIS report and its recommendations.

Schedule 2—Court-appointed advocate for young persons

Paragraphs 1.90 to 1.106 of the report consider the human rights compatibility of court appointed advocates for young persons.

Background

As noted in the report, the court appointed advocate model is based on the Family Court's independent children's lawyer (ICL) model (paragraph 1.99). While the court appointed advocate is not the young person's legal representative, nothing in Division 104 or elsewhere prohibits a young person (or any other person the subject of a control order) from engaging an independent legal representative.

Legitimate objective, rationally connected and proportionate

The court appointed advocate model in the Bill seeks to achieve the following outcomes:

- ensure the controls imposed by the control order and the consequences of failing to comply with them is fully explained to the child by an independent person (noting that interim control orders are generally obtained on an ex parte basis, such that the young person would not likely have legal representation at the time of service). The AFP will continue to be required to provide this and other information to the child at the time of service
- ensure there is an independent person who can provide the court with an assessment about what is in the child's best interests, and
- ensure, particularly in circumstances where the child does not have separate legal representation, that there is a legally qualified person from whom the child can seek advice, and who can adduce evidence and make submissions for the child during proceedings.

On 14 December 2015, the PJCIS requested the Department to review the submissions made by bodies such as the Law Council of Australia and the Gilbert and Tobin Centre of Pubic Law and respond to the issues raised. On 15 January 2016, the Department provided the PJCIS with a supplementary submission which sought to address each of those sets of issues. A number of the submissions discuss the court appointed advocate model and the PJCIS has asked the Department to consider whether an alternate model is feasible. The Department has advised the PJCIS that an alternate model may help address the concerns raised in those submissions, although any alternate model would be subject to agreement by the States and Territories under the requirements of the 2004 Inter-Governmental Agreement on Counter-Terrorism Laws.

Recommendation two of the PJCIS report considers the court appointed advocate model. The Government is presently considering the PJCIS report and its recommendations.

Schedule 5—'Imminent' test and preventative detention orders

Paragraphs 1.107 to 1.130 of the report consider the revised test for imminence in subsection 105.4(5) of the Criminal Code.

Background

Preventative detention orders (PDOs) are protective tools that are designed to achieve the following legitimate objectives:

- prevent an imminent terrorist act from occurring, or
- preserve evidence of, or relating to, a recent terrorist act.

Legitimate objective, rationally connected and proportionate

Currently, the issuing authority must be satisfied there are reasonable grounds to suspect that a terrorist act is imminent and is expected to occur, in any event, at some time in the next 14 days. The problem with this test is that even where police have grounds to suspect a person has the capacity to carry out a terrorist act at any time, neither the AFP nor the issuing authority may have information as to the time that has been selected to carry out that act – if indeed a time has been selected. For example, if a terrorist is prepared and waiting for a signal or instruction to carry out their act, the AFP may not be able to identify when that signal or instruction will be sent. Indeed the terrorist themselves may not know. Under the existing test, the AFP may not be able to seek a preventative detention order without information as to the expected timing. Accordingly, there is an operational gap in ability to deal with terrorist acts that are not planned to occur on a particular date, even where the preparations for that terrorist act may be in their final stages, or complete. The legitimate objective of the amendments is to address this gap so that the objectives of the preventative detention order regime can be realised.

As the AFP noted in their submission to the PJCIS, if the point in time that an incident will take place is not known, the issuing authority may not be satisfied the act is expected to occur sometime in the next 14 days. The proposed amendment addresses this issue by placing the emphasis on the capacity for an act to be carried out in the next 14 days. If a terrorist act is capable of being carried out, and could occur, within 14 days, that terrorist act will meet the definition of an 'imminent terrorist act'. Accordingly, the proposed amendment ensures the AFP has the ability to apply for a PDO to safeguard the public against such risks where they are identified. The inclusion of a 14-day timeframe in which the act could occur retains the imminence requirement, but focusses on the capability of a person to commit a terrorist act, as opposed to the specific time in which the terrorist act is expected to occur. Accordingly, the amendments are rationally connected and proportionate to the objective of preventing imminent terrorist acts and the need to ensure the utility of the preventative detention order regime to achieve that objective.

Furthermore, existing requirements that the AFP member and issuing authority must be satisfied of under existing subsection 105.4(4) ensure the PDO regime remains a proportionate, protective tool to counter immediate threats to national security. To obtain a PDO, an AFP member must demonstrate that the order will "substantially assist in preventing a terrorist act occurring" (paragraph 105.4(4)(c)) and that detention is "reasonably necessary" for the purpose of preventing the terrorist act (paragraph 105.4(4)(d)). The issuing authority must be similarly satisfied of both requirements.

These proportionality requirements ensure that law enforcement agencies must make a case for why the significant limitations on an individual's freedoms under a PDO are justified in each instance. Viewing the proposed amendment to subsection 105.4(5) in the context of the PDO framework as a whole demonstrates that the safeguards in place protect against the inappropriate use of the regime.

Recommendation fifteen of the PJCIS report considers the threshold for obtaining a PDO. The Government is presently considering the PJCIS report and its recommendations.

Schedule 8 —Monitoring compliance with control orders

Paragraphs 1.131 to 1.160 of the report consider the human rights compatibility of the monitoring compliance with control orders regimes.

Background

The former INSLM noted in his 2012 report that the efficacy of a control order depends largely upon the subject's willingness to respect a court order, and that in the absence of the ability to effectively monitor a person's compliance with the terms of a control order, there is no guarantee that a person will not breach the order or go on to commit a terrorist offence.

These comments acknowledge the limitation of existing Commonwealth coercive powers such as physical searches, telecommunication interception and surveillance devices, which are only available for the purposes of investigating an offence that has already been committed or where there is information that an offence about to be committed.

The proposed new monitoring powers respond to the former INSLM's concerns by creating targeted monitoring regimes that apply only to a person in relation to whom a superior court has already decided the relevant threshold for issue of a control order have been met and who therefore, by definition, is of security concern. These targeted regimes will facilitate monitoring of the person's conduct to mitigate the risk of breaches of control orders and, consequently, to mitigate the risk of the person engaging in preparatory acts, planning and terrorist acts.

It is imperative that our law enforcement agencies have adequate powers to monitor a person's compliance with the conditions of the control order. Without sufficient powers to monitor compliance, community safety may be put at risk if the person does not choose to comply with the conditions of the order and breaches go undetected.

Legitimate objective, rationally connected and proportionate

Currently, law enforcement agencies can only apply for a search warrant, or a warrant to use telecommunications interception or a surveillance device, if it is suspected that an offence has occurred or there is information indicating an offence is about to occur. These traditional powers do not fit the changing environment in which we live. The ability to use search, telecommunications interception and surveillance powers only after an offence is suspected of being committed undermines the preventative and protective purposes of control orders. The breach of the conditions of a control order may mean a person has been able to plan, prepare for, progress, or provide support to, terrorist plots or related activity, regardless of whether a terrorist act has occurred.

Physical search, telecommunications interception and surveillance powers are particularly relevant to monitoring a person's compliance with obligations, prohibitions and restrictions in relation to:

- the possession of specified articles or substances
- communication or association with specified individuals
- access or use of specified telecommunications or technology, including the internet, and
- the carrying out of specified activities.

Clearly, these obligations, prohibitions and restrictions can be critical to reducing the ability of a person to commit an offence and separating them from others who may encourage, or be involved in, terrorist activity. Where a person seeks to conceal their contravention of such conditions, search, telecommunications interception and surveillance powers are the most effective and efficient means of detecting breaches.

The Bill strikes an appropriate balance between enabling search, telecommunications interception and surveillance powers to be used to monitor compliance with control orders conditions, and ensuring there is sufficient accountability and oversight of the use of these powers.

However, recommendations nine, ten and eleven of the PJCIS report consider a number of aspects of the proposed monitoring warrant regime, including additional safeguards and accountability mechanisms. The Department is presently considering the PJCIS report and its recommendations.

Schedules 9 and 10 — Monitoring compliance with control orders

The Committee has specifically asked for information to assist in determining that the limitation on the right to privacy is proportionate to the objective.

The objective of the proposed new monitoring warrant framework is to ensure that a person who is subject to a control order is prevented from engaging in any activity related to terrorist acts and terrorism offences. The monitoring warrant powers are subject to appropriate restrictions which guarantee that the use of power is a proportionate limitation on the right to privacy.

The Bill requires the issuing authority to balance a number of different considerations, including whether there are any alternative methods that would be likely to assist the agency, in making the decision to issue the warrant. The warrants can only be issued once a number of thresholds are met. These thresholds include a requirement that the issuing authority must have regard to the possibility that the person:

- has engaged, is engaging, or will engage, in a terrorist act
- has provided, is providing, or will provide, support for a terrorist act
- has facilitated, is facilitating, or will facilitate, a terrorist act
- has provided, is providing, or will provide, support for the engagement in a hostile activity in a foreign country
- has facilitated, is facilitating, or will facilitate, the engagement in a hostile activity in a foreign country
- has contravened, is contravening, or will contravene, the control order, or
- will contravene a succeeding control order.

This threshold is designed to ensure that the issuing authority has regard to evidence of both a specific risk or propensity of the person engaging in such conduct or breaching the order, as well as evidence that there is a general risk or propensity that the person will engage in such conduct

or breach the control order. In making this decision, the issuing authority may consider a range of information, potentially including:

- whether there specific or general evidence indicating that there is a possibility that the person may engage in the conduct the control order is intended to prevent, or may breach the control order
- evidence pre-dating the issuing or service of the control order, including the grounds on which the control order was issued, that may indicate such a possibility, notwithstanding the fact that the control order has subsequently been issued and/or served, and
- evidence about whether other persons subject to control orders have engaged in conduct the control order is intended to prevent, or have breached their control order, to the extent such evidence may indicate whether there is a possibility of the person in question may engage in such conduct or breach the extant control order.

In essence, these cumulative factors require the issuing authority to balance privacy concerns with the extent to which monitoring would assist in preventing terrorist and related acts. This test constrains the use of the monitoring warrant powers to ensure that it is only used in circumstances where it would be reasonable and necessary.

In addition to this proportionately test, B-Party warrants are subject to further requirements to those that apply to other interception warrants:

- the person subject to the control order must be likely to communicate with the person whose service is to be intercepted
- the issuing authority must be satisfied that the agency has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the person subject to the control order, or that interception of the service used by the person subject to the control order would not otherwise be practicable, and
- the maximum period of 45 days for B-Party warrants is half that of the period applicable for other interception warrants, which acknowledges that B-Party interception involves a potential for greater privacy intrusion of persons who, though in contact with persons of interest, may not be involved in the commission of an offence.

The option for agencies to defer reporting maintains a level of transparency that is not at the expense of operational effectiveness. Due to the generally small number of control orders likely to be in force at any one time, immediate public reporting may enable an individual to determine or speculate as to whether they are subject to covert surveillance. However, if the Minister determines not to include the information in the Annual Report, then the chief officer of an agency is under a positive obligation to request the Minister to include the information in the next report if appropriate. All information must still be reported to the Minister, and the Minister must decide whether to report.

The Government notes the Committee's observation that the control order warrants under the SD Act can impact on third parties. The Government will amend the Statement of Compatibility to ensure this is appropriately reflected.

Further, recommendations nine to thirteen of the PJCIS report consider a number of aspects of the proposed monitoring warrant regime, including telecommunication inception and surveillance device warrants. The Department is presently considering the PJCIS report and its recommendations.

Schedules 9 and 10—Use of information obtained under warrant if interim control declared void

The provisions, inserted into the *Surveillance Devices Act 2004* (the SD Act) and *Telecommunications (Interception and Access) Act 1979* (the TIA Act) are intended to address the unlikely scenario where:

- an interim control order has been issued in respect of a person
- a law enforcement agency has duly obtained a monitoring warrant in relation to that person
- under that monitoring warrant, the agency has obtained information that indicates that the person is likely to engage in a terrorist act, cause serious harm to a person, or cause serious damage to property, and
- before the agency can act on that information, the interim control order is considered by a court at a confirmation hearing and declared void *ab initio* pursuant to subsection 104.14(6) of the Criminal Code on the grounds that, at the time of making the interim control order, there were no grounds on which to make the order.

As the existence of a valid control order is a condition for the issuing of a monitoring warrant, the likely effect of a court declaring an interim control order void ab initio pursuant to subsection 104.14(6) of the Criminal Code would be that any monitoring warrants predicated on that control order would also likely be void *ab initio*.

It is a fundamental principle of the Australian legal system that courts have a discretion as to whether or not to admit information as evidence into proceedings, irrespective of the manner in which the information was obtained. As an example, the *Bunning v Cross*[2] discretion places the onus on the accused to prove misconduct in obtaining certain evidence and to justify the exclusion of the evidence. This provision is expanded on in Commonwealth statute,[3] where there is an onus on the party seeking admission of certain evidence to satisfy the court that the desirability of admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. This fundamental principle reflects the need to balance the public interest in the full availability of relevant information in the administration of justice against competing public interests, and demonstrates the role the court plays in determining admissibility of evidence.

However, the SD Act and TIA Act depart from these fundamental principles, by imposing strict prohibitions on when material under those Acts may be used, communicated or admitted into evidence.[4] Under these Acts, it is a criminal offence for a person to deal in information obtained under these Acts for any purpose, unless the dealing is expressly permitted under one or more of the enumerated and exhaustive exceptions to the general prohibition. These provisions expressly override the discretion of the judiciary, both at common law and under the *Evidence Act 1995*, to admit information into evidence where the public interest in admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained. There is also a risk that these specific provisions might be interpreted, either by a court considering the matter after the fact, or by an agency considering the question *in extremis*, to override the general defence to criminal responsibility under the Criminal Code.

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[2] (1978) 141 CLR 54.
[3] Section 138 of the *Evidence Act 1995* (Cth).
[4] See s 63 of the TIA Act and s 45 of the SD Act.

For this reason, the Bill would insert new section 65B to the SD Act and section 299 to the TIA Act, which would expressly permit agencies to rely on such information to prevent, or lessen the risk, of a terrorist act, serious harm to a person, or serious damage to property. These provisions would also permit such information to be used to apply for, and in connection with, a preventative detention order.

These amendments do not infringe on the right to a fair trial and fair hearing as protected by article 14 of the ICCPR. 'Equality of arms' requires that each party be afforded a reasonable opportunity to present their case under the conditions that do not place them at a substantial disadvantage vis-à-vis another party.[5] This principle essentially denotes equal procedural ability to state the case. These amendments do not engage the 'equality of arms' principle. This is because the amendments do not derogate from, or abridge, existing procedural rights of parties to litigation and would not result in actual disadvantage or other unfairness to the defendant. That is, the amendments do not impact upon opportunities to adduce or challenge evidence or present arguments on the matters at issue.[6]

Accordingly, the provisions are a reasonable and proportionate limitation on the right to a fair trial and fair hearing in article 14 of the ICCPR.

Schedule 15—Protecting national security information in control order proceedings

Paragraphs 1.172 to 1.201 of the report consider amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2014* (NSI Act) that will provide the court with the option to consider national security information in control order proceedings (subject to the rules of evidence and other safeguards) which is not disclosed to the subject of the control order or their legal representative.

Legitimate objective, reasonable and proportionate

The Committee notes at paragraph 1-186 that the main purpose of the bill appears to be to provide for circumstances where the subject of a control order and their legal representative may not be provided with any details *at all* about the information being relied on, but which can still be considered by a court, in control order proceedings. However, this is not the purpose of the amendments.

There are specific provisions in Division 104 of the Criminal Code which set out what information needs to be provided to the controlee, subject to national security redactions. As the Committee notes, subsection 104.5(2A) provides that the interim control order must set out a summary of the grounds on which the order is made, but does not need to include information that would likely prejudice national security. If the AFP elects to confirm the interim control order, under section 104.12A the AFP must provide to the subject of the control order the statement of facts relating to why the order should or should not be made, and an explanation as to why each of the proposed obligations, prohibitions or restrictions should be imposed on the person, that were used in the AFP's application for the interim control order. Paragraph 104.12A(2)(a)(iii) also requires the AFP to serve personally on the person any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the control order.

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[5] *Brandstetter v Austria*, Application No: 11170/84; 12876/87; 13468/87, Strasbourg judgment 28 August 1991 §§41-69.

[6] *H. v Belgium*, Application No: 8950/80, Strasbourg judgment 30 November 1987 §§49-55.

However, these provisions do not require the AFP to provide information that the AFP may seek to protect for reasons of national security.

These specific disclosure provisions operate as protections for the subject of the control order, as they ensure the controlee is provided with timely access to the information used in support of the control order application. The provisions operate in addition to any other applicable procedural rights in federal civil proceedings, such as the normal processes of discovery, in which a party to a proceeding is entitled to obtain much of the material relied upon by the other party. At any stage where disclosure obligations arise, it is up to the AFP to either make a public interest immunity claim or seek to use the protections under the NSI Act to withhold any national security information. Wherever the AFP does so, it must satisfy the court that the non-disclosure of the information is appropriate. Neither the existing Division 104 Criminal Code provisions, nor the NSI Act provisions, permit evidence which a court considers ought to be subject to national security exceptions to be relied upon by the court in making its decision to confirm a control order.

Under the NSI Act, there are existing provisions that enable a court to consider, in a closed hearing, whether national security information may be disclosed and if so, in what form. The court has the discretion to exclude non-security cleared parties, their non-security cleared legal representatives and non-security cleared court officials from the hearing where the court considers that disclosing the relevant information to these persons would likely prejudice national security. If a party's legal representative is not security cleared, does not wish to apply for a security clearance, or a clearance is unable to be obtained in sufficient time before the closed hearing, then the court may still hold the closed hearing and determine the matter without the assistance of a legal representative of the party. Alternatively, the court could decide to appoint a security cleared special counsel to represent the interests of the party during the closed hearing (although there has been no need for a security cleared special counsel to be appointed under the NSI Act to date). However, any information the court decides should not be disclosed under the NSI Act cannot be used in the substantive proceeding.

The purpose of the proposed amendments to the NSI Act is it to provide the court with two further options when the NSI Act has been invoked in a control order proceeding. First, the option to exclude a respondent's legal representative, even if they are security cleared, at the closed hearing to determine if or how the information should be disclosed in the substantive control order proceeding. Second, it provides the option for the court to still consider that evidence in the substantive control order proceeding, even if it cannot be disclosed to the party or their lawyer (whether security cleared or not). The rationale for these amendments is that the evidence may be so sensitive that even a security cleared legal representative cannot see the information.

The AFP's submission to the PJCIS inquiry into the Bill explains the importance of protecting sensitive information, not only to maintain the confidentiality and integrity of law enforcement and intelligence operations and methodologies, but also to maintain the trust with which law enforcement has been provided this information. It also explains that in the current threat environment, it is increasingly likely that law enforcement will need to rely on evidence that is extremely sensitive, such that its disclosure, even to a security-cleared lawyer, could jeopardise the safety of sources and the integrity of investigations. There is a substantial risk that the inability to rely on sensitive information may mean that control orders are unable to be obtained in relation to a person posing a high risk to the safety of the community. Accordingly, the purpose of the amendments is aimed at achieving the legitimate objective of protecting national security information in control order proceedings, the disclosure of which may be likely to prejudice national security.

The amendments to the NSI Act will provide the court with the ability to make three new types of orders to protect national security information that may result in the court being able to

consider information in a control order proceeding that the person the subject of the control order proceeding (or their legal representative) may not see. Prior to making one of these new orders, under paragraph 38J(1)(c), the court must be satisfied that the subject of the control order proceeding has been provided sufficient notice of the allegation on which the control order request is based (even if the person has not been given notice of the information supporting those allegations).

When considering the effect of the proposed amendments to the NSI Act, it is important to consider the proposed amendments as a whole rather than considering the sections in isolation. There are several protections built into the legislation that mitigate any procedural unfairness. Prior to making one of the new orders, the court must consider whether the order would have a substantial adverse effect on the substantive control order proceeding (subsection 38J(5)). This requires the court to contemplate the effect that withholding the information from the respondent or their legal representative will have on procedural fairness for the subject of the control order proceeding. Furthermore, the proposed amendment to subsection 19(4) will confirm that the court has discretion to later order a stay of a control order proceeding, if one of the new orders has been made and later in the proceedings it becomes evident that the order would have a substantial adverse effect on the substantive control order proceeding.

Importantly, the court also has discretion to decide which order to make and the form the order should take. For example, if the AFP proposes to withhold an entire document from the subject of a control order, but use it in support of the control order application, the court may decide that only part of the document may be withheld and used, or that the entire document can be withheld and used but the person must be provided with a summary of the information it contains. This is often referred to as 'gisting'.

Furthermore, the normal rules of evidence apply to evidence sought to be introduced under these new orders, in accordance with the express terms of section 38J and the existing Criminal Code provisions (section 104.28A). The effect of those provisions is that if any material is withheld from the respondent but used in the proceeding, that material must otherwise be admissible as evidence under the normal rules of evidence applicable in control order proceedings. There is also nothing in the new provisions that would dictate to the court what weight it should give to any evidence that is withheld (either in full or in part) from the respondent in the substantive control order proceeding.

Accordingly, the amendments provide an appropriate balance between the need to protect national security information in control order proceedings, and procedural fairness to the person to whom the control order relates. It preserves the independence and discretion of the court and instils it with the powers needed to mitigate unfairness to the subject of a control order proceeding. Further, the court retains its inherit discretion to appoint a special advocate if it is assessed as necessary and appropriate to the circumstances. The amendments are therefore reasonable and proportionate for the achievement of the objective of protecting national security information in control order proceedings.

Recommendations four to six of the PJCIS report consider various aspects of the proposed amendments to the NSI Act. The Government is presently considering the PJCIS report and its recommendations.

ATTORNEY-GENERAL

CANBERRA

MC15-008499

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

11 FEB 2016

Dear Chair Philip

I am writing in response to the letter from the Deputy Chair of the Parliamentary Joint Committee on Human Rights (the Committee) dated 10 November 2015. The letter seeks my advice about the human rights compatibility of the Crimes Legislation Amendment (Harming Australians) Bill 2015 (the Bill).

The Bill will amend the *Criminal Code Act 1995* (the Criminal Code) to extend the retrospective operation of the existing offences of murder and manslaughter of an Australian citizen and resident of Australia overseas to apply to conduct that occurred at any time before 1 October 2002. The Bill is intended to address a gap in Australia's criminal law and will ensure that crimes of murder and manslaughter of Australians can be prosecuted, whenever and wherever they occur.

The Bill was prepared with Australia's obligations under international human rights instruments in mind, including the International Covenant on Civil and Political Rights (ICCPR).

In response to the issues raised in the Committee's *Thirtieth Report of the 44th Parliament*, my advice is set out below.

Absolute liability

As the Committee has noted, the Bill will apply absolute liability to the new elements of the offence provisions, concerning the murder or manslaughter of an Australian citizen or resident of Australia in a foreign country before 1 October 2002. Absolute liability currently applies to elements of the existing offences, which apply to conduct occurring on or after 1 October 2002.

The effect of the Bill's provisions will be that, for a prosecution under section 115.1 (murder of an Australian citizen or resident of Australia) in respect of conduct occurring before 1 October 2002, the prosecution will not need to establish a fault element for the following elements of the offences:

- the victim was an Australian citizen or resident, and
- at the time the conduct was engaged in, the conduct constituted an offence against a law of the foreign country, or the part of the foreign country, in which the conduct was engaged.

For a prosecution of the manslaughter offence in section 115.2 in respect of conduct occurring before 1 October 2002, the prosecution will not need to establish a fault element for the two elements described above, as well as the element 'that the conduct caused the death of another person'.

The Committee has noted that the extended application of absolute liability raises questions as to whether the proposed measures limit a defendant's right to a fair trial. The Committee has queried whether:

- the measures are aimed at achieving a legitimate objective
- there is a rational connection between the limitation and that objective, and
- the limitation is a reasonable and proportionate measure for the achievement of that objective.

The measures are aimed at achieving a legitimate objective. The purpose of the amendments is to ensure that crimes of murder and manslaughter of Australians can be prosecuted, whenever and wherever they occur. The measures in the Bill will ensure that Australia has every legal tool available to seek justice for Australian victims of the most serious crimes by applying Australian criminal law to those responsible for these offences where they occurred before 1 October 2002. The Bill will rectify a gap in our laws and in doing so, address a significant community concern.

There is a rational connection between this objective and the extended application of absolute liability. The measures go directly to achieving the purpose of the Bill. The application of absolute liability is appropriate and required to ensure the effective operation of the offences.

If recklessness was the requisite fault element applying to the particular elements above, it is possible the offences would not capture conduct which should be criminalised, for instance where an offender does not turn their mind to the possibility that the victim of their conduct is an Australian citizen or resident, or that their conduct may constitute an offence in the foreign jurisdiction. These are effectively jurisdictional elements which provide the circumstances in which the offences will apply, rather than elements which go to the essence of the offending.

There are safeguards in the Bill which help ensure that the application of absolute liability is a reasonable and proportionate approach to achieving the Bill's objective. The prosecution will still need to prove other elements of the offence beyond a reasonable doubt, including that the defendant intentionally or recklessly engaged in conduct and that there was a causal connection between that conduct and the victim's death. The Bill also contains a safeguard against double jeopardy and applies the existing requirement of Attorney-General's consent for a prosecution to commence.

Finally, as noted above, absolute liability applies in respect of the existing murder and manslaughter offences in section 115 of the Criminal Code. To not apply the same standard for the application of the offences to conduct occurring before 1 October 2002 would create an undesirable inconsistency in the law.

For these reasons, the application of absolute liability is an appropriate measure and is necessary to achieve the Bill's legitimate objective.

Prohibition against retrospective criminal laws (nature of the offence)

The Committee has also raised questions about the retrospective operation of the measures in the Bill. These are legitimate queries, as retrospective offences challenge a key element of the rule of law – that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. The Parliament does not make such offences lightly.

Murder and manslaughter are two of the most serious crimes a person can commit and involve conduct which is universally known to be criminal in nature. Although the Bill would create a criminal law which has a retrospective operation, it only has retrospective operation in a technical sense because there is no jurisdiction in the world which does not recognise within its domestic criminal law a crime of murder or manslaughter, however described.

The provisions have been formulated in this way noting that there are differences in other countries as to what constitutes the offence of murder compared to manslaughter and the fault elements that apply to each offence. It is not possible to take account of the different constructions of murder and manslaughter offences in each country. The Bill's provisions are not intended to apply to conduct that is not classified as murder or manslaughter in the foreign country.

The Bill provides protections to ensure the retrospective operation of the provisions does not apply unfairly, including dual criminality protections in proposed paragraphs 115.1(1)(e) and 115.2(1)(e). The effect of these provisions is that a person will only be liable for an offence of murder or manslaughter in relation to conduct occurring before 1 October 2002 if, at the time they engaged in the conduct, it also constituted an offence against the law of the foreign country. The provisions ensure that a person cannot be prosecuted for conduct that was not otherwise a criminal offence at the time of its commission.

The Committee has observed that the proposed provisions would not require that the conduct constitute manslaughter or murder (or equivalent offences) in the foreign jurisdiction – merely that it is 'an offence'. The Committee raised the possible situation where a person is involved in a joint criminal enterprise (such as burglary) in a foreign country, where an Australian citizen is killed as a result. In such a case, the Committee notes that a person may be subject to a charge of burglary in the foreign jurisdiction, and subsequently face a charge of murder in Australia under the Criminal Code.

I disagree that this situation would occur. For the Australian offences to apply, the conduct would need to satisfy all elements of both the Australian and the foreign offence. This would require the accused's conduct to have caused the death of an Australian citizen or resident, and for the accused to have had intended that the conduct would cause the death of the Australian citizen (or be reckless as to causing that outcome). It is unlikely that the elements of the Australian offence could be made out without that same conduct constituting some form of culpable homicide in the foreign jurisdiction.

If such a situation transpired, the operation of proposed subsections 115.1(1A) and 115.2(1A) would mean that the maximum applicable penalty would be lessened to penalty which applies for the relevant offence in the foreign jurisdiction. This means that, if the relevant offence in the foreign jurisdiction was something less than murder (for instance, manslaughter or some other lesser form of culpable homicide), the maximum applicable penalty would be accordingly set at the level for the foreign offence. Further, the consent of the Attorney-General would be required before a prosecution under these provisions could be commenced.

Prohibition against retrospective criminal laws (penalty provisions)

The Bill provides that the maximum penalties for the extended offences of murder and manslaughter are life imprisonment and 25 years' imprisonment respectively. This is consistent with the maximum penalties for the existing murder and manslaughter offences in section 115 of the Criminal Code.

Consistent with Australia's requirements under article 15(1) of the ICCPR, the Bill provides that where the conduct occurred before 1 October 2002, if the conduct was punishable in the foreign jurisdiction by a term of imprisonment less than life (for offences against section 115.1) or 25 years (for offences against section 115.2), the defendant is entitled to the benefit of that lower penalty. Where the conduct is punishable by a non-custodial sentence in the foreign jurisdiction, the court may impose a term of imprisonment of up to the maximum under the Australian provisions (life and 25 years respectively).

The Committee has noted that, if the conduct is punishable in the other country by a 'lesser' non-custodial sentence (such as a fine, compensation or community service order), the maximum penalty under the Criminal Code will apply.

The seriousness of the offences of murder and manslaughter are such that these offences are always appropriately punished by a period of imprisonment. It is highly unlikely that a person would receive a lesser non-custodial sentence in matters where their conduct caused the death of another person.

Should such circumstances transpire, under the existing sentencing provisions for Commonwealth offences in subsection 16A(2) of the *Crimes Act 1914*, it will be open to a court to consider any possible 'lighter' punishment than imprisonment which would have otherwise been available in the foreign jurisdiction. A court would not be obliged to do so. I believe that this is an appropriate approach, due to the difficulty of anticipating all possible punishments which may be applied in foreign jurisdictions.

I am satisfied that the Bill is compatible with human rights, and that, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The responsible adviser for this matter in my Office is James Lambie who can be contacted on 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001027

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

Dear Philip, ~~Mr~~ Ruddock

Response to questions received from the Parliamentary Joint Committee on Human Rights in its Eighteenth Report of the 44th Parliament

Thank you for your letters of 13 February 2015 in which information was requested on the *Australian Citizenship and Other Legislation Amendment Bill 2014* and the *Migration Amendment (Partner Visas) Regulation 2014*.

My response to your request is attached. I have also included a response to the committee's further questions regarding the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* which were raised in the Committee's 14th report.

I trust the information provided is helpful.

Yours sincerely

8/4/15

PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014

Schedule 1 – Maritime Powers Act amendments

1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 above are, and particularly:

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

1.362 The committee therefore considers that the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT.

Compliance with Australia's international obligations is to be measured by what Australia does *in toto* by way of legislation, policy and practice. The amendments in Schedule 1 do not change the need to give effect to Australia's international obligations, nor do they require action to be taken that is inconsistent with those obligations.

However, the amendments did seek to ensure that decisions about Australia's international obligations, including how to give effect to those obligations, are made by the executive government. This is both appropriate given the operational context in which these decisions need to be made, and consistent with decision-making generally relating to Australia's sovereignty and overarching national security and national interests. The Australian Government does not seek to take action that is inconsistent with Australia's non-refoulement obligations.

Maintaining the security of Australia's borders is a legitimate objective, and it is clear that maritime operations are rationally connected to that objective. All States, as sovereign nations, are entitled to decide who may enter their territory and the means by which they do so. Maritime operations have been shown to be necessary to achieve the legitimate objective of restoring order to Australia's borders – it is the maritime enforcement operations which have played the primary role in reducing deaths at sea by deterring illegal maritime arrivals. Over the past six years, more than a thousand people have tragically lost their lives at sea while attempting the dangerous journey to Australia in flimsy vessels with the assistance of criminal people smugglers, often with inadequate supplies and equipment. Australia received over 50 000 illegal maritime arrivals in that period, placing significant strain on Australia's migration program. It is also important to note that these maritime powers are necessary to ensure the integrity of Australia's borders and maritime possessions in relation to a range of other threats, such as environmental damage and drug smuggling.

- non-refoulement obligations:
  - Noting the Committee's finding that "the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the

International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)," it is important to reiterate that these amendments do not require that action be taken which would breach Australia's non-refoulement obligations. The Government takes Australia's international obligations seriously, and does not seek to take action that is inconsistent with Australia's non-refoulement obligations. A great deal of work is done to ensure that decisions made and actions taken under the *Maritime Powers Act 2013* (Maritime Powers Act) comply with Australia's international obligations. As a matter of international law, non-refoulement obligations limit the destination to which people may be sent, but do not require Australia to allow unauthorised entry.

- the right to security of the person and the right to be free from arbitrary detention; (ICCPR 9)
    - These amendments do not limit the right to be free from arbitrary detention – detention under the Maritime Powers Act is not arbitrary. Arbitrariness involves elements of inappropriateness, injustice or a lack of predictability. Any limitation on the freedom of movement of persons detained or otherwise held under maritime powers is not arbitrary. The legislation clearly sets out a range of factors governing the predictability of their application. Consistent with Government policy, any deprivation of liberty will be for the shortest period practicable for the performance of functions and duties to achieve the object and purposes of the Maritime Powers Act. These amendments simply clarify the time during which persons may be detained, and related factors, for the legitimate exercise of powers under the Act, ensuring there is a clear lawful basis for detention at each stage of a maritime operation.

- the prohibition on torture, cruel, inhuman and degrading treatment or punishment; (ICCPR 7)
    - The treatment of individuals in pursuit of the legitimate objective of protecting Australia's borders is carried out in full compliance with Australia's obligations in relation to the humane and dignified treatment of persons.

- the right to freedom of movement; (ICCPR 12)
    - Article 12 of the ICCPR applies to persons "lawfully within the territory of a State". This will not apply to persons engaged in maritime operations in all but the most unusual circumstances. The right to freedom of movement does not bestow a right to enter a country of which a person is not a national.
    - Any restriction on individuals' freedom of movement while on a vessel (for example, being restricted to one part of the vessel) is based on operational necessity and the overriding interest of the safety of the crew and passengers.

- the right to a fair trial; (ICCPR 14) and
    - Where relevant, any person to be charged with a criminal offence will be tried in accordance with normal practice in Australia, and it is open to anyone wishing to challenge their treatment to pursue action in the Australian courts.

- the obligation to consider the best interests of the child. (Convention on the Rights of the Child (CRC) 3 and 10)
    - The best interests of the child are to be a primary consideration in any decision affecting the interests of that child; however, this primary consideration may be outweighed by other primary considerations, such as the maintenance of the order of Australia's borders. The Government does not consider it to be in any child's best interests to be placed on an unseaworthy vessel by criminal people-smugglers seeking to exploit the child's vulnerability for their own ends.
    - The obligation in article 10 of the CRC to deal with applications to enter Australia for the purposes of family reunification positively, humanely and expeditiously does not provide a right to enter a country of which a person is not a national.

Schedules 2 and 3 - Temporary protection visas and safe-haven enterprise visas

1.378 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the proposed provisions for safe haven enterprise visas are compatible with human rights.

The details of Safe Haven Enterprise visas will come before the committee when the Safe Haven Enterprise visa regulations are finalised.

1.382 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the temporary nature of the proposed protection visas complies with Australia's obligations under the ICCPR and the CAT to not place any person at risk of refoulement.

Each time an applicant applies for a Temporary Protection Visa (TPV) they will have their protection claims re-assessed. This process includes an assessment against Australia's obligations under the ICCPR and the CAT. As there is no limit to the number of TPVs that can be granted to a person in respect of whom Australia has protection obligations, the temporary nature of these visas does not increase the risk of refoulement, under either the ICCPR or the CAT.

1.388 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the right to health, and particularly:

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

As outlined in the statement of compatibility with human rights the arrangements were aimed at achieving the legitimate objectives of dissuading people from taking potentially life threatening journeys to Australia, as well as the need to maintain the integrity of Australia's migration system and protect the national interest. Both permanent protection visas and family reunion may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia.

The Government notes the committee's concerns regarding possible mental health problems for TPV holders but maintains there is a rational connection between any limitations this policy may place on the right to health and a healthy environment and achieving these objectives, and that these limitations are reasonable and proportionate measures. As outlined in the statement of compatibility with human rights, all applicants will have access to Medicare and mainstream medical services. In addition they will have access to:

- the Government's Programme of Assistance for Survivors of Torture and Trauma (PASTT). PASTT provides direct counselling and related support services, including advocacy and referrals to mainstream health and related services;
    - in rural areas, PASTT has established rural, regional and remote outreach services to enable survivors of torture and trauma to access services outside metropolitan areas;
- the Government's Better Access initiative to receive rebates through Medicare should they wish to access selected mental health services provided by general practitioners, psychiatrists, psychologists and eligible social workers and occupational therapists; and
- the Mental Health Services in Rural and Remote Areas programme (MHSRRA) which provides rural and remote areas with more allied and nursing mental health services. The MHSRRA enables survivors of torture and trauma to access these services in areas of low or little mental health services.

Taking into account the fact that TPV holders will have access to Medicare and mainstream medical services, as well as the additional services listed above, any limitation on TPV holders' right to health is mitigated by the availability of these services, and is reasonable and proportionate to the objective of deterring people from making dangerous boat journeys to Australia.

1.397 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the obligation to consider the right to the protection of the family, and with the best interests of the child, and particularly:

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

As stated in the statement of compatibility with human rights, the changes were aimed, among other things, at achieving the legitimate objectives of dissuading people, including minors, from taking potentially life threatening journeys to achieve resettlement for their families in Australia, maintaining the integrity of Australia's migration system and protecting the national interest. Allowing TPV holders who are minors to sponsor family members to migrate to Australia, would likely have the unintended consequence of increasing the number of minors attempting to journey to Australia illegally.

The Government therefore notes the committee's concerns but maintains there is a rational connection between any limitation this policy places on the *best interest of the child* and achieving these objectives, and that, bearing in mind the potential for boat journeys to Australia to be life threatening, these limitations are a reasonable and proportionate measure for achieving these objectives.

Schedule 4 – Fast Track Assessment Process

1.401 The committee therefore requests the further advice of the Minister for Immigration and Border Protection as to whether 'fast track assessment process' is compatible with the obligation to consider the best interests of the child and the right to a fair trial, and particularly:

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

Schedule 4 established a new fast track assessment process for 'fast track applicants', defined as protection visa applicants who entered Australia as unauthorised maritime arrivals on or after 13 August 2012. The Government's objective was to establish an efficient and cost effective process for determining protection visa applications which deters applicants from raising unmeritorious protection claims as a means to delay departure from Australia. As stated in the Explanatory Memorandum to the Act, the measures were aimed at achieving the legitimate objective of enhancing the integrity of Australia's protection status determination framework and preventing abuse of process.

Right to a fair trial

As acknowledged in the Statement of Compatibility with Human Rights, Article 14 of the ICCPR expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to the administrative assessment of non-refoulement obligations. However, to the extent that Article 14 is engaged, the Government is of the view that the amendments relating to the fast track assessment process are compatible with Article 14.

All fast track applicants, including children, will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. As part of this process, all applicants will be afforded procedural fairness and the opportunity to articulate their protection claims, including during an interview, with the assistance of an interpreter if required.

Fast track applicants who receive a fast track reviewable decision, as defined in new section 473BB, will be automatically referred to the Immigration Assessment Authority (IAA) which will conduct a limited form of merits review and will either affirm the decision under review or remit it to my department with directions. The IAA will conduct independent and impartial reviews of decisions and will comply with the requirement to provide procedural fairness. In addition, the IAA has the discretion to consider new information and conduct an interview in exceptional circumstances, for example, where there is a change in circumstances or new information which suggests that there is an increased risk to the applicant.

It is the view of the Government that there is no express requirement under the ICCPR or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide merits review in the assessment of non-refoulement obligations. Consistent with this position, the Government considers that the obligation in Article 14, where it is engaged, would be satisfied if either merits review or judicial review is

available to an applicant. As stated in the Statement of Compatibility with Human Rights, the Executive Committee of the UNHCR has expressed the view that asylum processes should satisfy basic requirements including the ability to seek a reconsideration of a protection status determination decision from either an administrative or judicial body.

It is therefore the view of the Government that the fast track assessment process is compatible with Article 14 of the ICCPR as, following a robust and fair assessment of their protection claims, all fast track applicants have the ability to seek judicial review. In addition, the fast track assessment process provides the further safeguard, for the majority of fast track applicants, of access to merits review conducted by the IAA. Finally, all applicants who are refused the grant of a protection visa on character or security grounds have access to merits review conducted by the Administrative Appeals Tribunal (AAT).

Where merits review is not provided to excluded fast track review applicants, the Government considers this to be a reasonable and proportionate measure consistent with the stated objective. This position is discussed in detail below.

Best interests of the child

Article 10 of the CRC requires that where a child makes an application for family reunification, that application is dealt with positively, humanely and expeditiously. To the extent that Article 10 is engaged by the amendments relating to the fast track review process, the Government is of the view that the amendments are compatible with this obligation as all fast track applications will be dealt with positively, humanely and expeditiously. However, the Government has focused this response on Article 3 of the CRC as the Committee's question at 1.401 relates specifically to Article 3 of the CRC and the best interests of the child.

Article 3 of the CRC requires that the best interests of the child be a primary consideration in all actions concerning children. As stated in the Statement of Compatibility with Human Rights, the Government is committed to acting in accordance with Article 3 of the CRC and has established policies and procedures for the fast track assessment process that give effect to this commitment.

First, as part of the fast track assessment process, the government is committed to providing application support through the Primary Application Information Service (PAIS) to those considered most vulnerable including all unaccompanied minors. Access to PAIS is an important safeguard, consistent with the obligation in Article 3, as it ensures that vulnerable children have the necessary support to articulate their claims for protection during the fast track assessment process.

Secondly, all fast track applicants, including children, will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. The assessment of protection claims made by, or on behalf of, a child will continue to be conducted in an age-sensitive manner that recognises the special needs of children. As noted in the Statement of Compatibility with Human Rights, this includes providing unaccompanied minors with the support of an independent observer during the protection visa interview.

Thirdly, the majority of fast track decisions will be automatically referred to the IAA which will conduct a merits review of the decision. However, in limited circumstances, a fast track application made by or on behalf of a child may be excluded from the fast track merits review process where the applicant falls within the definition of excluded fast track review applicant in amended section 5(1). Where the child is listed as a dependent on the application of his or her parent, or the child is an applicant in his or her own right but has the support of adult family members throughout the fast track process, the Government's position is that any limitation on merits review, in the limited circumstances where the child is deemed to be an excluded fast track review applicant, is reasonable and proportionate to the Government's objective of enhancing the integrity of the protection status determination process.

However, in the case of vulnerable persons such as unaccompanied minors, new section 473BC provides an important safeguard as I have the ability to determine via legislative instrument that certain cohorts of people who would otherwise be excluded fast track applicants will receive access to the IAA. It is intended that a legislative instrument ensure that all applicants receiving PAIS, which will include all unaccompanied minors, are reviewed by the IAA. This safeguard ensures that the best interests of the child are a primary consideration in determining access to merits review.

In establishing the fast track assessment process, the Government has ensured that the best interests of the child, which include receiving a timely outcome and having their welfare sensitively and appropriately managed throughout the process, are a primary consideration. However, the Government notes the integrity, efficiency and cost effectiveness of the protection status determination framework are also primary considerations. Therefore, to the extent that Article 3 is limited by the amendments relating to the fast track assessment process, the Government is of the view that this outcome is reasonable and proportionate to the stated objective.

1.408 The committee therefore seeks the advice of the minister as to whether the proposed limitation on merits review through the creation of the Immigration Assessment Authority (IAA) is compatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review of claims to protection against non-refoulement.

Right to merits review of an assessment of non-refoulement obligations

As stated earlier, the Government is of the view that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of non-refoulement obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, the Government is of the view that these obligations are satisfied where either merits review or judicial review is available. Although merits review may be an important safeguard, there is no obligation to provide merits review where judicial review is available.

Article 13 of the ICCPR states:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except

> where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Government's position in relation to Article 13 is that the obligation only applies to persons considered to be lawfully in the territory of Australia. Where persons are considered to be lawfully in the territory, the obligation is satisfied by the provision of a robust, open and transparent assessment of non-refoulement obligations by the department followed in most cases by review by the IAA and in all cases by the opportunity for the applicant to seek judicial review in the case of an adverse decision.

To the extent that obligations relating to review under Article 2 of the ICCPR or Article 14 of the ICCPR are engaged in immigration proceedings, the Government's position is that these obligations are also satisfied where access to judicial review is available. Similarly, there is no express procedural obligation in Article 3 of the CAT to provide merits review where non-refoulement obligations have been considered and properly assessed by the department and where judicial review is available.

Where the State Party elects to provide merits review in the assessment of non-refoulement obligations, there is no express obligation to provide a full *de novo* review of the initial decision. Both the ICCPR and the CAT permit the State Party to determine the appropriate mechanism for merits review where sufficient safeguards are in place.

The fast track assessment process and the Immigration Assessment Authority (IAA)

All fast track applicants will be afforded a fair and robust assessment of their protection claims by a specially trained departmental officer. During this process all applicants will be afforded procedural fairness and the opportunity to articulate their protection claims, including during an interview with the assistance of an interpreter if required. All fast track applicants who are refused the grant of a protection visa will receive the reasons for the decision and have the ability to seek judicial review of the decision.

In addition, fast track review applicants who are refused the grant of a protection visa, other than those who fall within the definition of 'excluded fast track review applicant', will have automatic access to independent and impartial merits review conducted by the IAA. The IAA will conduct a limited form of merits review and will either affirm the decision under review or remit it to the department for reconsideration. Although the merits review model of the IAA differs from that of the RRT, the Government's position is that the IAA model is the appropriate model for processing protection claims for persons who entered Australia as unauthorised maritime arrivals on or after 13 August 2012.

In many cases review by the IAA will be limited as it will be conducted on the information provided by the applicant to the department and it will not involve an interview. However, new section 473DD allows the IAA to consider new information in exceptional circumstances and new section 473DC provides the IAA with the discretion to conduct an interview for the purposes of getting new information.

These provisions provide important safeguards which ensure that review by the IAA is effective and that all protection claims are adequately considered prior to any removal of a refused applicant from Australia. As stated in the Statement of Compatibility with Human Rights, the Government intends that the threshold of 'exceptional circumstances' will be satisfied where there is new information that indicates that the applicant may now engage Australia's protection obligations.

The Government is of the view that the provision of a fair and robust initial assessment by the department and access to judicial review for all fast track applicants satisfies Australia's obligations under the ICCPR and the CAT relating to review of administrative decisions. The Government also considers that access to a limited form of merits review by the IAA in the majority of cases is an additional safeguard that further supports compatibility with such obligations.

Finally, as stated in the Statement of Compatibility of Human Rights, the Government's objective in establishing the IAA is to improve the integrity, efficiency and cost effectiveness of merits review and to prevent abuse of process. To the extent that merits review is limited by the proposed amendments, the Government considers that the limitation is a rational, reasonable and proportionate measure to achieve the Government's stated objective. However, for the reasons provided earlier, the Government does not consider that any such limitation would be incompatible with Australia's obligations under the ICCPR or the CAT relating to review of non-refoulement assessments.

1.412 The committee therefore considers that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement.

Excluded fast track review applicants

The Government is of the view that there is no express requirement under the ICCPR or the CAT to provide merits review in the assessment of non-refoulement obligations, nor does lack of merits review amount to refoulement.

Clarification regarding internal departmental review

At paragraph 1.411 of the Committee's report, the Committee refers to an internal departmental review system in the excluded fast track review context. I would like to take this opportunity to clarify the internal processes that will apply to excluded fast track review applicants.

Prior to finalising a case involving a possible excluded fast track review applicant and in addition to the department's ordinary quality control checks, such cases will undergo a further legal check of the process within the department. The legal process check will form part of the department's quality control procedures and will be conducted prior to the decision being finalised by the delegate. The legal process check will ensure that draft decisions have adhered to basic administrative law requirements; it will not undertake a 'review' by considering any new information against the previous assessment of the fast track applicant's protection claims.

Schedule 5 Refugees Convention Codification

1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 above are, and particularly:

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

As the committee has noted, the Refugees Convention and its Protocol are not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee assesses the human rights compatibility of legislation. In the context of this Act, Refugees Convention issues have been raised and addressed in my responses to other Senate Committees.

1.374 The committee therefore requests the advice of the minister as to whether the proposed amendments in Schedule 5 are compatible with Australia's non-refoulement obligations under the ICCPR and the CAT.

The amendments proposed in Schedule 5 to the Act deal with Refugees Convention issues. ICCPR and CAT are dealt with through other provisions of the Act.

Schedule 6 – Children of unauthorised maritime arrivals

1.421 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the designation of children as 'unauthorised maritime arrivals' is compatible with the obligation to consider the best interests of the child and the right to acquire a nationality, and particularly:

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

Best Interests of the Child

The amendments proposed in the Bill clarify that children born to an unauthorised maritime arrival (UMA) in Australia or a Regional Processing Country (RPC) are also UMAs. However, they do not alter the need to conduct a case-by-case assessment of a child's best interests for each child liable for transfer to a RPC, nor do they impose a limitation on the obligation to consider the best interests of the child in ensuing processes. By clarifying that children have a status which is consistent with that of their parents, the proposed amendments recognise the central importance of family in considering a child's best interests, so reducing the prospect of family separation, as in most cases both parents are also UMAs.

The best interests of each UMA child are considered prior to any action to transfer the child to a RPC through a Pre-Transfer Assessment and an additional Best Interests Assessment for Transferring Minors to a RPC (Best Interests Assessment). These assessments support the application of sections 198AD and 198AE of the Act, that is, they are used to consider whether it is reasonably practicable to transfer a minor or whether they should be referred to me for possible consideration of my public interest discretion to exclude the minor from being transferred to a RPC. In particular, the Best Interests Assessment is used to consider whether appropriate support and services are available in the RPC to meet the needs of the individual child. The assessment identifies whether there are barriers to the minor being transferred to a RPC, and, if it is considered not reasonably practicable at that time, the minor may be recommended for consideration for transfer at a later date.

The amendments achieve a legitimate objective of strengthening the government's existing IMA policies, which are aimed at deterring IMAs from seeking to enter Australia illegally. They do this by clarifying that the children of UMAs, born in Australia or in a RPC, have a migration status consistent with their UMA parent(s). It is the government's view that the amendments do not impose limitations in respect of the best interests of the child.

Right to a nationality

The proposed amendments in the Bill do not affect Australian citizenship law. In particular, a UMA born in Australia will continue to have access to Australian citizenship if they would otherwise be stateless.

If a UMA child born in Australia has never been a citizen or national of any country, and is not entitled to the citizenship or nationality of a foreign country, he or she is eligible for Australian citizenship by conferral under the statelessness provision [subsection 21(8) of the *Australian Citizenship Act 2007* (the Citizenship Act)]. Applications made pursuant to subsection 21(8) are fee-free. A person does not need to be in Australia to lodge an application for Australian citizenship, nor when an application made under subsection 21(8) is decided. Furthermore, the general residence requirement (Section 22 of the Citizenship Act) has no application to such applications under subsection 21(8). Stateless children born in Australia to UMAs who wish to apply for Australian citizenship are required to follow the same application processes and meet the same eligibility requirements as any other stateless person born in Australia.

Not all children born to UMA parents in Australia will be eligible for Australian citizenship under the statelessness provisions, because not all UMAs are stateless. In many cases, a child born in Australia or a RPC to a UMA parent who does have a nationality will be eligible for the same citizenship held by their father and/or mother.

Schedule 7 – Capping protection visas

Right to security of the person and freedom from arbitrary detention

1.427 The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to whether the cap is compatible with the right to freedom from arbitrary detention, and particularly:

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

It is the view of the Government that a person would not be kept in detention simply because a cap on certain visa grants was in place, accordingly there is no incompatibility between the capping provision and the right to freedom from arbitrary detention.

The proposed amendment to ensure that I am able to place a statutory cap on the Onshore component of the Humanitarian programme is aimed at achieving the legitimate objective of appropriately managing the Humanitarian programme. In the past, when more Protection visas than the Humanitarian programme allowed for were granted, it meant that there were fewer visa grants in the Special Humanitarian programme. This reduced places available from those people who waited offshore, and provided an incentive for IMAs to use people smugglers to get to Australia. It is appropriate for the Government to be able to manage the proportion of visas granted onshore and offshore, noting that the proposed amendments do not require me to place a cap, nor do they impose a cap, rather they ensure that I am able to should I so choose.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001080

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Federal Member for Berowra
Parliament House
CANBERRA ACT 2600

Philip,

Dear ~~Mr~~ Ruddock

I refer to the letter of 3 March 2015 from the former Chair of the Parliamentary Joint Committee on Human Rights, Senator Dean Smith. This letter refers to the committee's comments on the compatibility with human rights of the Migration Amendment (Character and General Visa Cancellation) Bill 2014 in the Committee's nineteenth report of the 44th Parliament.

My response addressing the committee's questions raised in the report is attached. I hope that it assists the committee in its role to examine this legislation for compatibility with human rights.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON

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Non-refoulement obligations and the right to an effective remedy

1.65 To the extent that 'independent, effective and impartial' review including merits review is not provided in relation to non-refoulement decisions, the proposed expansion of visa cancellation powers may be incompatible with Australia's non-refoulement obligations.

1.66 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the expanded visa cancellation powers or decisions to remove a person once a visa has been cancelled are subject to sufficiently 'independent, effective and impartial' review so as to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.

Whilst noting the committee's concerns, it is the Government's position that while merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of non-refoulement obligations.

As stated previously, Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. Expanded cancellation powers do not alter the framework within which decisions are made. Where a delegate of the Minister makes a decision to cancel or refuse a visa under section 501 of the *Migration Act 1958* (Act), that decision is merits reviewable through the Administrative Appeals Tribunal (AAT). At either the primary decision or review stage, non-refoulement obligations must be considered as part of the requirement to exercise the discretion to refuse or cancel a visa. Further, both departmental delegates and AAT members are bound by Ministerial Direction 65, which in part requires non-refoulement obligations to be considered. While personal decisions of the Minister are not merits reviewable, such decisions can be appealed to the Federal Court on the basis the Minister has made an error of law when making the decision. Further, there are other mechanisms within the Act which provide the Government with the ability to address non-refoulement obligations before removal. This occurs through the protection visa process or the Minister's personal public interest powers in the Act.

The amendment does not, and is not intended to, affect opportunities set out elsewhere in the Act which enable the Government to be satisfied that a person's removal will not breach Australia's non-refoulement obligations. These Act amendments are not incompatible with Australia's non-refoulement obligations.

Right to liberty

1.77 The committee therefore considers that the expansion of visa cancellation powers, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

The amendments introduced strengthen the visa cancellation provisions; they do not alter the detention powers or framework already established in the Act. The Statement of Compatibility (SOC) outlined the Government's position that the detention of unlawful non-citizens as the result of visa cancellation is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. The amendments widen the scope of people being considered for visa cancellation or refusal, and the Government's position is that these amendments present a reasonable response to achieving a legitimate purpose under the Covenant – the safety of the Australian community.

The SOC further stated that the character and cancellation provisions were amended in order to address the risk to the Australian community posed by non-citizens of character, integrity or security concern. The safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective. The cancellation of a non-citizen's visa in circumstances where they present a risk to the Australian community, and their subsequent detention prior to removal, follows a well-established process within the legislative framework. I would reiterate, as stated in the SOC, the amendments do not limit a person's right to security of the person and freedom from arbitrary detention. However to the extent that it may be interpreted as limiting the obligations in Article 9 of the ICCPR, there is clearly a rational connection between ensuring non-citizens who present a risk to the Australian community can be considered for visa cancellation or refusal and the legitimate objective of protecting the safety of the Australian community from those who pose a risk to it. Further, people who are affected by these measures will still continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4).

Right to freedom of movement

1.86 The committee therefore considers that the expansion of visa cancellation powers may limit the right to freedom of movement and specifically the right of a permanent resident to remain in their 'own country'. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

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

I disagree with the committee's view that the reference to a person's own country is not necessarily restricted to the country of one's citizenship. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. In any event, the enhanced cancellation and refusal powers are limited to visa cancellation and refusals only and therefore do not fall within article 12(4). Further, the non-citizen's ties to the Australian community, including their length of residence is taken into account when considering the cancellation or refusal of their visa. The amendment is therefore compatible with human rights because it is consistent with Australia's human rights obligations

Right to freedom of association

1.95 The committee therefore considers that the amendment providing that a person will not pass the character test on the basis of group membership or association limits the right to freedom of association. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

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

A finding that a person does not pass the character test based on an association with a specific person, group or association is not in itself a decision to refuse or cancel a visa. Rather, it then enlivens the discretion whether or not to cancel a visa. As articulated in the SOC this amendment is targeted specifically at non-citizens who have associations to criminal motorcycle gangs, terrorist organisations, organised criminal groups, people smuggling, people trafficking, or involvement in war crimes, genocide or human rights abuses. It is the Government's position that these types of associations or memberships may present a risk to

the Australian community or represent a national security risk. The Government therefore considers it reasonable that non-citizens with these types of memberships or associations are thoroughly scrutinised and assessed in order to determine the level of risk these associations might pose to the Australian community. There is no intention that this new association ground will be used to cancel or refuse the visas of non-citizens who do not pose a risk to the Australian community. As stated in the SOC, creating a disincentive for non-citizens to associate with criminal organisations, or other people involved in criminal activity is seen as reasonable, proportionate and necessary, and has a rational connection to the legitimate objective of protecting the Australian community.

Right to freedom of opinion and expression

1.103 The committee therefore considers that the lowering of the threshold for the character test where there is a 'risk' that a person would incite discord in the community limits the right to freedom of expression and opinion. As set out above, the statement of compatibility does not justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

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

A finding that a person does not pass the character test based on the risk a person would incite discord in the community is not in itself a decision to refuse or cancel a visa. Rather, it then enlivens the discretion whether or not to cancel a visa. It is the Government's position that lowering the existing risk threshold in this provision of the character test is an appropriate response to the current security climate as the right to freedom of expression may have an express limitation for the purposes of national security, public order, public safety, public health or morals and the respect of the rights or reputation of others. In any event, lowering the risk threshold in this way does not regulate a person's ability to express certain views.

Departmental delegates are instructed to consider these grounds against Australia's well established tradition of free expression. However, where a non-citizen's opinions may attract strong expressions of disagreement or condemnation from the Australian community, the views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.

The Australian Government will not tolerate public statements from non-citizens that encourage or advocate violence against other people, or violence as a legitimate form of political expression. It is the Government's position that lowering this risk threshold is entirely appropriate and aimed as the legitimate objective of protecting public safety. Lowering the risk threshold will ensure non-citizens who may pose a risk to the Australian community by advocating violence are thoroughly scrutinised and the risk they pose is properly assessed. As such, to the extent that there may be any limitation on the right to freedom of expression, there is a clear and rational connection between allowing a thorough assessment of risk and the legitimate aim of protecting public safety. The Government

believes this limitation is a reasonable and proportionate measure to ensure public safety, particularly in the current security environment.

Right to privacy

1.115 The committee therefore considers that the requirement to provide personal information for the purposes of the character test limits the right to privacy. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

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

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

Section 501 of the Act sets out the basis upon which a person could be found to not pass the character test. Section 501L of the Act is clearly limited to the Minister requesting information from a State or Territory agency, that the agency can reasonably acquire, and where the information is *relevant* to the assessment of whether or not a non-citizen passes the character test. In this regard, I do not agree with the committee's view that this represents a broad and unconstrained requirement to share personal information.

I would reiterate that this legislative provision puts beyond doubt that my department has a legislative basis upon which to obtain information relevant to a non-citizen's character. To the extent that this is a limitation of person's right to privacy, there is rational connection between this limitation and the Government's objective of protecting the Australian community from the risk of harm by a non-citizen who is suspected of not passing the character test. It is reasonable and proportionate that State, Territory and Federal Government departments are able to share information about non-citizens who may do harm or engage in criminal activity where that information is relevant to the assessment of that person against the character test.

This amendment does not alter the way in which information received by the Government in relation to non-citizens is used, disclosed and stored. My department has in place a Privacy Policy to address its obligations regarding collection, use and disclosure of personal information, and sets out how the department complies with its obligations under the *Privacy Act 1988*. All personal information held by my department is stored in compliance with Australian Government security requirements and includes the department's processes being the subject of mandatory reporting processes and protocols in accordance with guidelines issued by the Privacy Commissioner.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001898

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

Dear Philip, Mr Ruddock

I refer to your letter of 24 March 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the *Migration Amendment (2014 Measures No.2) Regulation 2014*, and the *Migration Amendment (Subclass 050 Visas) Regulation 2014*.

The committee's remarks are contained in its *Twenty-first Report of the 44th Parliament*. My response addressing the remarks is attached.

Thank you for bringing the committee's views to my attention. I trust the attached information is of assistance.

Yours sincerely

PETER DUTTON 01/05/15

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Non-refoulement obligations

1.59 The committee... seeks the advice of the Minister for Immigration and Border Protection as to whether imposing additional criteria to be satisfied before a visa can be granted, including a protection visa, complies with Australia's non-refoulement obligations under the [International Covenant on Civil and Political Rights] and the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment].

Regulation 2.03AA provides that, where a person is required to satisfy either or both of Public Interest Criterion (PIC) 4001 or 4002 for grant of a visa, the person must provide a statement from an appropriate authority about his or her criminal history and a completed approved Form 80 (*Personal particulars for assessment including character assessment*), if requested by the Minister. A waiver of the requirement to provide the criminal history statement is available where the Minister is satisfied that it is not reasonable for the applicant to provide it.

Regulation 2.03AA made no change to the requirement for existing visa applicants to be assessed against either or both of PIC 4001 or PIC 4002 where applicable. Historically, there have been numbers of visa applicants who have not completed the Form 80, or have not provided the information requested about their criminal history. Within the previous statutory framework, there was no mechanism to compel an applicant to provide the requested information, thus limiting the ability of the Department of Immigration and Border Protection (the Department) to comprehensively assess whether a visa applicant presented a character or security risk. The amendment ensures that a visa applicant who is required to satisfy PIC 4001 and/or PIC 4002 is also required to provide the documentation required to assess these PICs if requested by the Minister, with a waiver of the request available in certain circumstances.

This amendment has not changed the long-standing practice in relation to people seeking protection, being that protection visa applicants will not be required to obtain a criminal history statement from an authority in a country from which protection is sought. It is important to note that under existing and long-established policy guidelines, there are already waiver provisions in place to this effect.

It is also the case that the amendments have no impact on the independent, effective and impartial review of visa decisions. Whether or not merits review is available to a visa applicant of a Departmental decision depends on other provisions in the *Migration Act 1958* (the Migration Act). This means that merits review may be available to a visa applicant refused a visa due to a failure to satisfy either regulation 2.03AA or the applicable clause in Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations) that requires satisfaction of PIC 4001 and/or PIC 4002, as has always been the case. As part of the review process, the merits review body will be able to consider whether it was reasonable for the applicant to be required to provide evidence of their criminal history from an appropriate authority in their home country.

As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, whilst noting the committee's concerns, it is the Government's position that while merits review can be an important safeguard, there is no express requirement under the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for merits review in the assessment of non-refoulement obligations. Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. Further, there are other mechanisms under the Migration Act which provide the Government with the ability to address non-refoulement obligations. These include through the protection visa application process, the Minister's personal public interest powers in the Migration Act, and International Treaties Obligation Assessments that take place prior to a person's involuntary removal from Australia to confirm compliance with Australia's non-refoulement obligations, if such an assessment has not previously occurred.

It is the Government's view that this regulation amendment is not incompatible with Australia's non-refoulement obligations.

Right to liberty

1.66 The committee... considers that imposing additional criteria to be satisfied before a visa can be granted, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

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

The Government is of the view that the imposition of the additional criteria in regulation 2.03AA does not engage or limit the prohibition against arbitrary detention. This amendment is aimed at the minority of non-protection visa applicants who do not provide the required documents, and is applicable where a visa applicant does not comply with reasonable requests made by the Department for the purposes of assessing them against PIC 4001 or PIC 4002. The amendment ensures that a visa applicant who is required to satisfy PIC 4001 and/or PIC 4002 is also required to provide the documentation required to assess these PICs if requested by the Minister, with a waiver of the requirement available in certain circumstances.

This amendment is not intended to change long standing practices in relation to people seeking protection from Australia. It is important to note that under existing and long-established policy guidelines, there are already provisions in place to provide that a protection visa applicant is not required to obtain a statement from an appropriate authority, such as a penal certificate, in relation to a country from which they are claiming protection.

Regulation 2.03AA made no change to the requirement for existing visa applicants upon whom PIC 4001 and/or PIC 4002 are imposed, to be assessed against those PICs in order for character and security risks to be assessed. As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, the safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective. The refusal to grant a visa in circumstances where the applicant presents a risk to the Australian community, and their subsequent detention as an unlawful non-citizen prior to removal from Australia, is undertaken within a well-established legislative process. I would reiterate, and as previously stated in the Regulation's Statement of Compatibility with human rights, that the amendments do not limit a person's right to security of the person and freedom from arbitrary detention. To the extent that it may be interpreted as limiting the obligations in Article 9 of the ICCPR, there is a clearly rational connection between ensuring that non-citizens in Australia who present a risk to the Australian community can be considered for visa refusal on character grounds, and the legitimate objective of protecting the safety of the Australian community from those who may pose a risk to it. Further, people who are affected by these measures will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4). As noted above, the amendments also have no effect on the availability of review of visa refusal decisions.

This regulation amendment does not alter the detention powers or framework already established in the Migration Act. The Statement of Compatibility which accompanied the Explanatory Statement to the Regulation outlined the Government's position that the detention of unlawful non-citizens as the result of visa refusal is neither unlawful nor arbitrary under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. While the amendments provide that a small number of visa applicants may be considered for visa refusal, it is the Government's position that these amendments present a reasonable response to achieving a legitimate purpose– being the safety of the Australian community.

Right to freedom of movement (right to return to Australia)

1.75 The committee... considers that the expansion of the exclusion criteria may limit the right to freedom of movement and specifically the right of a permanent resident to return to their 'own country'. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:

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

As stated in my response to the committee's *Nineteenth report of the 44th Parliament*, I respectfully disagree with the committee's view that the reference to a person's own country is not necessarily restricted to the country of one's citizenship. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. The expansion of the 'exclusion criteria' to include all character cancellation decisions is limited to visa cancellations only. It is the Government's view that this does not fall within article 12(4) of the ICCPR because the legislation has not been extended to matters of Australian citizenship. In deciding whether or not to cancel a non-citizen's visa, a decision-maker will take into account the non-citizen's ties to the Australian community, including their length of residence. The amendment is therefore compatible with human rights because it is consistent with Australia's international human rights obligations.

Obligation to consider the best interest of the child.

1.81 The committee considers that the regulation engages and limits the obligations to consider the best interest of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.

It is possible that a minor could have his or her visa cancelled under section 501, 501A or 501B of the Migration Act, however, it would be rare that a person under the age of 18 would be considered against the character test in subsection 501(6) of the Migration Act. Policy guidelines on minors who may not pass the character test in subsection 501(6) of the Migration Act relevantly state:

> The fact that the person is under 18 must be given significant consideration. Therefore, the whereabouts of the minor's parents will be crucial in deciding whether to pursue visa cancellation or refusal for the minor. Under policy, cancellation or refusal should not be pursued if that decision would result in the minor being separated from their parents or legal guardians, unless the minor does not pass the character test because of an extremely serious offence.
>
> Cancellation or refusal may be considered appropriate in cases involving less serious offences where the decision would not result in the minor being separated from their parents or legal guardians. An example would be a 16 year old who is in Australia as the holder of a student visa and whose parents live in the home country.

In circumstances where a minor is being considered for visa cancellation under section 501 of the Migration Act (or sections 501A or 501B), the individual's legal guardians would also be included in any procedural fairness process, and the person's age when they committed the act(s) that brought them within the scope of the character test would be a relevant factor to consider when exercising the discretion to cancel their visa. As stated in the Statement of Compatibility for this Regulation, the Minister's delegates and Administrative Appeals Tribunal members making a decision under section 501 are bound by a Ministerial Direction made

under section 499 of the Migration Act which requires a balancing exercise of countervailing considerations.

In all visa cancellation decisions based on the character test, the best interests of the child are a primary consideration. While rights relating to children generally weigh heavily against visa cancellation, there will be circumstances where this may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.

The decision to cancel a non-citizen's visa under section 501 of the Migration Act relates only to the individual who has been found to not pass the character test. Any associated visa holder of a non-citizen who has had their visa cancelled under the character provisions, such as a spouse or child, would continue to hold their visa, and would not be subject to consequential visa cancellation under any provision of section 501. Therefore, a minor would not be subject to an exclusion period under SRC 5001 due to imposition of the character provisions in section 501 on an associated visa holder.

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC16-011213

Chair
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Dear Mr Ruddock

Thank you for your letter dated 2 February 2016 regarding the Parliamentary Joint Committee on Human Rights' assessment of the Social Security Legislation Amendment (Community Development Program) Bill 2015 (the CDP Bill).

As outlined in the Explanatory Memorandum, the changes proposed in the CDP Bill promote rights to social security, an adequate standard of living, to work and are consistent with the right to equality and non-discrimination. To the extent (if any) that they may limit human rights, those limitations are reasonable, necessary and proportionate to support job seekers in remote Australia, by strengthening the existing incentives for remote job seekers to actively engage with their income support activity requirements and opportunities to participate and remain in paid work. Please see Attachment A for further information on the Bill's compatibility with human rights.

There has been significant interest in participation in phase one of the reforms and I have met with providers in Queensland, New South Wales, Western Australia, South Australia and the Northern Territory to explain the proposed model, as has the Department of the Prime Minister and Cabinet. All CDP service providers have attended a two-day meeting with Departmental staff and myself in February 2016 as part of ongoing engagement with providers. The meeting included consultation on the proposed reforms and the feedback and input that I received during this meeting will inform the design of the legislative instrument. My Department will continue to work closely with CDP providers over the coming months.

The measures in the CDP Bill are reasonable and proportionate to achieve its objectives. They apply equally to all job seekers who reside in remote income support regions in Australia, the measures in the CDP Bill are non-discriminatory and are not a special measure.

Please note that I have committed to making further information in relation to the detail of the scheme available to members of Parliament before debate of the CDP Bill and expect to circulate consultation papers on the proposed CDP penalties scheme and compliance framework by mid-March. I will also make these papers available to the committee at this time.

Thank you for the opportunity to respond to your concerns.

Yours sincerely

NIGEL SCULLION

23 / 2 / 2016

Further information on the compatibility of the CDP Bill

The new obligation and penalty arrangements promote the right to social security by helping job seekers avoid future compliance action and therefore, receive income support payments to a greater extent.

The current national job seeker compliance framework is not well suited to the needs of remote job seekers. The Department of the Prime Minister and Cabinet (PM&C) receives consistent feedback from communities and provider organisations that:

- Current arrangements are not easily understood by remote job seekers which means that behavioural change happens slowly, if at all.
- The current compliance system arrangements mean jobseekers experience long delays. Having to interact with a compliance system that is run from major cities potentially thousands of kilometres away makes it difficult to apply the necessary agility and immediacy to overcome the pervasive welfare reliance in remote Australia.
- Communities want arrangements that better combine income support with employment opportunities and community development projects, with sufficient community control to ensure participation can be maximised.

As a result of current compliance arrangements, job seekers do not understand the link between attending activities and receiving income support. Therefore, behaviour is not changing. This is indicative of a historically high trend in non-attendance and disengagement with employment services in remote Australia. At end of June 2015, 22 per cent of all financial penalties nationally were applied to CDP participants. In early July 2015, less than 5 percent of the CDP caseload attended their activity. By the end of December 2015 attendance had improved but was still tracking low, at just under 25 per cent. Despite the increase in application of penalties under CDP, attendance in activities remains disproportionately low.

The changes proposed in the CDP Bill will simplify the system and make it easier for job seekers in remote Australia to understand the link between attendance at CDP activities and income support payments. These changes will also enable, through legislative instruments, the application of a simpler compliance framework that is tailored to the unique social and labour market conditions in remote Australia. Ultimately, these changes will make it easier for these job seekers to understand their obligations and also help them to avoid compliance penalties.

In addition, the CDP Bill makes it possible for penalties to be applied in the same week by a locally based decision maker with direct and more immediate access to job seekers. This more immediate relationship between payments and attendance is designed to encourage job seekers to attend more of their activities so that they incur fewer penalties.

It is also worth noting that the arrangements do not limit the right to social security as the changes proposed in the CDP Bill do not reduce the general entitlements of job seekers or make their obligations more onerous. For instance, the reforms will not change the amount a job seeker is entitled to receive (their maximum basic rate) or their hours of obligation.

The protections afforded to job seekers in relation to review and appeals processes will remain substantively the same as existing arrangements under the social security law. Review processes will be in place, with PM&C responsible for reviewing provider decision making on payments and compliance (similar to review processes within the Department of Human Services (DHS)). Other protections with respect to reviews of payment decisions and financial penalties, including recourse to the Administrative Appeals Tribunal, will be retained.

Appropriate safeguards against unnecessarily limiting a person's right to social security such as clear, consistent guidelines for providers and robust external review processes will be in place to ensure that decision-making does not lead to inconsistent treatment of job seekers. In addition, section 1061ZAAZ(2)(ii) of the CDP Bill requires the Minister to consider whether there is social and economic disadvantage within the proposed region prior to determining a remote income support region. A limitation (if any) is reasonable, proportionate and necessary to achieve the legitimate objectives of the CDP Bill in addressing entrenched welfare and disadvantage in the relevant region.

In addition, any limitation is proportionate to achieve the Bill's objective, as the reforms are designed to overcome the inherent imbalance in employment opportunities and consequential disadvantage experienced in parts of remote Australia.

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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