Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-seventh report of the 44th Parliament

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Functions of the committee

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

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

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in the 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 15 to 17 March 2016, legislative instruments received from 4 to 17 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):

- Corporations Amendment (Auditor Registration) Bill 2016;
- Customs and Other Legislation Amendment Bill 2016;
- Fair Work Amendment (Protecting Australian Workers) Bill 2016;
- Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016;
- Migration Amendment (Family Violence and Other Measures) Bill 2016;
- National Disability Insurance Scheme Amendment Bill 2016;
- National Disability Insurance Scheme Savings Fund Special Account Bill 2016;
- Northern Australia Infrastructure Facility (Consequential Amendments) Bill 2016;

- Northern Australia Infrastructure Facility Bill 2016;
- Social Services Legislation Amendment (Consistent Treatment of Parental Leave Payments) Bill 2016;
- Statute Law Revision (No. 2) 2016 Bill 2016;
- Statute Update Bill 2016;
- Superannuation Legislation Amendment (Choice of Fund) Bill 2016;
- Superannuation Legislation Amendment (Transparency Measures) Bill 2016;
- Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016; and
- Tax Laws Amendment (Tax Incentives for Innovation) 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.

1.9 In light of the committee's concluding comments on the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 at Chapter 2 of this report, the committee has also concluded its examination of the previously deferred Child Care Benefit (Vaccination Schedules) (Education) Determination 2015 [F2015L02101] and makes no further comment on the instrument.[2]

Previously considered measures

1.10 The following instruments implement measures which the committee has previously considered limit human rights and the committee refers to its previous comments in the *2016 Review of Stronger Futures measures* report:

- Social Security (Administration) (Trial Area—East Kimberley) Determination 2016 [F2016L00307];
- Social Security (Administration) (Trial Area—Ceduna and Surrounding Region) Amendment Determination (No. 1) 2016 [F2016L00309]; and

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

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

- Social Security (Administration) (Trial—Community Body—Ceduna Region Community Panel) Authorisation 2016 [F2016L00310].

1.11 In addition the following instruments, while machinery in nature, implement measures the committee has previously considered limit human rights and the committee refers to its previous comments in the *2016 Review of Stronger Futures measures* report:

- Social Security (Administration) (Trial—Variation of Percentage Amounts) Determination 2016 [F2016L00297];
- Social Security (Administration) (Trial—Excluded Voluntary Participants) Determination 2016 [F2016L00306];
- Social Security (Administration) (Welfare Restricted Bank Account) Determination 2016 [F2016L00311]; and
- Social Security (Administration) (Trial—Declinable Transactions) Determination 2016 [F2016L00312].[3]

Deferred bills and instruments

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

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2016 (No. 1) [F2016L00047] (deferred 23 February 2016, pending a response from the Minister for Foreign Affairs regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*);[4] and
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2016 (No. 2) [F2016L00117] (deferred 16 March 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]

3 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 37-61.

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

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

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 Border Force Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 25 February 2015

Purpose

2.3 The Australian Border Force Bill 2015 (the bill) provided the legislative framework for the establishment of the Australian Border Force (ABF) within the Department of Immigration and Border Protection (the department), including establishing the role of the Australian Border Force Commissioner (ABFC).

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

Background

2.5 The committee previously considered the bill in its *Twenty-second 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.[1]

2.6 The bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee on 5 March 2015, which tabled its report on 7 May 2015.

2.7 The bill passed both Houses of Parliament on 14 May 2015 and achieved Royal Assent on 20 May 2015, becoming the *Australian Border Force Act 2015* (the Act).

2.8 The committee requested a response from the minister by 5 June 2015. However, the minister's response was not received by the committee until 29 March 2016.

2.9 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.[2] The committee notes that, in this instance, the

1 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament* (13 May 2015) 5-23.

2 See Appendix 2 of this report.

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 in a timely fashion.

Human rights considerations

2.10 Prior to the establishment of the ABF, there were approximately 8800 employees in the Department of Immigration and Border Protection and approximately 4900 employees in the Australian Customs and Border Protection Service (Customs Agency).[3] As a result of the Act, the workforces of the two agencies were combined and a range of requirements and restrictions, which previously had only applied to customs workers, were extended to the broader workforce of the department. Those requirements include being subject to detailed investigations as to employment suitability, certain exclusions from the protections under the *Fair Work Act 2009* and being subject to alcohol and drug testing.

2.11 The structure and composition of government agencies and departments is entirely a matter for government. The committee does not question the rationale or purpose of combining the two agencies.

2.12 Instead, the committee's concerns relate to the necessity and proportionality of measures that restrict a range of human rights of those employed by the integrated department. For example, proportionality considerations require an examination of the necessity of extending the drug and alcohol testing regime to cover a whole department of 13 700 employees rather than just the 4900 employees involved in duties formally performed by the Customs Agency. The nature and type of work performed by those subject to these restrictions is relevant to the assessment of the proportionality of the regime, as is the extent to which individuals performing similar roles in other departments of state are subject to similar restrictions.

2.13 Accordingly, while the committee recognises the importance of having strong probity measures to ensure that those with law enforcement powers are subject to appropriate screening and oversight, much of the analysis below questions whether it is necessary and proportionate to apply those same measures to those not performing law enforcement functions in the broader department.

Requiring immigration and border protection workers to complete an organisation suitability assessment

2.14 Section 55 of the Act gives the Secretary of the Department of Immigration and Border Protection (the secretary) the power to issue written directions in connection with the administration of the department. Under section 55(4), the

3 Australian Government, *Budget 2015 – Budget Papers No. 4 – Part 2 Staffing of Agencies* (May 2015), *Table 2.2: Estimates of average staffing level (ASL) of agencies in the Australian Government General Government Sector(a) – Immigration and Border Protection*, 137, available from http://www.budget.gov.au/2015-16/content/bp4/html/bp4_part_02.htm.

directions may relate to the imposition of organisational suitability assessments (OSA) on immigration and border protection staff. Section 26 of the Act would also give the ABFC to the power to issue written directions requiring completion of an OSA.

2.15 The statement of compatibility stated that the requirement to undertake an OSA engaged the right freedom of assembly and association and the right to privacy.

2.16 As the committee had little information about the type of matters that will be included in an OSA, the committee considered that more information was required to determine whether the imposition of an OSA engaged and limited rights, including the type and nature of information required to be disclosed as part of the assessment.

2.17 Accordingly, the committee sought further information as to the content and nature of any proposed OSA, including the information required to be disclosed as part of the assessment, which individuals will be required to complete the OSA and the consequences of an adverse OSA for that individual's employment. In light of this, the committee also sought further information as to the human rights compatibility of imposing an OSA requirement under the Act.

Minister's response

> As part of measures to increase the Department's resistance to corruption and establish a strong integrity framework, the Secretary is able to direct Immigration and Border Protection (IBP) workers to undertake an organisational suitability assessment (OSA) (known as employment suitability screening) and, where an Employment Suitability Clearance (ESC) is held, to meet ongoing requirements. The requirement to obtain and maintain an ESC reflects the Department's operating environment.
>
> The Committee states that 'It is unclear why such assessments are required across the department when such assessments are not routinely applied in other Commonwealth departments.'
>
> The Australian Government's Protective Security Policy Framework (PSPF), and specifically the *Personnel Security Guidelines* (October 2014), requires Commonwealth agencies to undertake general employment screening to determine personnel's suitability to be entrusted with Australian Government resources as well as agency specific checks to mitigate any personnel security threats applicable to the agency that are not addressed by general employment screening.
>
> Agencies are to identify checks necessary to mitigate additional agency personnel security risks where these are not addressed by minimum employment screening.
>
> 'Some examples of character checks may be, but are not limited to:
>
> - drug and alcohol testing

- detailed financial probity checks, including wealth and credit checks
- psychological assessment
- agency specific questionnaires or other tests related to the industry, and
- partial or full exclusions under Part VIIC of the *Crimes Act 1914* (Cth), the Spent Convictions Scheme relating to engagement in positions covered by specific legislations to which exemptions are given.'

Further, the PSPF provides that agencies ' ... are to manage and assess the ongoing suitability of all personnel'. The requirements of the PSPF regarding employment suitability screening are distinct from, and additional to, the requirement on agencies to ensure that personnel with ongoing access to Australian Government security classified resources hold security clearances at the appropriate levels. Employment suitability screening, known as OSA, was in place for a number of years for all staff of the former Australian Customs and Border Protection Service (ACBPS). The requirement to hold and maintain an ESC is the Department's additional employment suitability screening measure, consistent with the PSPF and reflecting the particular vulnerabilities and risks faced by the Department, including the Australian Border Force (ABF).

The Department is responsible for managing the integrity of the Australian border, a national strategic asset, which requires significant trust. To retain the confidence of the Government and community the Department must maintain a culture resistant to corruption.

The ESC process seeks to identify integrity risks based on a person's character and the detection of any criminal associations. Employment suitability screening may require IBP workers to declare any family, friends or associates whose activities, for example a criminal history or associations with organised crime or an Outlaw Motorcycle Gang, may be relevant to the assessment of the worker's organisational suitability and the assessment of the worker's honesty, integrity and trustworthiness.

Noting the Department's role, the restrictions on Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) are therefore necessary in the interests of national security, public safety, public order and the protection of the rights and freedoms of others.

I acknowledge that some associations are unavoidable and it is intended that relevant policies would not require IBP workers to relinquish close familial ties. Together with the worker, my Department will conduct a risk assessment of the individual's circumstances and the risk posed by maintaining a declarable association with a family member.

I consider that restrictions imposed on IBP workers, such as having to cease an association or declare further contact with such persons, is

proportionate to the interests of national security as there are procedures and protections in place to ensure that the right to freedom of association is not unduly restricted. For example, aftercare arrangements are put in place where risks identified during employment suitability screening can be adequately and cost effectively mitigated or managed. This provides support to employees in terms of offering an alternative to not being granted an ESC.

Furthermore, strict protocols and procedures for conducting employment suitability screening and rules of procedural fairness apply. Under the screening process arrangements, employees with an adverse decision are provided with the reason/s for the outcome and an opportunity to respond. Any responses are reviewed by the decision maker prior to making the decision. The only exception to this is if it relates to a matter otherwise protected by law.

The direction to obtain and maintain an ESC requires an employee to provide personal information about themselves and their associates in the form of a questionnaire so that screening can be undertaken to assess if an employee is suitable from an integrity and character perspective.

I consider the requirement to provide personal information, which may also impact on a person's reputation and that of other people, to be proportionate to the interests of national security as there are procedures and protections in place to ensure that the rights to privacy and reputation are not unduly restricted.

Personal information obtained from an ESC screening process may be accessed by members of the Employment Suitability Team, and members of the Integrity and Professional Standards Branch, on a strict 'need to know' basis and is stored in appropriately rated and secure containers and IT systems. It is essential for members of the Employment Suitability Team to disclose personal information to facilitate checks with a range of law enforcement, intelligence and regulatory agencies. Personal information collected, used, disclosed and stored during screening processes is in accordance with the *Privacy Act 1988* (the Privacy Act) and Part 6 of the *Australian Border Force Act 2015* (ABF Act).[4]

Committee response

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

2.19 Some committee members noted that the minister's response highlights that the measures are part of the Department's approach to building 'resistance to corruption and establish[ing] a strong integrity framework.' These committee members consider that the minister's response demonstrates a need for department

4 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 2-4.

wide employment screening using an OSA. These committee members further note the minister's advice that there are procedures and protections in place in relation to aftercare arrangements and privacy safeguards to ensure that employees' right to freedom of association and privacy and reputation are not unduly restricted.

2.20 **Accordingly, some committee members consider that the completion of an organisational suitability assessment may be appropriate and necessary in a law enforcement context and in maintaining a culture resistant to corruption, if implemented with suitable safeguards. Based on the minister's response, these committee members consider that the measure may be proportionate, and thereby compatible with Australia's obligations under international human rights law.**

2.21 Other committee members support the following analysis. In light of the information provided in the minister's response, the requirement that employees of the department complete an organisational suitability assessment (OSA) engages and limits the right to privacy as employees will be required to provide significant personal information about their private life to their employer. In addition, the OSA process may lead to individuals being required not to associate with certain individuals, including family members. Accordingly, the requirements of the OSA process engage and limit the right to freedom of association and the right to protection of the family.

2.22 In terms of justifying the limitation on these rights, the minister's response explains that the Act seeks to create an integrated Department of Immigration and Border Protection in order to better manage the integrity of the Australian border and that, as a law enforcement agency, it is responsible for maintaining a culture resistant to corruption. The committee considers that this is a legitimate objective for the purposes of international human rights law.

2.23 The minister's response further explains that the purpose of the OSA is to identify integrity risks based on a person's character and to detect any criminal associations. On this basis, the measure is rationally connected to the legitimate objective as such screening is likely to identify risks to probity and integrity in the department and improve compliance.

2.24 The minister's response explains that the OSA was in place for a number of years for all staff of the former Customs Agency and that such a requirement is consistent with the Australian Government's Protective Security Policy Framework.

2.25 The Act empowers the secretary to require an OSA for all employees of the integrated Department of Immigration and Border Protection – expanding the individuals subject to those requirements from approximately 4900 to 13 700. There is no information in the minister's response to suggest that the 8800 additional individuals who are now subject to the OSA requirements are undertaking additional or varied duties or that the nature of their work has changed significant as a result of

the merger of the Customs Agency and the department so as to justify the imposition of an OSA.

2.26 There are a range of public service functions that exist in other departments of state which are comparable to those in the Department of Immigration and Border Protection that are not subject to the requirements of the Act. For example, staff in the Attorney-General's Department closely support operational law enforcement and security agencies such as the AFP, ASIO and the Australian Crime Commission (ACC). Those staff are not subject to an OSA. Apart from the simple fact of the integration of the Customs Agency within the department, there is no apparent reason why those who are not involved in law enforcement roles either directly, or as part of necessary operational support, should be subject to an OSA.

2.27 **Accordingly, other members of the committee consider that while it is clear that the completion of an organisational suitability assessment may be appropriate and necessary in a law enforcement context, it is not clear why it is necessary to empower the secretary to impose an organisational suitability assessment across the broader department. Accordingly, those committee members consider that the measure may be disproportionate and thereby incompatible with Australia's obligations under international human rights law.**

Alcohol and drug testing of immigration and border protection workers

2.28 Part 5 of the Act sets out the legislative basis for the testing of immigration and border protection workers for the presence of drugs and alcohol. The committee considered that testing workers for drugs and alcohol engages and limits the right to privacy.

Right to privacy

2.29 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and
- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measures with the right to privacy

2.30 The statement of compatibility acknowledged that the drug and alcohol testing regime engages the right to privacy. The statement of compatibility stated that the regime serves a number of legitimate objectives, including:

- ensuring that immigration and border protection workers are not seen to condone drug importation; and

- promoting a drug and alcohol free work place.[5]

2.31 The committee agreed that drug and alcohol free workplaces are particularly important in a law enforcement context and that these provisions largely mirror those that previously applied to customs workers. The committee considered that the measures have a legitimate objective and that the measures were rationally connected to that objective, in that a testing regime may encourage compliance and otherwise provide the evidence to address failures to comply with the regime.

2.32 However, the committee raised its concern that the regime's coverage appears overly broad and there was an absence of sufficient safeguards in the legislation. In particular, the committee noted that the Act largely leaves the details of the alcohol and drug testing regime to regulations.

2.33 The committee considered that the imposition of a drug and alcohol testing regime across the Department of Immigration and Border Protection engaged and limited the right to privacy. The committee therefore requested the advice of the Minister for Immigration and Border Protection as to whether the measure was a proportionate means of achieving the stated objective, particularly, whether there are effective safeguards over the measures.

Minister's response

> Preventing the movement of illicit substances and prohibited and restricted goods across the border is a core element of the Department's responsibilities. Where individuals are privately participating in activities that include the use and possession of illicit drugs, this behaviour is in conflict with official duties.
>
> The introduction of drug and alcohol testing is part of a broader Drug and Alcohol Management Programme put in place by the Department. This programme meets the Australian standards for drug and alcohol testing and includes an education component to ensure IBP workers are aware of their responsibilities and rights. The Department has worked closely with staff and their representatives to develop policies that are transparent, fair and consistent and allow the Department to ensure the integrity of the process and the test results.
>
> In the absence of a positive test, details of IBP workers subject to drug and alcohol testing will only be accessible to:
>
> - members of the Drug and Alcohol Management Programme team;
> - the laboratory technicians analysing the collected samples; and
> - the Medical Review Officer.

5 Explanatory memorandum (EM) 10.

Where an IBP worker returns a positive test, the matter is referred to the Integrity and Professional Standards Branch for assessment against the APS Code of Conduct.

In relation to drug and alcohol testing procedures, each sample is only identified by a reference number, therefore neither the laboratory staff nor the Medical Review Officer know the identity of the person being tested until the Medical Review Officer verifies a sample has returned a 'positive' test. Prior to a test being positive, only members of the Drug and Alcohol Management Programme team are able to match a reference number to an individual staff member.

Further, the information is only used by, or disclosed to, other workers/agencies in accordance with the Australian Privacy Principles. The medical provider is also required to comply with the requirements under the Privacy Act in collecting, using and disclosing personal information.

Prior to action being taken by the Department, the person being tested is given an opportunity to discuss the results with the Medical Review Officer. This information is used by the Medical Review Officer in determining whether a verified positive result is within acceptable parameters considering any declaration made by the individual being tested.

Any other information revealed about the person during this process is only transmitted to the Department where it is determined the information is likely to cause a significant hazard to the workplace and there is a direct relationship to the individual's functions and potential integrity. An example may include where a worker in a designated 'use of force' position has not declared that they are taking medications that the Medical Review Officer considers may impact on their ability to use a firearm.

The Committee states that whilst '...drug and alcohol testing is not uncommon for law enforcement agencies, it would seem unusual for such a regime to apply across a public service department. ... It is not clear ... why immigration workers not engaged in the ABF should be subject to such a regime.'

Drug and alcohol testing was introduced to the former ACBPS with the amendment of the *Customs Administration Act 1985* in 2012. The powers introduced into that Act mirror the powers provided now in the ABF Act. Those powers facilitated a testing regime that applied to the whole of the former ACBPS workforce, and not just persons in frontline, operational positions. It is important to note other agencies that conduct drug and alcohol testing such as the Australian Crime Commission and the Australian Federal Police test their entire workforce, not just operational staff.

Whilst the ABF carries out significant law enforcement functions, including detecting and disrupting the importation of prohibited narcotics, the

Department underpins and supports the ABF's operation in every way. Additionally there is ready and fluid movement of personnel between the Department and the ABF. As such, the risk posed to the integrity of the ABF's functional effectiveness and reputation is not sufficiently managed by restricting drug and alcohol testing to ABF personnel only. Were an employee of the Department to be found to have used a prohibited narcotic, whether that person is working in the ABF or in another departmental role, the reputational risk to the Department as a whole is the same. And from a personnel security risk perspective, an officer in the information technology or intelligence divisions using prohibited narcotics poses just as significant a vulnerability as a frontline officer working in an airport or a cargo examination facility.

The testing regime is proportionate to the interests of ensuring the integrity and reputation of the Department as a whole, thus enhancing community trust in the Department's capacity for managing the integrity of the Australian border, a national strategic asset. To retain the confidence of the Government and community, the Department must maintain a culture resistant to corruption.

The requirement to provide personal information is considered to be proportionate to the interests of national security as there are procedures and protections in place to ensure that the rights to privacy and reputation are not unduly restricted.

The absence of sufficient safeguards and lack of limitations on intrusiveness and the retention of records

The *Australian Border Force (Alcohol and Drug Tests) Rule 2015* (the Rule) requires that a drug or alcohol test conducted for section 34, 35 or 36 of the ABF Act be conducted in a respectful manner, and in circumstances affording reasonable privacy to the IBP worker. The Rule requires that tests must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the test, and that the test must not involve the removal of more clothing than is necessary for the conduct of the test, and more visual inspection that is necessary for the conduct of the test. Further, if practicable, the test must be conducted by a person of the same sex as the IBP worker. In collecting a hair sample for a drug test, the authorised tester must use the least painful technique known and available, must only collect the amount of hair necessary for the conduct of the test, and cannot collect the sample from the IBP worker's genital or anal area or buttocks.

The Rule limits the amount of information that may be collected from a drug or alcohol test conducted for section 34, 35 or 36 of the ABF Act to information relating to the detection of alcohol or prohibited drugs. A body sample or other record relevant to a test must be kept in a secure location unless destroyed in accordance with the Rule. A positive body sample (one that does indicate the presence of alcohol or prohibited drugs) must be destroyed no later than two years from the day of the test.

> A negative body sample must be destroyed no later than 28 days after the day of the test. The two year retention period for a positive test allows for disciplinary action and any contest of such actions that may follow a positive result. Other records relating to an alcohol or drug test may be retained until such time as the IBP worker to whom the record relates ceases, for any reason to be an IBP worker.[6]

Committee response

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

Rules and procedures for alcohol and drug testing

2.35 The minister's response refers to the *Australian Border Force (Alcohol and Drug Tests) Rule 2015* (the Rule), which sets out in more detail the processes and procedures for alcohol and drug testing within the department. The committee has previously concluded that the Rule is compatible with the right to privacy. Accordingly, the committee considers that in relation to the conduct of the testing itself, there are sufficient safeguards to protect the right to privacy.

Proportionality of applying the alcohol and drug regime to the entire department

2.36 In relation to the proportionality of the alcohol and drug testing regime more broadly, some committee members noted that the minister's response refers to the introduction of entire workforce testing for the Customs Agency (introduced in 2012) and that similar agencies, such as the Australian Crime Commission and the Australian Federal Police, test their entire workforce.

2.37 In addition, the minister explains that there is a ready and fluid movement of personnel between the department and the ABF and that, as a result, the risk posed to the integrity of the ABF's functional effectiveness and reputation is not sufficiently managed by restricting drug and alcohol testing to ABF personnel only.

2.38 **Accordingly, some committee members consider that an alcohol and drug testing regime is appropriate for employees whose function is primarily law enforcement and that the minister has provided reasons why it is necessary and proportionate for this drug and alcohol testing regime to apply to all employees of the broader department. Accordingly, these committee members consider that the measure may be compatible with the right to privacy.**

2.39 Other committee members support the following analysis. In relation to the proportionality of the alcohol and drug testing regime more broadly, the committee's initial analysis was principally concerned with the extension of the regime beyond those in operational roles (and roles directly supporting operational roles) within the ABF to the department as a whole.

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6 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 4-6.

2.40 As set out above in relation to the requirement that all employees of the department may be required to undergo an OSA, the Act now subjects all employees of the integrated Department of Immigration and Border Protection to a drug and alcohol testing regime expanding the individuals subject to those requirements from approximately 4900 to 13 700. The minister's response notes that entire workforce testing was introduced for the Customs Agency in 2012 and that similar agencies, such as the Australian Crime Commission and the Australian Federal Police, test their entire workforce. However, there is no information in the minister's response to suggest that the 8800 additional individuals who are now subject to these requirements are undertaking additional or varied duties or that the nature of the work has changed significantly as a result of the merger of the Customs Agency and the department so as to justify the imposition of a drug and alcohol testing regime.

2.41 There are many typical public service positions within the broader Department of Immigration and Border Protection that would appear to remain unrelated to the law enforcement functions of the ABF. There is no apparent justification for extending drug and alcohol testing to these employees where it is not required for other public service employees performing similar roles in other departments of state.

2.42 The minister explains that there is a ready and fluid movement of personnel between the department and the ABF and that, as a result, the risk posed to the integrity of the ABF's functional effectiveness and reputation is not sufficiently managed by restricting drug and alcohol testing to ABF personnel only. However, no information is provided as to the degree and extent of movement between the department and the ABF.

2.43 Moreover, while the fluidity may impose management challenges on those responsible for the ABF and the department, it is not clear from the minister's response why the only available option is to impose a drug and alcohol testing regime on the entire department. Accordingly, it would appear that this is not the least rights restrictive approach to managing the integrity risks posed by those undertaking law enforcement functions while under the influence of illicit substances.

2.44 **Accordingly, other members of the committee consider that while an alcohol and drug testing regime is appropriate for employees whose function is primarily law enforcement, it is not clear why it is necessary to subject all employees of the broader department to this drug and alcohol testing regime. Accordingly, those committee members consider that the measure may be incompatible with the right to privacy as the measures are broader than necessary.**

Minister's response

> *The lack of criteria about what the Secretary or ABF Commissioner might consider in prescribing a prohibited drug*
>
> The concern of the committee is noted; however, it is not always appropriate to be overly prescriptive in primary legislation. I consider that the benefits of providing a definition are outweighed by the risks arising from [the] evolving and changing nature of the drug environment.
>
> Providing a definition of a 'prohibited drug' will confine the ability of the Department to meet the challenges presented by new drugs and will undermine the ability of the Department to maintain a drug free workplace. Defining the term by legislative instrument will provide a lawful and flexible mechanism to allow the Secretary and ABF Commissioner to respond quickly to this ever-changing environment.
>
> Further, this instrument is a disallowable instrument in accordance with the *Legislative Instruments Act 2003* and is subject to scrutiny by Parliament. Any determination made by the Secretary or ABF Commissioner will be subject to oversight by Parliament.[7]

Committee response

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

2.46 The committee agrees with the minister's assessment that it is not always appropriate to be overly prescriptive in primary legislation. However, the committee's primary concern was that the Act enables the ABFC or secretary to expand the drugs that are prohibited for immigration and border protection workers beyond those that are defined as a narcotic substance. No limitation is placed on this power, such as a requirement that the ABFC or the secretary must be satisfied that the drug is illegal and/or has a demonstrated deleterious effect on an individual's ability to perform their functions as an immigration and border protection worker. In the absence of such restrictions, the power granted to the ABFC and the secretary would appear broader than is necessary and therefore not the least rights restrictive approach.

2.47 **As set out above, no limitation is placed on the power to prescribe a drug as prohibited, such as a requirement that the Australian Border Force Commissioner or Secretary of the Department of Immigration and Border Protection must be satisfied that the drug is illegal and/or has a demonstrated deleterious effect on an individual's ability to perform their functions as an immigration and border protection worker. Accordingly, the *Australian Border Force Act 2015* permits the alcohol and drug testing regime to be expanded to**

7 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 6.

substances where there is no evidence of a link between that substance and illegal behaviour or poor work performance. Accordingly, the committee considers that the measure may be incompatible with the right to privacy as the measures are broader than strictly necessary.

Exemption of Fair Work Act where an immigration or border protection worker is terminated for serious misconduct

2.48 Part 4 of the Act provides that if the secretary terminates the employment of an APS employee in the department and the secretary or the ABFC reasonably believes that the employee's conduct or behaviour amounts to serious misconduct, the secretary or the ABFC may make a declaration to that effect. The effect of the declaration is that provisions of the *Fair Work Act 2009* (Fair Work Act) dealing with unfair dismissal, and notice of termination or payment in lieu, will not apply to the APS employee. The committee considered that these measures engage and limit the right to just and favourable conditions at work.

Right to just and favourable conditions of work

2.49 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[8]

2.50 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the right not to be deprived of work unfairly.

Compatibility of the measures with the right to just and favourable conditions of work

2.51 The statement of compatibility noted that the provisions in Part 4 engaged and limited the right to just and favourable conditions of work. The statement of compatibility did not specifically and explicitly set out the legitimate objective of the measures. The statement of compatibility did explain that the measures were necessary to ensure the ability of the department to carry out its functions effectively. How the provisions of the Fair Work Act relating to unfair dismissal may limit the ability of the department to carry out its functions effectively was not explained.

2.52 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether Part 4 is compatible with the right to just and favourable conditions of work, and particularly, whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection

8 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 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).

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

Section 32 of the ABF Act provides that the Secretary or the ABF Commissioner may make a written declaration of serious misconduct where the Secretary or the ABF Commissioner reasonably believes that an employee's conduct or behaviour amounts to serious misconduct and is having or is likely to have a damaging effect on the professional self-respect or morale of some or all of the APS employees in the Department or the reputation of the Department. This power may only be exercised once a person's employment has been terminated by the Secretary or delegate, and does not reduce the obligation on the Department to accord the person a fair process in determining whether or not they have breached the Code of Conduct, and, if they have, whether they should be dismissed as a sanction for that breach.

The declaration cannot be used for behaviour that falls short of the definition of serious misconduct. Serious misconduct is defined as corrupt conduct engaged in, a serious abuse of power, or a serious dereliction of duty, or any other seriously reprehensible act or behaviour, whether or not acting, or purporting to act, in the course of the worker's duties. This definition is consistent with the definition that was in the *Customs Administration Act 1985*, and the definition currently in the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979*.

It is intended that the serious misconduct declaration will minimise the risk of reinstatement. Although reinstatement may be rarely ordered in practice, formally under the *Fair Work Act 2009* it is the remedy of first resort: see s. 390. Therefore, the application of the Fair Work Act may result in the person having to be reinstated, and reinstated relatively quickly. This poses significant risks to the Government and the community in light of the expanded law enforcement role of the Department, and that the workforce is exposed to increased attempts by criminal elements to penetrate, compromise and corrupt officers. In the first place, if the Fair Work Commission's review of a dismissal were to result in a person being reinstated, this would send a mixed signal to the community and the workforce about the tolerance of serious misconduct within the Department. Avoiding sending this message, and enhancing the ABF's capability to deal with serious misconduct, should be upheld as a legitimate objective in the same way the limitation on Part 3-2 of the Fair Work Act was upheld when it was introduced in section 15A of the *Customs Administration Act 1985*. In the second place, to the extent that the Fair Work Commission's unfair dismissal jurisdiction operates speedily, so that a person can be reinstated within a couple of months, there is a risk that a person could be returned to the workforce before the Department has been able, for example, to implement measures to prevent the particular mechanism for corruption exploited by the person

being reinstated. Equally, there is a risk that a person, who, for example, has engaged in seriously reprehensible behaviour, could be returned to the workforce before morale in the Department, or the Department's reputation in the community, has had a chance to recover.

The limitation regarding Part 3-2 of the Fair Work Act is reasonable and proportionate because alternative avenues remain to seek remedies (though only exceptionally a remedy similar to reinstatement) under Part 3-1 (general protections claims). The ABF Commissioner's written declaration of serious misconduct will be a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The option of judicial review under [the] ADJR Act should be considered an adequate alternative because it provides a mechanism to ensure that the decision to terminate employment was reasonable in the circumstances, with less chance that the Government and the community is exposed to the risk that an employee who has engaged in corrupt conduct is reinstated to a position of public trust and confidence.

This provision mirrors the declaration provision that applied to former ACBPS employees, both those in operational roles and non-operational roles, under section 15A of the Customs Administration Act and it is proposed to replicate its effect across the integrated Department. Section 15A of the Customs Administration Act was modelled on the declaration of serious misconduct provisions applicable to Australian Crime Commission and Australian Federal Police staff. The provision was introduced into the Customs Administration Act in 2012 as part of a series of measures designed to increase the resistance of the ACBPS to corruption and to enhance the range of tools available to ACBPS to respond to suspected corruption. At this time the Committee scrutinised this provision and was satisfied that this measure is compatible with the right to an effective remedy. It is therefore appropriate to reiterate that while Article 2(3)(a) of the ICCPR is based on the premise that any person who has their rights or freedoms violated shall have an effective remedy, Article 2(3)(b) qualifies this right more prescriptively. Article 2(3)(b) states that the right shall be '*…determined by competent judicial, administrative or legislative authorities, or by any competent authority provided for by the legal system of the state and to develop the possibilities of judicial remedy.*' In the same way that former ACBPS workers were still considered to have an avenue to seek redress for their dismissal through the ADJR Act, workers affected by section 32 of the ABF Act have the same avenue to develop the possibilities of judicial remedy to their dismissal.[9]

Committee response

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

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 March 2016) 7-8.

2.54 The minister's response demonstrates that the measures pursue the legitimate objective of national security through effective border control. In enhancing the department's power to deal with serious misconduct by its employees, which may undermine border protection, the measure is rationally connected to that objective.

2.55 The minister's response notes that section 32 of the Act mirrors the declaration provision that previously applied to Customs Agency employees, both those in operational roles and non-operational roles. The Act would simply apply this provision across the entire integrated Department of Immigration and Border Protection. The response also notes that the committee previously considered the original provision in relation to the Customs Agency when it was introduced in 2012 and considered that the measure was compatible with the right to an effective remedy.

2.56 In terms of proportionality, section 32 of the Act permits the secretary or the ABFC to abrogate the existing right of a current APS employee of the department to challenge the fairness of a decision to dismiss them for serious misconduct. The committee's initial analysis recognised that this section 32 power may be reasonable in its application to operational ABF staff. Such powers are comparable to those of the Australian Federal Police Commissioner and the CEO of the ACC in relation to their respective workforces. The committee recognised the particular necessity of strong powers to protect the integrity and probity of law enforcement agencies.

2.57 However, there are many typical APS roles within the broader Department of Immigration and Border Protection. The minister's response provides no apparent justification for excluding employees in these roles from the Fair Work Act remedies available to other APS employees in other departments of state. These protections are important components of just and favourable conditions of work.

2.58 The minister's response focuses on concerns that in the absence of section 32 in the Act, the Fair Work Commission may order the department to reinstate an employee found to have engaged in serious misconduct.

2.59 While the power to order reinstatement is available to the Fair Work Commission under s 309 of the Fair Work Act 2009, it is available as a remedy in the event that the person is found to have been unfairly dismissed, that is, 'the dismissal was harsh, unjust or unreasonable' (s 385). Moreover, the Fair Work Commission may be satisfied that, notwithstanding that a dismissal was unfair, reinstatement is inappropriate (s 390(3)).

2.60 The only time the Fair Work Commission is likely to require reinstatement is if it were satisfied that a decision to dismiss for serious misconduct was wrong; that is, that the misconduct did not occur. It is highly unlikely that reinstatement would be ordered if the Fair Work Commission were satisfied that the individual had engaged in serious misconduct. First, while there may be room for interpretation as to when a dismissal is reasonable in certain circumstances, it can be expected that

dismissal is reasonable if an employee has in fact engaged in serious misconduct. Second, even if, hypothetically, the dismissal were unreasonable in such circumstances, reinstatement is highly unlikely to be the remedy ordered. The minister acknowledges that reinstatement is rarely ordered in practice.

2.61 Accordingly, it is unclear to the committee on what basis the minister considers that the 'application of the Fair Work Act may result in the person having to be reinstated and reinstated relatively quickly' where the individual concerned had in fact engaged in serious misconduct.

2.62 Finally, if an employee was reinstated because the Fair Work Commission had found that an employee had not engaged in serious misconduct, this would arguably send a signal to the community that the department follows due process rather than sending a 'mixed signal' to the community regarding the probity of the department.

2.63 **As set out above, the committee recognises that Part 4 of the *Australian Border Force Act 2015* may be reasonable in its application to operational Australian Border Force staff. However, there are many typical public service positions within the broader Department of Immigration and Border Protection and there is no apparent justification for excluding them from *Fair Work Act 2009* remedies available to other public service employees in other departments of state. Accordingly, the committee considers that the measure may be incompatible with the right to just and favourable conditions of work.**

Power to delay resignation to complete investigation into serious misconduct

2.64 Part 3 of the Act gives the secretary or the ABFC the power to delay an employee's resignation by up to 90 days in circumstances where the employee may have engaged in serious misconduct, to allow further investigation of that conduct.

2.65 These measures engage and limit the right to just and favourable conditions at work because this limits an employee's ability to determine their date of termination. It may limit their ability to obtain alternative employment in circumstances where they are technically still employed in the department.

Right to just and favourable conditions of work

2.66 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.[10] More information is provided at paragraph [2.50] above.

Compatibility of the measures with the right to just and favourable conditions of work

2.67 The statement of compatibility noted that the provisions in Part 3 engaged and limited the right to just and favourable conditions at work. The statement of compatibility did not explicitly set out the legitimate objective of the measures.

10 Related provisions relating to such rights for specific groups are also contained in the ICERD, articles 11 and 14(2)(e) of the CEDAW, article 32 of the CRC and article 27 of the CRPD.

2.68 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether Part 3 was compatible with the right to just and favourable conditions of work, 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.

Minister's response

> Provisions in the ABF Act allow the Secretary or ABF Commissioner to defer an employee's date of resignation by up to 90 days from written notification of resignation by the employee where the Secretary or ABF Commissioner reasonably believes an employee has engaged in serious misconduct or is being investigated for such conduct. This enables the finalisation of any investigation, determination of breach of the APS Code of Conduct and consideration of whether to impose the sanction of termination of employment.
>
> Under current provisions of the Public Service Act, an investigation into a breach of the APS Code of Conduct can continue after an APS employee has resigned. However, there is no provision to apply a sanction to the person once they are no longer an employee. This provision allows the resignation to be delayed so that any investigation can be concluded, and where warranted, a sanction can be applied.
>
> It enables the Department to address incidences of serious misconduct, including corruption, through an investigation and subsequently to terminate an employee if serious misconduct is found to have occurred. This is considered an important demonstration to employees, the Government and the wider community of the Department's commitment to professionalism and high standards of integrity and its unwillingness to tolerate conduct that threatens these values.
>
> The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Rights in work include the enjoyment of just and favourable conditions of work. I consider that this measure does not unduly restrict the right to work or rights in work because the effect of this provision would not require the employee to continue or resume duties during the period of investigation. It is intended that an employee who is being investigated for serious misconduct would be suspended from duties in accordance with section 28 of the Public Service Act and regulation 3.10 of the *Public Service Regulations 1999*.[11]

11 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 9.

Committee response

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

2.70 **The committee considers that the minister's response has demonstrated that the provisions in the *Australian Border Force Act 2015* which allow the Secretary of the Department of Immigration and Border Protection (the secretary) or Australian Border Force Commissioner (the ABFC) to defer an employee's date of resignation by up to 90 days where the secretary or ABFC reasonably believes an employee has engaged in serious misconduct or is being investigated for such conduct, is likely to be compatible with the right to just and favourable conditions of work.**

Mandatory reporting of immigration workers' associations with known criminals

2.71 Section 26 of the Act gives the ABFC the power to issue written directions in connection with the administration of the ABF. Similarly, section 55 of the Act gives the secretary the power to issue written directions in connection with the administration of the department. The statement of compatibility stated that this would include a direction that immigration and border protection workers 'declare associations and other relevant information.'[12] The statement of compatibility indicated that the department will require workers to disclose associations with criminals and/or those involved in misconduct.

2.72 The statement of compatibility suggested that this engaged the rights to freedom of assembly and association and the right to privacy and reputation.

2.73 In order to assess the compatibility of a direction that may require immigration and border protection workers to declare their associations, the committee sought a copy of the draft order and detailed information as to how the department proposes to implement the order in practice.

Minister's response

> The provision of the ABF Act which enables the ABF Commissioner to issue directions requiring an IBP worker to report alleged serious misconduct or alleged criminal activity, by or involving an IBP worker, replicates a similar power that applied to employees of the former ACBPS under the Customs Administration Act. The Customs Administration Act provision was introduced in 2012 as part of a package of integrity measures designed to increase the resistance of the ACBPS to corruption and to enhance the range of tools available to the ACBPS to respond to suspected corruption. At the time of the proposed amendments to the Customs Administration Act in 2012, the Committee scrutinised this provision and was satisfied

12 EM 13.

that this measure is compatible with the right to minimum guarantees in criminal proceedings.

The former ACBPS Chief Executive Officer issued a direction in reliance on the Customs Administration Act provision in late 2012. That direction operated without incident, and was supported by internal guidelines and instructions.

On 1 July 2015, the Department relevantly published an Associated Document to the Instruction and Guideline on Employment Suitability Screening, regarding Declarable Associations which provides further information, as does the Secretary's Direction (under subsection 55(1) of the ABF Act) on Integrity Measures. These documents are available on the Department's website at the following link:

http://www.border.gov.au/about/access-accountability/integrity[13]

Committee response

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

2.75 **The committee refers to its analysis above in relation to organisational suitability assessments and the human rights concerns raised by a requirement that Department of Immigration and Border Protection workers disclose certain known associations to their employer.**

Requirement to disclose information that may incriminate an individual

2.76 Section 26 of the Act gives the ABFC the power to issue written directions in connection with the administration of the ABF. Section 26(4) provides that the directions may include a requirement that immigration and border protection workers report serious misconduct and/or criminal activity by an immigration and border protection worker. Section 26(8) provides that if a person is required to provide information under a direction issued under section 26, that they are not excused from providing information on the grounds it might incriminate them. Similarly, section 55 gives the secretary comparable powers in connection with the administration of the department.

2.77 As the Act includes provisions that require individuals to provide self-incriminating information, the committee considered that the Act engaged and limited the protection against self-incrimination – a core element of fair trial rights.

Right to a fair trial and fair hearing rights

2.78 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, to cases before both courts and tribunals and to military disciplinary proceedings. The right guarantees to all

13 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 9-10.

persons a fair and public hearing by a competent, independent and impartial tribunal established by law.

2.79 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 to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

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

2.80 The statement of compatibility identified that the measures engage the right to be free from self-incrimination. The statement of compatibility provided no justification for the limitation on the protection against self-incrimination. The committee noted that the bill includes a use immunity which prevents 'the self-incriminating evidence being used in most legal proceedings' against the person required to disclose the evidence.[14] The committee noted that there is no justification for the exceptions provided to the use immunity and no justification for the absence of a derivative use immunity.[15]

2.81 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the limitations on the right to freedom from self-incrimination are compatible with 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 a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The intention of the power of the Secretary and the ABF Commissioner to impose mandatory reporting requirements is to promote full disclosure by IBP workers of misconduct which they observe or are involved in, so that action can be taken against IBP workers involved in corruption. Mandatory reporting contributes to a culture that does not ignore or condone corruption, serious misconduct or illegal activities, and where staff are supported to speak up. It is important that the Department be able to act on and undertake further investigations in relation to information obtained under these powers.
>
> The effect of a derivative use immunity would be to ensure that any information derived by the Department, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take

14 EM 14.

15 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 may 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.

> action against the person who made that disclosure. Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct, and it may be difficult to obtain evidence other than that derived from the person's admissions. If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that appropriate action can be taken against the person.
>
> The ABF Act provides for the Secretary or the ABF Commissioner to be able to issue directions about mandatory reporting as well as other matters regarding the administration and control of the Department and the ABF. In the course of considering the application of the abrogation of the privilege against self-incrimination, a deliberate decision was taken to limit the breadth of orders to which the potential provision would apply. This reflected the approach under the Customs Administration Act. I consider that the current provision provides a balance between the public benefit in compelling the provision of information concerning possible corrupt activity affecting the Department and the privilege against self-incrimination.[16]

Committee response

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

2.83 The requirement of mandatory reporting is limited to serious misconduct by a worker; and criminal activity involving a worker where the serious misconduct or criminal activity affects, or is likely to affect, the operations, responsibilities or reputation of the department. Accordingly, the requirement of mandatory reporting is limited to employees in relation to matters directly affecting (or likely) to affect their employer and does not extend to criminal activity more broadly.

2.84 The Act includes a 'use immunity' so that information disclosed by a worker may not be used against them in any proceeding. As set out in the minister's response a 'derivative use immunity' is not provided so as to ensure that the information may be used to further investigate an individual who has engaged in serious misconduct or criminal activity. Ordinarily, the committee looks to both a 'use' and a 'derivate use' immunity to justify limitations on the protections against self-incrimination. However, in the context of the limited nature of the requirement to disclose and the department's role in national security, the provision appears justified.

2.85 **Accordingly, the committee considers that the requirement that immigration and border protection workers report serious misconduct and/or**

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 March 2016) 10-11.

criminal activity, even if that might incriminate them, is likely to be compatible with the right to a fair trial.

Secrecy provisions

2.86 Part 6 of the Act includes an offence provision which criminalises the disclosure by an immigration and border protection worker of any information obtained by a person in their capacity as an immigration protection worker. A breach of the penalty provision is subject to a maximum penalty of two years in prison.

2.87 The offence provision includes limited exceptions which permit disclosure in circumstances including where:

- it is permitted by the secretary of the department;
- the disclosure is required by an order of a court or tribunal;
- the disclosure is required by the *Law Enforcement Integrity Commissioner Act 2006*; or
- disclosure is necessary to prevent a serious threat to the life or health of an individual.

2.88 These exceptions reverse the onus of proof and place an evidential burden on the defendant to establish (prove) that the statutory exception applies in a particular case. The committee considered that reversing the burden of proof engaged and limited the right to be presumed innocent.

2.89 The committee also considered that the offence provision engages and may limit the right to an effective remedy. The committee also considered that the offence provision limits the right to freedom of expression as it would limit the disclosure by individuals of information gained in the course of their work with the department, including discussions that may be in the public interest.

Right to a fair trial (presumption of innocence)

2.90 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.

2.91 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.

2.92 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.

Compatibility of the measure with the right to a fair trial

2.93 The statement of compatibility did not identify the offence provision as engaging the right to a fair trial. Accordingly, it did not seek to justify its compatibility with human rights.

2.94 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the offence provisions which includes a reverse evidentiary burden was compatible with 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 a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> Part 6 of the ABF Act does not change or alter what any criminal prosecution of an alleged breach must prove. An individual who is subject to a prosecution remains innocent until found guilty by a court and the offence in no way limits a defendant's right to a fair trial or limits their right to be presumed innocent. The onus remains on the prosecution to prove each element of the offence beyond reasonable doubt. If the defendant is claiming a defence to a breach of the prohibition on recording or disclosure of protected information, he or she bears the evidential burden in relation to whether one or more of the exceptions applied to his or her recording or disclosure. This evidential burden of proof in relation to exceptions to an offence is set out in subsection 13.3(3) of the *Criminal Code*, not Part 6 of the ABF Act. That is that any defendant who wishes to deny criminal responsibility bears an evidential burden in relation to that matter. This evidential burden applies to all offences across the Commonwealth. An evidential burden in relation to a matter means the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
>
> The secrecy and disclosure provisions of Part 6 of the ABF Act reflect section 16 of the Customs Administration Act which regulated the disclosure of protected information and provided an offence of prohibited disclosure of protected information punishable by a maximum penalty of two years imprisonment. As the Explanatory Memorandum for the ABF Act noted, the Department, including the ABF, creates, receives and uses critical and important information on a daily basis, including critical intelligence and personal information, much of which is sensitive and complex. As such, it is appropriate that measures that were in place when the ABCPS was a separate agency be applied to the Department as a whole. As noted above with respect to alcohol and drug testing, the Department underpins and supports the ABF's operation in every way and as such, the receipt, creation and use of sensitive and complex information is not limited to personnel in the ABF, but rather are spread throughout the Department. For these reasons, I consider that the secrecy offence

> pursues a legitimate aim. That is to ensure the integrity of the Department's handling of protected information by appropriately deterring other entrusted persons from engaging in conduct which leads them to breach the prohibition.
>
> Given that aim of the secrecy offence, I consider that the burden to be borne by a defendant in denying criminal responsibility by adducing or pointing to evidence that suggests a reasonable possibility that an exception exists to a given disclosure, is reasonable and proportionate to achieving the aim of the secrecy offence. I further note that the provision is consistent with those of other agencies with law enforcement and national security responsibilities, such as the AFP.
>
> For these reasons, I consider that the new strict liability offence is not inconsistent with the presumption of innocence set out in article 14(2) of the ICCPR.[17]

Committee response

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

2.96 As set out above, Part 6 of the Act includes an offence provision which criminalises the disclosure by an immigration and border protection worker of any information they have obtained in their capacity as an immigration and border protection worker. The offence provision includes limited exceptions. These exceptions reverse the onus of proof and place an evidential burden on the defendant to establish (prove) that the statutory exception applies in a particular case.

2.97 As noted above at [2.91], 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. 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.

17 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 11-12.

2.98 This approach to assessing the proportionality of reverse burden offences is consistent with the Attorney General's Department's Guide to Framing Commonwealth Offences, which explains that:

> Offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. Therefore, a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:
>
> - it is peculiarly within the knowledge of the defendant, and
> - it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[18]

2.99 A number of the exceptions to the offence provision do not appear to be peculiarly within the knowledge of the defendant nor does there appear to be any apparent reason why those exceptions would be more difficult and costly for the prosecution to prove than the defendant.

2.100 For example, the offence provision could have been drafted to require the prosecution to prove beyond reasonable doubt that the secretary did not consent to the disclosure rather than imposing a burden on the defendant to prove on the balance of probabilities that the secretary did in fact consent to the disclosure. Accordingly, it is the specific construction of the offence provision that gives rise to evidentiary burdens on the defendant and not simply the broader criminal law as suggested in the minister's response.

2.101 Beyond describing the department's operational context, the minister's response does not provide detailed information in relation to the appropriateness of the defendant being required to carry an evidential burden in relation to each of the specific matters in the offence provision.

2.102 **Accordingly, the offence provision, which includes a reverse evidentiary burden, is likely to be incompatible with the right to a fair trial.**

Right to an effective remedy

2.103 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. Accessing effective remedies requires an ability to access information which may identify human rights violations.

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18 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, (September 2011 edition) 50, available from https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx.

2.104 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.

2.105 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

2.106 The statement of compatibility did not identify the measure as engaging the right to an effective remedy. Offence provisions that prohibit the disclosure of government information may prevent relevant information coming to light that would enable human rights violations to be addressed as required by the right to an effective remedy. That is, the prohibition on disclosing information by government employees may adversely affect the ability of individual members of the public to know about possible violations of human rights and therefore seek redress for such potential violations.

2.107 As the statement of compatibility did not identify the right to an effective remedy as engaged, no justification for the limitation on the right was provided.

2.108 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the offence provisions was compatible with the right to an effective remedy, 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.

Minister's response

> The *Public Interest Disclosure Act 2013* (PID Act) provides protection to 'whistleblowers' who provide information in breach of the provisions of Part 6 of the proposed ABF Act, where the disclosures are made in accordance with the PIO Act. This protection is the same as that which was provided previously in respect of breaches of section 16 of the Customs Administration Act.
>
> The secrecy offence provided by Part 6 of the ABF Act provides several exemptions to the offence, including if the disclosure is done in accordance with Part 6 itself, or if the disclosure is required or authorised by or under a law of the Commonwealth, State or Territory. The PIO Act will, in certain circumstances, protect an entrusted person who discloses protected information in contravention of Part 6 of the ABF Act (for example if the disclosure was made by an entrusted person who was not authorised to make the disclosure under sections 44 and 45 of the ABF Act).

Under the PIO Act, the disclosure must relate to 'disclosable conduct'. 'Disclosable conduct' is set out in section 29 and includes, for example, conduct engaged in by a public official in connection with their position as a public official that contravenes a law of the Commonwealth. The disclosure must also be a 'public interest disclosure', the requirements for which are set out in section 26 the PIO Act. For example, a person may only make an external disclosure provided all of the following requirements are met:

(a) the discloser previously made an internal disclosure regarding the information being disclosed externally; and

(b) the discloser believes that either: the investigation (under Part 3) was inadequate; or the response to an investigation was inadequate; or the investigation was not completed within the time limit (90 days, or longer if extension granted - section 52 of the PIO Act); and

(c) disclosure is not, on balance, contrary to the public interest (see section 26(3) of the PIO Act); and

(d) no more information is publically disclosed than is reasonably necessary to identify the instance(s) of disclosable conduct; and

(e) the information does not consist of, or include intelligence information (defined in section 41 of the PIO Act); and

(f) none of the conduct with which the disclosure is concerned relates to an intelligence agency.

The PIO Act provides immunity from any civil, criminal or administrative liability for making the disclosure in accordance the PIO Act. Therefore, even if disclosure under the PIO Act breaches Part 6 of the ABF Act, the entrusted person would not be subject to criminal liability for the offence under Part 6.[19]

Committee response

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

2.110 **In light of the minister's advice that if a disclosure is made consistent with the *Public Interest Disclosure Act 2013* it would not be a breach of Part 6 of the *Australian Border Force Act 2015*, the committee considers that the offence provision is likely to be proportionate and compatible with the right to an effective remedy.**

19 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 12-13.

Right to freedom of opinion and expression

2.111 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.

2.112 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,[20] 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.[21]

Compatibility of the measure with the right to freedom of expression

2.113 The statement of compatibility did not identify the offence provision as engaging the right to freedom of expression. Accordingly, it did not seek to justify its compatibility with human rights. The offence provision criminalises the disclosure of any information which an individual has come across in the course of their work with the department.

2.114 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the bill was compatible with the right to freedom of opinion and expression, 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.

Minister's response

> By restricting 'entrusted persons' from communicating protected information, the secrecy and disclosure provisions limit freedom of expression. However, this restriction is considered necessary for the protection of public order and Australia's national security as the Department and the ABF within it will regularly create, receive and use sensitive and complex information including intelligence and personal information.

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20 '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.

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

> I consider that this measure is a proportionate and reasonable way to achieve this objective as the provision includes a comprehensive framework to regulate the disclosure of this information in appropriately controlled circumstances.[22]

Committee response

2.115 **The committee thanks the Minister for Immigration and Border Protection for his response. In light of the information provided by the minister, which explains the operational context in which the department operates, and the foregoing information regarding public interest disclosure, the committee considers that the offence provision is likely to be proportionate and compatible with the right to freedom of expression.**

22 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 14.

Fairer Paid Parental Leave Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 25 June 2015

Purpose

2.116 The Fairer Paid Parental Leave Bill 2015 (the bill) seeks to amend the *Paid Parental Leave Act 2010* (PPL Act) to:

- provide that from 1 July 2016 primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme; and
- remove the requirement for employers to provide paid parental leave to eligible employees, unless an employer chooses to manage the payment to employees and the employees agree for the employer to pay them.

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

Background

2.118 The bill reintroduced a measure previously introduced in the Paid Parental Leave Amendment Bill 2014 (PPLA bill), which would remove the requirement for employers to provide paid parental leave to eligible employees. The PPLA bill was introduced into the House of Representatives on 19 March 2014 and is currently before the Senate. The committee considered the PPLA bill in its *Fifth Report of the 44th Parliament* and requested further information from the Minister for Small Business as to the compatibility of the measures with the right to social security, rights at work and the right to equality and non-discrimination.[1] The committee then considered the minister's response in its *Eighth Report of the 44th Parliament*.[2]

2.119 The committee previously considered the bill in its *Twenty-fifth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Social Services as to the compatibility of the bill with the right to social security, right to work and maternity leave, and the right to equality and non-discrimination.[3]

1 Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 13-16.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014) 54-57.

3 Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 47-55.

Schedule 1—Adjustment to primary carer pay

2.120 Schedule 1 to the bill would amend the PPL Act to provide that from 1 July 2016 primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided PPL scheme.

2.121 Primary carers who are entitled to receive employer-provided parental leave payments will not be eligible to receive payments under the government's PPL scheme, unless their employer-provided payments are valued at less than the total amount of payments under the government's PPL scheme.

2.122 The committee considered in its previous report that the reductions in PPL payments for primary carers who receive employer-funded primary carer leave payments engage and may limit the right to social security, rights at work and the right to equality and non-discrimination.

Right to social security

2.123 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.

2.124 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; and affordable (where contributions are required).

2.125 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.

Compatibility of the measure with the right to social security

2.126 The amendments in Schedule 1 to the bill would revise the existing provisions so that primary carers can receive only one form of parental leave pay. As primary carers who receive employer-funded parental leave pay will have their government-funded entitlements reduced or removed under the bill, the amendments therefore engage the right to social security.

2.127 The statement of compatibility explains that the right to social security is engaged by the measure, but does not acknowledge that the right is limited.

2.128 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.

2.129 The committee therefore sought the advice of the Minister for Social Services 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

> The objective of the proposed amendments included in Schedule 1 of the Bill is to create savings. As you are aware, the Australian Government remains committed to returning the Budget to surplus as soon as possible and as a result, I have had to look for areas where money can be saved.
>
> Currently, new parents (usually birth mothers) are able to receive payments under the PPL scheme of up to 18 weeks at the rate of the National Minimum Wage (that is, up to $11,826) regardless of whether they also receive primary carer pay[4] from their employer.
>
> Given the tight budgetary position of the Government and the need to apportion payments to families in the most fair and effective manner, the current arrangement is no longer sustainable and expenditure will be more effective in other areas. Expanding government investment in areas such as child care helps advance rights relating to choice, independence and the opportunity to work. There is widespread community support for this investment, but we need to fund this from somewhere.
>
> The proposed amendments in this Bill will target PPL to those new parents who need it most because they do not have access, or have only limited access, to paid leave from their employer to care for a newborn or recently adopted child. This change will deliver almost $1 billion in savings that can be redirected to other key areas to support families, such as child care.
>
> *Right to social security*
>
> The committee's report explains that access to social security is required when a person has no other income and has insufficient means to support themselves and their dependants. Analysis by my Department of data from

4 '*Primary carer pay* is an employer payment under the terms of an employee's employment payable because the employee is expecting to give birth, or to be the primary carer for a child who has not yet turned one or who has been adopted by the employee or entrusted to their care as part of an adoption process.'

> the PPL evaluation[5] indicates that 53 per cent of new parents will not be affected by this measure and therefore will not have their right to social security limited in any way. Of the remaining parents, their rate of PPL will be reduced in accordance with the primary carer pay that they receive from their employer. While I accept that this will result in a reduction in the support that they receive through the PPL scheme, it does not mean that these parents will have insufficient means to support themselves and their dependants. These new parents will have at least the same amount of paid parental leave as those new parents who are supported through the PPL scheme. Given this, and given the crucial objective to create savings to allow expenditure in other key areas of benefit to families, I see this as a reasonable and necessary change and am confident that there are sufficient protections in place through the provision of income support and family assistance to support the social security rights of these parents.[6]

Committee response

2.130 **The committee thanks the Minister for Social Services for his response.**

2.131 Schedule 1 to the bill would amend the PPL Act to provide that primary carers of newborn children will no longer receive both employer-provided primary carer leave payments and the full amount of parental leave pay under the government-provided PPL scheme. In reducing the social security support available to new parents, the measure is a retrogressive measure for the purposes of international human rights law. A retrogressive measure may be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and is otherwise proportionate.

2.132 As previously noted, the committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.[7] As the amendments would allow for substantial savings to the federal budget, the measure is also likely to be rationally connected to this objective.

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5 'The analysis of the impact of the measure on PLP claimants used PPL evaluation survey data that was undertaken as part of the overall PPL evaluation. The analysis was based on responses from a two wave survey of over 4,000 mothers who had a baby in October or November 2011. Surveys were undertaken when the babies were about 7 months old and again when the babies were 13 months old. The impact assessment factored in incomes changes (i.e. incomes were increased to 2014-15 values). The estimates of numbers affected were derived by extrapolating information from PPL evaluation survey data to the PPL population as a whole. The PPL evaluation survey data was sample data that was nationally representative of PPL eligible mothers.'

6 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 23 March 2016) 2.

7 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 172.

2.133 In terms of proportionality, the committee notes the minister's advice that affected parents who receive parental leave payments from their employer will have at least the same amount of paid parental leave as those new parents who are supported through the PPL scheme and that the measures do not leave any parents without any form of parental leave income support.

2.134 **The committee's assessment of the removal of the adjustment to primary carer pay against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) is that the measure is compatible with international human rights law.**

Right to work and the right to maternity leave

2.135 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the ICESCR.[8]

2.136 The UN Committee on Economic Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

2.137 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

2.138 The right to maternity leave is protected by article 10(2) of the ICESCR and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Further provisions are contained within articles 3 and 9 of the ICESCR and articles 4(2) and 5(b) of the CEDAW.

2.139 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[9]

2.140 In addition, the CEDAW requires state parties to implement measures to eliminate discrimination against women in the field of employment. Particular obligations include:

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8 Related provisions relating to such rights for specific groups are also contained in the ICERD, 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 and article 27 of the Convention on the Rights of Persons with Disabilities.

9 UN Committee on Economic, Social and Cultural Rights, *General Comment 16*, The equal right of men and women to the enjoyment of all economic, social and cultural rights (2005).

> To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.[10]

2.141 Accordingly, CEDAW recognises that adequate provisions for maternity leave are a critical component of the right to work.

Compatibility of the measure with the right to work

2.142 The statement of compatibility for the bill states that Schedule 1 is likely to engage rights at work, including the right to maternity leave, but does not address the limitation of this right.

2.143 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.

2.144 The committee therefore sought the advice of the Minister for Social Services 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

> The proposed amendments do not interfere with the existing rights under the *Fair Work Act 2009* to access 12 months of unpaid parental leave without loss of employment or seniority within the workplace, noting that Australia has a reservation in relation to Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women.
>
> The evaluation of the PPL scheme found that, following the introduction of PPL, higher income mothers did not significantly change the amount of leave they took after the birth or adoption of their child. In contrast, mothers who were on lower incomes, self-employed or casually employed significantly extended the time they took off work after the birth of their child.[11]
>
> Further analysis undertaken by my Department using the PPL evaluation survey data shows that those mothers with higher incomes are more likely to have access to primary carer pay and that mothers who were on lower incomes, self-employed or casually employed were less likely to have access to primary carer pay.
>
> As detailed earlier, there is a substantial concern in the community and in government that access to affordable quality child care is a barrier to

10 Article 11(2)(b) of the CEDAW.

11 'PPL Evaluation, final report, pages 4-5, available at: https://www.dss.gov.au/our-responsibilities/families-andchildren/programmes-services/paid-parental-leave-scheme/paid-parental-leave-evaluation-phase-4-report.'

participation for many women. Increasing workforce participation and, through this, opportunity, is a priority approach for all working age people. As the safety net already provided by the scheme will remain in place for women most in need, the measure is considered reasonable and proportionate because it will contribute savings to be redirected to deliver other measures considered in the community to be more effective ways of increasing participation opportunity – and therefore the progressive realisation of rights. As identified in the 2015 Intergenerational Report, increasing workforce participation is a core priority for maintaining and improving standards of living.[12]

Committee response

2.145 **The committee thanks the Minister for Social Services for his response.**

2.146 The committee notes the minister's advice regarding the government's budgetary position, and that the amendments would redirect expenditure to other measures aimed at increasing workforce participation.

2.147 As noted above at [2.131], the committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.[13] The committee further considered that the measure is likely to be rationally connected to its objective.

2.148 Noting the minister's advice that the existing PPL scheme provides a minimum safety net which will continue if the measures are implemented, the committee considers that the amendments are likely to be proportionate to the stated objective.

2.149 **The committee's assessment of the removal of the adjustment to primary carer pay against articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (right to work and the right to maternity leave) is that the measure is compatible with international human rights law.**

Right to equality and non-discrimination

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

2.151 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.

12 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 23 March 2016) 2-3.

13 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 172.

2.152 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[14] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[15] 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.[16]

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

2.153 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of the paid parental leave scheme, reductions to this scheme under the bill will disproportionately impact upon this group.

2.154 The statement of compatibility does not address the limitation in terms of its potential to indirectly discriminate against women.

2.155 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if the measure pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

2.156 The committee therefore sought the advice of the Minister for Social Services 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

> The changes detailed in this Bill preserve the existing safety net of the value of 18 weeks' payment at the National Minimum Wage for Eligible primary carers, primarily benefiting mothers. The changes do not interfere with the existing rights under the *Fair Work Act 2009* to access 12 months of unpaid parental leave without loss of employment or seniority within the workplace, leaving the key protection against discrimination in place. The continuation of the PPL scheme remains a clear reminder that it is appropriate and desirable to take time out from the workplace to care for a newborn or newly adopted child.

14 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.

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

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

> Evening out the access to paid maternity leave is considered reasonable and proportionate as it contributes savings to other measures that are beneficial to women. Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity.[17]

Committee response

2.157 **The committee thanks the Minister for Social Services for his response.**

2.158 As noted above at [2.131], under international human rights law budgetary constraints are capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.[18] The committee further considered that the measure is likely to be rationally connected to its objective.

2.159 Noting the minister's advice that the existing PPL scheme provides a minimum safety net which will continue if the measures are implemented, the committee considers that the amendments are likely to be proportionate to the stated objective.

2.160 **The committee's assessment of the removal of the adjustment to primary carer pay against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) is that the measure is compatible with international human rights law.**

17 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 23 March 2016) 3.

18 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 172.

Shipping Legislation Amendment Bill 2015

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 25 June 2015

Purpose

2.161 The Shipping Legislation Amendment Bill 2015 (the bill) sought to provide a new framework for the regulation of coastal shipping in Australia, including:

- replacing the existing three tiered licensing system with a single permit system available to Australian and foreign vessels, which will provide access to the Australian coast for a period of 12 months;
- establishing a framework of entitlements for seafarers on foreign vessels engaging or intending to engage in coastal shipping for more than 183 days;
- allowing for vessels to be registered on the Australian International Register if they engage in international shipping for a period of 90 days or more; and
- making consequential amendments and repealing the *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012*.

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

Background

2.163 The committee previously considered the bill in its *Twenty-seventh Report of the 44th Parliament* (initial report) and requested further information from the Minister for Infrastructure and Regional Development as to the compatibility of the bill with the right to just and favourable conditions of work.[1]

2.164 The committee then considered the minister's response in its *Thirty-fourth Report of the 44th Parliament* (previous report), and requested additional information in order to finalise its consideration of the bill.[2]

2.165 The bill was negatived in the Senate on 26 November 2015. Notwithstanding that the bill is no longer on the legislative agenda; the committee's practice is to conclude its consideration of legislation for the information of the legislation proponent and parliament.

12-month permit system for access to Australian coastal shipping

2.166 Under the bill, vessels registered under the laws of a foreign country would not be subject to Australian crew requirements unless they declare on their permit that they intend to engage in coastal shipping for more than 183 days during the

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 16-19.

2 Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 97-101.

permit period, or, if the vessel actually engages in coastal shipping for more than 183 days during the permit period. Accordingly, under the proposed permit system, foreign vessels would be able to operate in Australian coastal waters and not pay their workers in accordance with Australian laws provided that the vessel spends less than six months in Australian waters in any given 12-month period.

2.167 Accordingly, the committee considered in its initial report that the measure engages and may limit the right to just and favourable conditions at work as the bill may permit individuals to be paid less than Australian award wages whilst working in Australian coastal waters.

Right to just and favourable conditions of work

2.168 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

2.169 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

2.170 The right to work may be subject only to such limitations as are determined by law and are compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to just and favourable conditions of work

2.171 The committee previously considered that to the extent that the bill may expand the number of individuals working in Australian coastal waters on below Australian award wages, the bill may limit the right to just and favourable conditions of work.

2.172 The committee therefore sought the advice of the Minister for Infrastructure and Regional Development as to the human rights compatibility of the bill. The minister's response stated that it did not consider the right to just and favourable conditions of work to be engaged by the measure.

2.173 In considering the minister's response, the committee noted that the bill sought to reduce the barriers faced by foreign vessels in providing Australian coastal shipping services. Those ships would be operating between Australian ports and

3 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination, articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women, article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities.

almost exclusively in Australian territorial waters. As such, those ships would fall within Australia's jurisdiction for the purposes of international human rights law.

2.174 The committee further noted that to the extent that the bill would result in more individuals working on ships undertaking interstate trade within Australia on less than Australian award wages, the bill would limit the right to just and favourable conditions of work. The loss of Australian jobs and their replacement by employees working on lower foreign wages is acknowledged in the regulatory impact statement (RIS) attached to the explanatory memorandum to the bill.[4]

2.175 However, there was no information in the response or statement of compatibility to demonstrate that there are not other less rights restrictive ways to achieve this objective. For example, the RIS explains that the modelling undertaken for the cost-benefit analysis of the measures in the bill did not include the cost of the potential loss of Australian seafarer jobs.[5]

2.176 Accordingly, the committee sought further information from the Minister for Infrastructure and Regional Development as to whether the limitation on just and favourable conditions of work is proportionate, in particular, with reference to the economic benefits of the bill and the impact on Australian jobs in the domestic shipping industry.

Minister's response

> I note the Committee's assessment that the Bill raises questions as to whether its measures are a justified limitation on the right to just and favourable conditions of work.
>
> While I note the further questions raised in the report, I can only reiterate that the Australian Government considered that the measures contained in the Bill were reasonable, necessary and proportionate to achieving the legitimate objective of ensuring efficient and reliable coastal shipping services as part of the national economy.
>
> The Bill would have resulted in significant positive impacts across the Australian economy. With regards to Australian jobs specifically, a more competitive and efficient coastal shipping industry as a result of the Bill would have led to more jobs in the whole economy, as well as in the on-shore maritime industry specifically.
>
> In addition, a cost benefit analysis commissioned by the Department of Infrastructure and Regional Development measured the impact of the proposed reforms as being an economic benefit of $667.4 million over a 20 year period. The economic benefits therefore justify the measures

4 Explanatory memorandum (EM), regulatory impact statement (RIS) 75.

5 RIS 75.

contained in the Bill. Unfortunately, however, the Bill was defeated in the Senate in November 2015.[6]

Committee response

2.177 **The committee thanks the Minister for Infrastructure and Transport for his response**.

2.178 The minister's response states that 'a more competitive and efficient coastal shipping industry… would have led to more jobs in the whole economy, as well as in the on-shore maritime industry specifically', and refers to overall benefits highlighted by economic modelling commissioned by the Department of Infrastructure and Regional Development. However, the quantum of jobs created in the economy as a whole is not specifically explained in the minister's response.

2.179 Moreover, the response refers to the impact of the proposed reforms as being an economic benefit of $667.4 million over a 20 year period. However, as the committee previously noted, this modelling specifically excluded the cost of the potential loss of Australian seafarer jobs and so it is not possible to unequivocally conclude that the bill would have a net positive impact overall.[7]

2.180 The economic benefits of the bill are an important component of an assessment of the proportionality of the bill, that is, the value to be created as a consequence of limiting the right to just and favourable conditions of work for those engaged in domestic shipping.

2.181 In addition, it is necessary to consider whether there are any alternative options available to the government that would produce comparable economic benefits without the loss of Australian seafarer jobs. This would be a least rights restrictive approach for the purposes of international human rights law. The minister has not provided further information in this respect.

2.182 **Accordingly, the committee's assessment of the 12-month permit system for access to Australian coastal shipping by foreign flagged vessels against articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (right to just and favourable conditions of work) is that the minister's response does not sufficiently justify the measure for the purposes of international human rights law and the measure may be incompatible with Australia's obligations under international human rights law.**

6 See Appendix 1, Letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Philip Ruddock MP (received 15 March 2016) 1-2.

7 RIS 75.

Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 21 October 2015

Purpose

2.183 The Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015 (the bill) sought to amend the *A New Tax System (Family Assistance) Act 1999* to:

- increase family tax benefit (FTB) Part A fortnightly rates by $10.08 for each FTB child in the family up to 19 years of age;
- restructure FTB Part B by increasing the standard rate by $1000.10 per year for families with a youngest child aged under one; introducing a reduced rate of $1000.10 per year for single parent families with a youngest child aged 13 to 16 years of age and extending the rate to couple grandparents with an FTB child in this age range; and removing the benefit for couple families (other than grandparents) with a youngest child 13 years of age or over; and
- phase out the FTB Part A and Part B supplements.

2.184 The bill also sought to amend the *Social Security Act 1991* to increase certain youth allowance and disability support pension fortnightly rates by approximately $10.44 for recipients under 18 years of age.

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

Background

2.186 Similar amendments to the FTB Part B reforms in the bill were previously introduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014, which the committee considered in its *Ninth Report of the 44th Parliament* and *Twelfth Report of the 44th Parliament*.[1]

2.187 The committee previously considered the bill in its *Thirtieth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Social Services as to its compatibility with the right to social security and right to an adequate standard of living.[2]

2.188 The bill passed both Houses of Parliament on 30 November 2015 and received Royal Assent on 11 December 2015, becoming the *Social Services*

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83-99; and Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67-83.

2 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 53-60.

Legislation Amendment (Family Payments Structural Reform and Participation Measures) Act 2015 (the Act).

2.189 The Act as passed included a number of amendments to the original bill. These amendments include removing Schedule 3 of the bill, which would have phased out FTB supplements; as well as removing Schedule 1 (relating to payment rates) and certain sections of Schedule 2 (relating to the eligibility for increased and reduced rates of FTB Part B).

Reduced rate of Family Tax Benefit Part B

2.190 Schedule 2 of the Act reduces the rate payable of FTB Part B for single parent families with a youngest child aged 13 to 16 to $1000.10 per year (currently $2737.50) and would remove FTB Part B for couple families (other than grandparents) with a youngest child aged 13 or over.

2.191 The committee previously considered that these changes to FTB Part B engage and limit the right to social security and right to an adequate standard of living.

Right to social security

2.192 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.

2.193 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).

2.194 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.

2.195 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.

Compatibility of the measure with the right to social security

2.196 The statement of compatibility acknowledged that the measures engage the right to social security.

2.197 The committee noted in its previous report that while ensuring the sustainability of the social security scheme is likely to be a legitimate objective for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation.

2.198 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. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme.

2.199 In terms of the proportionality of the measure, no information is provided as to the impact of these changes on families and how those families will meet their living expenses with the reduced rates of FTB Part B or how the measures have been targeted to avoid undue economic hardship. No information is provided as to why the changes to FTB Part B are structured around the age of the child and not the income of the family. Accordingly, no information is provided as to how the measure is the least rights restrictive way of achieving a legitimate objective.

2.200 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

2.201 The committee therefore sought the advice of the Minister for Social Services 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.

Right to an adequate standard of living

2.202 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.

2.203 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.

Compatibility of the measure with the right to an adequate standard of living

2.204 For some low income families receipt of FTB Part B may be important in realising an adequate standard of living. The measure, in reducing (or removing) FTB Part B for families with the youngest child aged 13 to 16, may engage and limit the right to an adequate standard of living.

2.205 The statement of compatibility did not specifically address how the measures are compatible with the right to an adequate standard of living.

2.206 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.

2.207 The committee therefore sought the advice of the Minister for Social Service 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.

Removal of family tax benefit supplements

2.208 Schedule 3 of the bill would phase out the FTB Part A supplement by reducing it to $602.25 a year from 1 July 2016 and to $302.95 a year from 1 July 2017, before withdrawing it entirely from 1 July 2018. The FTB Part B supplement will be reduced to $302.95 a year from 1 July 2016 and to $153.30 a year from 1 July 2017, before also being withdrawn from 1 July 2018.

2.209 The FTB Part A and B supplements are components of the rate of family tax benefit, and are added into the rate after the end of the relevant income year when certain conditions are satisfied.

2.210 The committee previously considered that the removal of family tax benefit supplements engages and limits the right to social security and right to an adequate standard of living.

Right to social security

2.211 The right to social security is contained within article 9 of the ICESCR. More information is set out above at paragraphs [2.192] to [2.195].

Compatibility of the measure with the right to social security

2.212 The statement of compatibility noted that the measure engages the right to social security and explained that the measures are nevertheless justified.

2.213 However, as noted above in relation to Schedule 2 of the bill, while ensuring the sustainability of the social security scheme is likely to be a legitimate objective for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme.

2.214 In terms of proportionality the statement of compatibility notes that:

> Families affected by this measure are still eligible to receive fortnightly payments of family tax benefit to assist with the costs of raising children.[3]

2.215 While the continued availability of family tax benefit will be important for many families, this does not explain why removing the family tax benefit supplement for all families (regardless of income) is proportionate.

2.216 The committee therefore sought the advice of the Minister for Social Services 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.

Right to an adequate standard of living

2.217 The right to an adequate standard of living is contained within article 11(1) of the ICESCR. More information is set out above at paragraphs [2.202] to [2.203].

Compatibility of the measure with the right to an adequate standard of living

2.218 The statement of compatibility explained that the measure engages the right to an adequate standard living, but does not specifically address how the measure is compatible with that right.

2.219 The committee therefore sought the advice of the Minister for Social Services 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

> The Committee requested clarification on three aspects of the measures proposed in the Bill. Please find below the requested details.

3 Explanatory memorandum, statement of compatibility 5.

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.

The objective of the family payment reform measures is to ensure that the family payments system remains sustainable in the long term. The United Nations Committee on Economic. Cultural and Social Rights recognises that a social security scheme should be sustainable, and that the conditions for benefits must be reasonable and proportionate.

The Australian income support system relies more heavily on income testing and directs a higher share of benefits to lower-income groups than any other country in the Organisation for Economic Cooperation and Development (OECD).

As a result, Australia has one of the most targeted and efficient systems of social security benefits of any OECD country. Australia gives over 12 times more in transfer payments to the poorest fifth of households than to the wealthiest fifth of households (see insidestory.org.au/how-fair-is-australias-welfare-state).

As outlined in the McClure review, despite this highly effective targeting, demographic changes are expected to place pressure on the budget, meaning it is important to ensure that costs are constrained. Similarly, the report notes there is also an opportunity to contribute to economic growth through measures that promote greater levels of participation and improved labour force productivity.

The need to constrain costs is supported by analysis of the 2015-16 Budget by Dr Shane Oliver, the Chief Economist of AMP Capital. This analysis highlighted that government spending increased rapidly between 2006-07 and 2008-09 and has not been unwound, meaning that current government spending was exceeding revenue. Without corrective action, this situation will impact the ability of the economy to respond to any future downturns or to withstand the impacts of demographic shifts that are expected to create further pressure on government spending (see www.ampcapital.com/olivers-insights/may-2015/the-2015-16-australian-budget).

Whether there is a rational connection between the limitation and the objective

While overall spending on social welfare continues to increase as a share of Gross Domestic Product (GDP), Australia still spends comparably less than the OECD average, largely as a result of this targeted approach. Australian spending on social welfare increased from 10.2 per cent of GDP in 1980 to 19 per cent in 2014, compared to the OECD average of 15.4 per in 1980 and 21.6 per cent in 2014.

However, when considering just family assistance payments, Australian spending has been consistently above the OECD average as a share of GDP.

This increasing share can also be seen in the composition of social spending from 1980 to 2009. As a share of GDP, government spending on family assistance in Australia has tripled from 0.9 per cent in in 1980 to 2. 7 per cent in 2012, the most recent year for which comparable data is available (see OECD social expenditure database stats.oecd.org).

The number of families who receive Family Tax Benefit has declined over time, down from 1.72 million in 2010-11 to 1.62 million in 2012-13. Despite this decline in the number of recipients, the cost continues to rise with expenditure increasing by almost a billion dollars over the last three financial years for which data is available, up from $18.9 billion in 2010-11 to $19.8 billion in 2012-13.

Whether the limitation is a reasonable and proportionate measure for the achievement of that objective

The Australian Government supports families with the direct costs of raising dependent children through Family Tax Benefit Part A or youth income support payments, with a family's rate of assistance determined by family income. These payments have the primary objective to ensure that all children have access to a basic acceptable standard of living.

Family assistance provides additional support to families with one main income through Family Tax Benefit Part B to recognise and support the role of parents and other carers as carers and members of the workforce. The design of Family Tax Benefit Part B has a workforce participation focus and is not based on a family income test, but a primary earner and a secondary earner income test.

The level of financial support provided by Family Tax Benefit Part B is higher for families with a youngest child aged four and under in recognition of the higher need for parental provision of direct care of children, and reduced when a youngest child turns five (moving into compulsory education) and primary carers have a greater capacity to move into the workforce or increase their workforce participation.

Where a youngest child has reached the age of 13, the Government considers it appropriate to expect primary carers to engage in the workforce, or increase their workforce participation. While this measure will reduce a family's rate of family assistance once their youngest child turns 13, this measure does not limit an individual's right to social security and they will retain access to income support or social security payments for themselves, and assistance for dependent children through Family Tax Benefit Part A or youth income support payments. The proposed changes also acknowledge that grandparent and single parent carers may have more difficulty increasing workforce participation, and this is why these families would continue to receive a level of assistance once the relevant children turn 13.

Under current rules, Family Tax Benefit customers need to provide estimated annual income to receive their entitlement by fortnightly

instalment, with their actual entitlement determined after an entitlement year through the reconciliation process. The Family Tax Benefit supplements were announced in 2004 (when there was a budget surplus of over $13 billion) in response to high levels of reconciliation debt experienced by the Family Tax Benefit population. This debt was often due to families not being able to accurately predict changes in income or changes in circumstances such as a return to work. In comparison, individuals in receipt of income support have their entitlement determined on base year parental income (verified income from a previous financial year) and fortnightly personal income. The phasing out of the Family Tax Benefit supplements recognises that the Government's investment in service delivery reform such as Single Touch Payroll will provide real time verification of a customer's income, which ·will improve the accuracy of income reporting and negate the need for an end-of-year reconciliation process for Family Tax Benefit and the supplements to offset the risk of debt.

The proposal reduces the annual Family Tax Benefit Part A package available to a family but increases the level of indexed fortnightly assistance, ensuring that families will not experience a reduction in fortnightly assistance and will continue to be able to meet the day-to-day costs of raising their children.

In the context of ensuring the long-term sustainability of the family payments system in the current budget position, the changes proposed are both reasonable and proportionate measures.[4]

Committee response

2.220 **The committee thanks the Minister for Social Services for his response.**

2.221 The committee notes that the Act as passed does not phase out the FTB supplements as proposed in the original bill. However, the supplementary explanatory memorandum explains that this measure will be reintroduced in a separate bill. The committee has therefore continued to assess the measure's compatibility with international human rights law.

2.222 The committee considers that the minister has demonstrated that the measures pursue the legitimate objective of ensuring the long term sustainability of the family payments system. The committee notes the minister's advice that as a result of the changes families will not experience a reduction in fortnightly assistance and will continue to be able to meet the day-to-day costs of raising their children. On the basis of this advice the committee considers that the measures are likely to be both rationally connected and proportionate to their stated objective.

4 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 16 March 2016) 1-3.

2.223 **The committee's assessment against article 9 and article 11(1) of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) of the reduced rate of Family Tax Benefit Part B and removal of Family Tax Benefit supplements is that the measures are likely to be compatible with international human rights law.**

Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 2 December 2015

Purpose

2.224 The Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* (SS Act) and the *A New Tax System (Family Assistance) (Administration) Act 1999*. In particular, the bill would:

- provide that people serving an income maintenance period for a mainstream payment, such as Newstart allowance, cannot access a special benefit during that period;
- align reconciliation times for Family Tax Benefit recipients;
- set full-time study requirements for Youth Allowance (student) and Austudy payments;
- amend the definition of new apprentice in the SS Act so that the requirements for the definition can be determined by the minister; and
- exempt from the Austudy assets test people with a partner receiving a relevant pension, benefit, allowance or compensation.

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

Background

2.226 The committee previously considered the bill in its *Thirty-third Report of the 44th Parliament* (previous report) and requested further information from the Minister for Social Services as to the compatibility of the bill with the right to social security and right to education.[1]

2.227 The bill was referred to the Senate Community Affairs Legislation Committee on 4 February 2016, which tabled its report on 10 March 2016.

Study requirements for Youth Allowance (student) or Austudy

2.228 Schedule 3 of the bill seeks to amend the SS Act to provide that in assessing a full-time study load for Youth Allowance (student) or Austudy, two or more courses of education for a person cannot be aggregated to satisfy the undertaking full-time study requirement.

1 Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016) 13-16.

2.229 The amendments will affect certain individuals' access to a social security payment which they are currently receiving and as such the measure engages the right to social security. The receipt of social security is an important resource to enable students to complete their education and, accordingly, the measure also engages the right to education.

Right to social security

2.230 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.

2.231 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).

2.232 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. The Australian government has highlighted its comprehensive system of social security, including payments and services to students, as part of its efforts to realise the right to social security as part of its Universal Periodic Reviews in 2011 and 2015.[2]

Right to education

2.233 The right to education is guaranteed by article 13 of the ICESCR, under which state parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms.

2 National Report of Australia, Universal Periodic Review Second Cycle – 2015, 18; Australia's Universal Periodic Review – Final National Report (2011) 16.

Compatibility of the measure with the right to social security and the right to education

2.234 The statement of compatibility sets out the objective of the measures as to 'achieve growth in skills, qualifications and productivity through providing income support to students to assist them to undertake further education and training'.[3]

2.235 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. The statement of compatibility does not set out reasons or evidence why the objective identified is a pressing or substantial concern.

2.236 Moreover, it must be demonstrated that the limitation imposed by the legislation is rationally connected to the objective being pursued. It is not explained in the statement of compatibility how these amendments will support the growth in skills, qualifications and productivity.

2.237 In terms of proportionality, the committee previously considered that it is not clear, on the basis of the information provided, why it is necessary for the achievement of growth in skills, qualifications and productivity that multiple part-time courses cannot be aggregated to enable eligibility for Youth Allowance (student) and Austudy. Nor is it clear why the imposition of this limitation is reasonable or proportionate, or whether other less rights restrictive ways to achieve the stated objective are available.

2.238 The committee therefore sought the advice of the Minister for Social Services 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

Right to social security

This measure engages the right to social security under article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by restricting the make-up of a full-time study workload to a single course or courses that are offered together under a formal arrangement by the relevant tertiary institution as one course of study.

The intent of the requirement that a student be undertaking a full-time study workload in order to qualify for student income support (Youth Allowance (student) or Austudy) is to ensure government support is provided to the recipient for a standard duration of time that will allow

3 Explanatory memorandum (EM), statement of compatibility 7.

them to complete their course of education and enter the workforce. Under article 4 of the ICES[C]R, economic, social and cultural rights may be subject to only such limitations that are compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society. The targeting of social security payments to those who are in need is an important element in the sustainability of Australia's welfare system.

Social security assistance is available to full-time students subject to their completing their course within a standard duration determined by the full-time workload. Income support for students is not available to those who are undertaking a part-time study workload as they have the capacity to self-support by taking up paid work opportunities in addition to their study. Should a student choose to enter into two or more part-time courses of study, which may be in unrelated or non-complementary areas, they will not complete their study within a standard full-time study timeframe (three or four years) and study may go on for an extended period.

To the extent that this measure may limit the right [to] social security, this limitation is reasonable and proportionate to the Government's objective of targeting social security assistance for students to those who are undertaking a specific course of study, for a limited period of time, in order to obtain specific skills and qualifications and enter the workforce.

The right to education

Article 13 of the ICESCR guarantees the right to education. This measure does not limit a person's right to education "for the full development of human personality and sense of dignity" as described in article 13 of the ICESCR. However it does place a limitation on a student's access to social security, beyond the acquisition of skills and qualifications in a reasonable timeframe that will enable them to enter the workforce.

This measure does not place a limitation on people undertaking combined courses where a formal arrangement exists to offer the course as one course of study, with two qualifications/awards (for example, a combined Bachelor of Commerce/Bachelor of Finance or dual/double degrees), which have related/complementary subjects and hence provide formal qualifications that enhance a person's employment and career prospects.

The proposed amendments affirm the objective of government income support for students, which is to support people undertaking full-time study in a course that will provide them with a qualification within the standard duration of a course. Income support for tertiary students is designed to support their right to education to the extent that it allows them to gain formal qualifications to be able to enter the workforce.

> The proposed changes are reasonable and proportionate for the achievement of the objective
>
> The proposed changes preclude financial support to students that are studying in such a manner that they will not gain formal qualifications from their part-time courses within the allowable time for one of the courses.
>
> The proposed changes are proportionate and will only affect a small number of students enrolled part-time in more than one course. Under the 'allowable time' rules, a student is only eligible to receive student payments for the standard full-time duration of their course, plus an additional semester or a year depending on the length of the course units. For example, a student undertaking a three-year Bachelor level course may be eligible to receive Austudy payments for a maximum period of three and a half years, based on a course with units of six months in length.
>
> The limitation that this Bill seeks to apply is reasonable and proportionate for encouraging students seeking income support to configure their studies to qualify them for employment in their chosen field within a reasonable timeframe.[4]

Committee response

2.239 **The committee thanks the Minister for Social Services for his response.**

2.240 The explanatory memorandum states that the bill merely introduces minor 'housekeeping' amendments, and that there is no financial impact from the bill.[5]

2.241 However, the minister's response states that the 'targeting of social security payments to those who are in need is an important element in the sustainability of Australia's welfare system'.[6] The minister has previously highlighted the government's current commitment to making a number of fiscal savings measures for budgetary reasons.[7]

2.242 The committee has consistently recognised that under international human rights law budgetary constraints are capable of providing a legitimate objective for

4 See Appendix 1, letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 23 March 2016) 1-2.

5 EM 1-2.

6 See Appendix 1, letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 23 March 2016) 1.

7 See, for example, the minister's response in relation to the Fairer Paid Parental Leave Bill 2015 at Appendix 1 of this report.

the purpose of justifying reductions in government support that impact on economic, social and cultural rights.[8]

2.243 The minister has not advanced this position as the objective of the measures, despite alluding to the desired sustainability of the welfare system. However, as the bill appears to promote savings, it is likely to pursue a legitimate objective for the purposes of international human rights law in light of these considerations.

2.244 The committee further notes the minister's advice that only a small number of students will be affected by the measure, and that the continued provision of Austudy payments to students undertaking a full-time course ensures an adequate safety net for the majority of students. The committee therefore considers that the measure is likely to be proportionate.

2.245 **The committee's assessment of the revised study requirements for Youth Allowance (student) and Austudy against articles 9 and 13 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to education) is that the measure may be compatible with international human rights law.**

8 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 172.

Social Services Legislation Amendment (No Jab, No Pay) Act 2015

Portfolio: Social Services
Introduced: House of Representatives, 16 September 2015

Purpose

2.246 The Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (the bill) sought to amend the *A New Tax System (Family Assistance) Act 1999* to provide that child care benefit, child care rebate and the Family Tax Benefit Part A supplement will only be payable where a child fully meets the immunisation requirements.

Background

2.247 The committee previously considered the bill in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Social Services as to the compatibility of the bill with the right to freedom of thought, conscience and religion.[1]

2.248 The bill was referred to the Senate Community Affairs Legislation Committee on 17 September 2015, which tabled its report on 11 November 2015.

2.249 The bill passed both Houses of Parliament on 23 November 2015 and received Royal Assent on 26 November 2015, becoming the *Social Services Legislation Amendment (No Jab, No Pay) Act 2015* (the Act).

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

No exception for religious or conscientious objections

2.251 Prior to enactment, the *A New Tax System (Family Assistance) Act 1999* provided that certain family assistance payments were conditional on meeting the childhood immunisation requirements for children at all ages. However, an exception existed where the child's parent had declared in writing that he or she has a conscientious objection to the child being immunised. A conscientious objection was defined as follows:

> An individual has a conscientious objection to a child being immunised if the individual's objection is based on a personal, philosophical, religious or medical belief involving a conviction that vaccination under the latest edition of the standard vaccination schedule should not take place.[2]

1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (13 October 2015) 31-33.

2 See section 5 of the *A New Tax System (Family Assistance) Act 1999* (Compilation No. 77).

2.252 The Act repealed this exception meaning that certain family assistance payments are only payable in relation to a child that has been immunised (unless there is a medical contradiction to immunisation or immunisation is unnecessary as the child has developed a natural immunity). There is no longer an exception where the parent objected to immunisation based on their religious or personal beliefs.

2.253 The committee considered in its previous analysis that the removal of the exemption for conscientious objectors engaged and may limit the right to freedom of thought, conscience and religion.

Right to freedom of thought, conscience and religion

2.254 Article 18 of the International Covenant on Civil and Political Rights (ICCPR) protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching. The right includes the right to have no religion or to have non-religious beliefs protected.

2.255 The right to hold a religious or other belief or opinion is an absolute right. However, the right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is necessary to protect public safety, order, health or morals or the rights of others.

Compatibility of the measure with the right to freedom of thought, conscience and religion

2.256 The statement of compatibility acknowledged that the right to freedom of thought, conscience and religion is engaged by this measure as families will no longer be eligible to receive certain levels of family assistance where they have a conscientious or religious belief that prevents them from immunising their children. However, it noted that article 18 of the ICCPR permits limitations on the right if necessary to protect public health or the fundamental rights and freedoms of others.

2.257 The statement of compatibility also stated that the purpose of the bill was to 'encourage parents to immunise their children' and noted that in so doing the bill promoted the right to health as vaccination is recognised to be the most effective method of preventing infectious diseases and providing protection to both the vaccinated individuals and the wider community.[3]

2.258 The committee agreed that the objective of the bill, in encouraging parents to immunise their children and thereby prevent the spread of infectious diseases is a legitimate objective for the purposes of international human rights law.

3 Explanatory memorandum (EM), statement of compatibility (SOC) 1-2.

2.259 However, no information was provided to explain whether the measures would be likely to be effective in achieving the objective of encouraging vaccination. It was not clear to the committee whether these particular measures which result in certain family assistance payments being withheld would be likely to encourage persons with strongly held objections to vaccinate their child.

2.260 In addition, little information was provided in the statement of compatibility as to whether there were any less rights restrictive options available to achieve the bill's objective. No information was given as to whether other less restrictive options had been explored.

2.261 The committee therefore sought the advice of the Minister for Social Services as to how the measures in the bill were rationally connected with the stated objective, and why the limitation was a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> Thank you for your letter of 13 October 2015 on behalf of the Parliamentary Joint Committee on Human Rights regarding the human rights compatibility of the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015. I appreciate the time you have taken to bring this matter to my attention.
>
> In your letter you raise an assertion that the removal of the 'conscientious objector' exemption to the immunisation requirements may engage and limit the human right to freedom of thought, conscience and religion. You note that the statement of compatibility which accompanies the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 does not provide information on whether there is a rational connection between this possible limitation and the objective of encouraging immunisation and thereby preventing the spread of infectious diseases.
>
> The rationale of the changes made by the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 is to effect practical changes that reflect the Australian Government's policy position that immunisation is an important public health measure for children, their families and the community. The aim of this policy is to further increase immunisation rates in the Australian community and therefore increase the right to health of the overwhelming majority of individual Australians by providing high community rates of immunisation against infectious diseases. This new policy will strengthen the definition relating to conscientious objection and introduce a link between vaccination and some welfare benefits, as a mechanism designed to reinforce the importance of immunisation as a matter of public education and increase rates of vaccination to enhance the protection of public health. These outcomes are sought to be achieved by providing a level of encouragement and incentive for families to more

thoroughly inform themselves about the importance of immunising their children and then pursue the course of action to immunise their children.

The Government recognises that parents have the right to decide not to vaccinate their children. Nothing in the present policy approach prevents such a decision being made, however, if they make such a decision as an objector to vaccinations, their decision will mean they are no longer eligible for some government financial assistance. Importantly, an individual is not prohibited from maintaining their vaccination objection; although they will not receive some family assistance they may otherwise receive. For example, the Family Tax Benefit Part A supplement is currently $726 per year. This is a relatively small financial cost to the vaccination objectors family, particularly when compared to the cost that the spread of crippling, debilitating and deadly diseases has on our health system and community and particularly when it is noted this is public tax-payer funded welfare money.

The financial consequences of losing access to Child Care Benefit and Child Care Rebate are not insubstantial, however, this is a proportionate policy reasonably matched to the purpose of ensuring the highest possible immunisation rates at the country's child care and early learning centres.

Additionally, you have asked that I advise whether this possible limitation to the human right to freedom of thought, conscience and religion is reasonable and proportionate for the achievement of the objective of encouraging vaccination, in particular that it is the least right restrictive approach to achieving the aim of this new policy. As noted above, there is no limitation whatsoever on freedom of thought or conscience, rather the Government has determined to no longer allocate taxpayer funded welfare payments to reward freely made decisions that diminish public health outcomes.

Further, it should be noted that article 18(3) of the International Covenant on Civil and Political Rights states that a freedom to manifest religion or beliefs may be limited by law when it is necessary to protect public safety and the health of others. It is the Government's view that when an individual decides not to vaccinate their child they are putting their child and the community at risk of infectious diseases. Following these changes, the only exemptions will be those on medical grounds i.e. where the child is unable to be vaccinated or unable to benefit from vaccination.

The Government has previously introduced policy which has improved immunisation coverage in Australia, for example through the initial linkages between immunisation and family assistance payments. However, allowing vaccination objectors to be exempt from these requirements has allowed an increase in vaccination objectors from 0.23 per cent of the population in 1999, to 1.77 per cent in 2014. This suggests that this exemption is encouraging a section of the population to avoid the vaccine requirement.

> Additionally, successive governments have placed mutual obligations on recipients of social security payments. The rationale for this is that mutual obligation encourages behaviours beneficial to individuals and the broader community. For example, in order to receive Family Tax Benefit for teenagers aged between 16 and 19 years, they must be enrolled in full-time secondary study. This is to encourage teenagers to stay in school and obtain their Year 12 Certificate, as evidence shows that those teenagers who finish their education or get a trade are better off in the long term.
>
> The overwhelming body of medical and scientific evidence supports the promotion of vaccination for the prevention of potentially crippling, debilitating and deadly diseases. By allowing the continuation of an exemption from immunisation as a vaccination objector, the Government would contradict its position that immunisation is an important public health policy. The choice not to vaccinate on the grounds of vaccination objection is neither supported by public health policy nor medical research. It is therefore important that these views, which put others' right to health at risk, should not be encouraged or accepted by Government.
>
> It is my view that the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 is compatible with human rights because it advances the protection of the right to physical health, and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.[4]

Committee response

2.262 **The committee thanks the Minister for Social Services for his response.**

2.263 As the minister notes, article 18(3) of the ICCPR provides that a freedom to manifest religion or beliefs may be limited by law when it is necessary to protect public safety and the health of others. The committee agrees that medical research makes it clear that immunisation has important public health and safety benefits for all individuals in a community. The committee reiterates its view that the objective of the Act, in encouraging parents to immunise their children and thereby prevent the spread of infectious diseases is a legitimate objective for the purposes of international human rights law.

2.264 The minister has provided evidence indicating that allowing vaccination objectors to be exempt from immunisation requirements has led to an increase in vaccination objectors from 0.23 per cent of the population in 1999 to 1.77 per cent in 2014. While direct causality is difficult to determine, the committee agrees that it is likely that the exemption encourages a section of the population to avoid the vaccine requirement. If this is true, then repealing the conscientious objectors exemption will likely improve vaccination rates.

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4 See Appendix 1, Letter from the Hon Christian Porter, Minister for Social Services, to the Hon Philip Ruddock MP (received 9 March 2016) 1-2.

2.265 While the evidence is not completely clear, the committee considers that withholding family assistance payments is likely to assist in increasing the vaccination rate. As such, the measures in the Act are rationally connected to the objective of the Act.

2.266 In terms of proportionality, the minister did not indicate whether less rights restrictive options, such as education or awareness campaigns informing Australians of the importance of immunisation, had been considered. However, the committee appreciates the minister's advice that retaining the conscientious objector exemption weakens the government's position, supported by the weight of public health policy and medical research, that immunisation is vitally important for public health. For this reason, an education campaign, while potentially valuable, may not lead to the same level of reduction in vaccination objectors.

2.267 **The committee's assessment of the removal of the exemption for conscientious objectors against article 18 of the International Covenant on Civil and Political Rights (right to freedom of thought, conscience and religion) is that the measures are compatible with international human rights law.**

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

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

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

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

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

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

Purpose

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

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

Background

2.270 The committee previously considered the instruments in its *Thirty-fifth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Infrastructure and Transport as to their compatibility with the right to equality and non-discrimination.[1]

Prohibitions in relation to specified countries

2.271 The instruments relating to Yemen, Somalia and Syria provide a blanket prohibition on bringing cargo into Australian territory that has originated from, or has transited through these countries. The instruments relating to Egypt and Bangladesh provide a limited range of exceptions to the prohibition. The committee notes that the instruments apply to 'aviation industry participants'. However, by prohibiting all or most cargo from Yemen, Somalia, Bangladesh, Egypt and Syria from being brought into Australia, the instruments may have a disproportionate effect on

1 Parliamentary Joint Committee on Human Rights, *Thirty-fifth Report of the 44th Parliament* (25 February 2016) 4-6.

people living in Australia who are originally from these countries as they will be unable to have goods sent to them from these countries.

2.272 The committee considered in its previous report that the instruments therefore engage and limit the right to equality and non-discrimination.

Right to equality and non-discrimination

2.273 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). This right is set out above at paragraphs [2.150] to [2.152].

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

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

2.275 As outlined above at paragraph [2.271] the committee considered that, by effectively precluding people in Australia from accessing goods from particular countries by air, the instruments engage and may limit the right to equality and non-discrimination as there may be a disproportionate impact on people based on their ethnicity.

2.276 The committee noted that it understands that these instruments are made in good faith and with the intention of protecting Australia's national security. However, discrimination under international law is broadly defined and includes indirect discrimination which occurs where a rule or measure that is neutral on its face disproportionately affects people with a particular personal attribute. Measures that target particular countries and not others may disproportionately affect people in Australia on the grounds of ethnicity. In these instances, it is appropriate for the statement of compatibility to set out briefly why the measure is justified in accordance with the committee's analytical framework.

2.277 The committee therefore sought the advice of the Minister for Infrastructure and Regional Development 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 on rights and that objective; and reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> In December 2015, the then Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, exercised powers under Part 4, Division 6A of the *Aviation Transport Security Act 2004* to prohibit air cargo originating from, or transiting through Yemen, Somalia, Egypt, Bangladesh and Syria.
>
> The prohibitions are a preventive security measure, based on the Australian Government's understanding of the aviation security threat and risk environments in these countries. In assessing the potential risks, the

Government has drawn on information from intelligence sources and international partners.

The prohibitions on air cargo from Syria, Egypt, Yemen and Somalia are commensurate with bans imposed by like-minded countries, including the United States and Canada. The prohibition on air cargo from Bangladesh is based on advice from the UK Department for Transport regarding poor aviation security practices at Hazrat Shahjalal Airport in Dhaka in addition to intelligence reporting of a specific terrorist threat relating to air cargo.

Although Australia does not have direct flights from any of the countries subject to the restrictions, international air cargo arrangements are complex, with cargo subject to trans-shipment and consolidation along the supply chain. This means that high-risk air cargo originating from, or transiting through, these countries could be transported to Australia.

The prohibitions apply to air cargo only. Cargo sent to third countries by sea, rail, or land freight is not restricted and the measures do not apply to passengers or their baggage. Consequently, people living in Australia who are originally from the affected countries may continue to receive goods from these countries via other transport means. I am advised that a number of exporters are using these alternative arrangements to ship goods originating from these countries to Australia.

The Government believes the action taken is a necessary precautionary measure that addresses air cargo security risks without imposing undue restrictions on the international movement of goods. The Government is monitoring air cargo security developments closely and will review the prohibitions as necessary.[2]

Committee response

2.278 **The committee thanks the Minister for Infrastructure and Transport for his response.**

2.279 The committee considers that the measures pursue the legitimate objective of protecting national security and that, based on the minister's advice that he has drawn from intelligence, these measures are likely to be rationally connected to their objective as the prohibitions will minimise the risk of potential security breaches.

2.280 The committee also considers that the measures are likely to be proportionate to their stated objective, as these restrictions do not apply to passengers travelling by air, and affected persons are still able to receive goods in Australia which were sent to third countries via other modes of transport such as sea, rail or land freight. The committee further welcomes the minister's advice that the government monitors air cargo security developments closely and will review the prohibitions as necessary.

2 See Appendix 1, Letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Philip Ruddock MP (received 17 March 2016) 1-2.

2.281 **The committee's assessment of the prohibitions on importing goods from specified countries via air cargo against articles 2 and 26 of the International Covenant on Civil and Political Rights (the right to equality and non-discrimination) is that the measures are compatible with international human rights law.**

Migration Regulations 1994—Specification of Required Medical Assessment—IMMI 15/119 [F2015L01747]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Regulations 1994
Last day to disallow: Exempt from disallowance

Purpose

2.282 The Migration Regulations 1994—Specification of Required Medical Assessment—IMMI 15/119 (the instrument) prescribes classes of people who are required to take medical assessments when entering Australia.

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

Background

2.284 The committee previously considered the instrument in its *Thirty-second 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 instrument with the right to equality and non-discrimination.[1]

Medical assessments for certain visa applicants

2.285 The instrument specifies that certain visa applicants are required to take certain medical tests in order to satisfy decision makers that they meet the health requirements for the visa for which they have applied.

2.286 The instrument alters the arrangements set by the previous instrument in a number of ways, including moving from a 'three tiered' system, specifying countries as 'low', 'medium' and 'high' risk, to a 'two tiered' system. Most significantly, the instrument reduces the period of temporary stay for which a medical assessment is generally not required from 12 to six months.[2]

2.287 The instrument would see more people who intend to spend between six and 12 months in Australia needing to undergo a medical assessment before they are granted a visa. As a result, more people may have their applications rejected on health grounds. The required medical tests may exclude individuals who have a medical condition that is a disability for the purposes of international human rights law.

2.288 The committee previously noted that as these changes widen the circumstances in which persons with a disability may not be granted a visa, the instrument engages the right to equality and non-discrimination for persons with a

1 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 41-43.

2 Migration Regulations 1994—Specification of Required Health Assessment—IMMI 14/042 [F2014L00981].

disability, and the committee therefore required further information to properly assess the impact of the instrument on this right.

2.289 The committee also noted that subjecting individuals to medical testing would also engage and limit the right to privacy, but considered that in the context of the visa application process this is likely to be a justifiable limitation.

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

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

2.291 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.

2.292 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[3] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[4] 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.[5]

2.293 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

2.294 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

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

2.295 The instrument is not accompanied by a statement of compatibility as the instrument is not specifically required to have such a statement under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). However, the committee's role under section 7 of the Act is to examine all instruments for

3 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.

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

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

compatibility with human rights (including instruments that are not required to have statements of compatibility).

2.296 The instrument widens the circumstances in which temporary visa applicants may have the grant of a visa refused on health grounds. As persons with a disability necessarily have pre-existing health conditions, they may be disproportionately affected by this instrument. Indirect discrimination may occur where a measure, irrespective of its intention, has a disproportionately negative effect on a particular group in practice. However, under international human rights law, this disproportionate effect may be justified, such that the measure is compatible with the right to equality and non-discrimination.

2.297 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 Committee has sought comment regarding recent changes to the health examinations that applicants for an Australian visa are required to complete in order to determine whether they meet the immigration health requirement.

These changes are aimed at achieving a legitimate objective

Almost all applicants for a visa to Australia are required to meet the health requirement in order to:

- protect the Australian community from public health risks (principally, active Tuberculosis - TB);
- contain public expenditure on health care and community services; and
- safeguard access to health services in short supply.

The Government applies a risk based approach to determine which visa applicants must complete immigration health examinations. This approach is known as the 'health matrix'. Health matrix settings are based on a number of factors including, but not limited to, the applicant's country of citizenship and its TB incidence rate, their intended activities in Australia and their proposed length of stay. The health matrix settings are reviewed and updated periodically.

A key focus of the health matrix is to ensure that immigration screening arrangements remain appropriately targeted and that Australia's low incidence of TB can be maintained. TB continues to be a serious worldwide public health threat and is now the greatest killer worldwide due to a single infectious agent. Australia has one of the lowest TB rates in the world despite increasingly large numbers of migrants from affected countries. The health matrix is important to the effectiveness of these processes.

Rational connection between the limitation and objective

It is noted that the particular instrument referred to has since been revoked, and replaced by instrument IMMI 15/144 [F2015L01826]; however, the replacing instrument has the same effect. The updates to the health matrix are designed to:

- more efficiently facilitate visa grant for hundreds of thousands of temporary entrants on a yearly basis while continuing to safeguard the Australian community from public health threats (in particular, TB);
- focus resources on higher risk cohorts with stay durations of six months or more, rather than on higher volume, shorter stay caseloads, such as Visitor visa holders, about whom clinical advice indicates are considered less likely to present with active TB while onshore; and
- align Australia's health screening settings more closely with those of our Five Country Conference (FCC) partners, which also have low rates of TB.

The Committee may wish to note that, as a result of these changes, the Department of Immigration and Border Protection (the Department) expects that approximately 40,000 less visa applicants will need to undertake immigration health examinations. This is primarily because, under the previous settings, high risk visa applicants were required to undertake a medical assessment if they were planning to stay in Australia for *three months or more*. Under the new settings, high risk visa applicants only need to undertake medical assessments if they intend to stay in Australia for *six months or more*. For low risk applicants, the settings continue to provide that, under ordinary circumstances, no health examinations are required for temporary visa applicants, regardless of the intended stay period.

As a result of updated TB data (which is informed by World Health Organization (WHO) data), and the shift to a two-tier health matrix, a small number of countries were reassigned to the high risk level, where they had previously been considered low or medium risk. These countries, places or former countries include: *Anguilla, Antarctica, Brazil, Colombia, Fiji, Greenland, Honduras, Libya, Maldives, Martinique, Panama, Singapore, St Barthélemy, St Martin, St Pierre and Miquelon, St Vincent/Grenadine, Suriname, Venezuela and Yugoslavia*.

As per current arrangements, additional health examinations may be requested based on relevant information known to the Department - for example, a declaration that the applicant may need medical treatment in Australia, or an intention to work in or visit a healthcare facility during their stay.

A reasonable and proportional measure for the achievement of that objective

The changes to the health matrix were informed by clinical expertise, and were endorsed by the National Tuberculosis Advisory Committee (NTAC) as well as the Chief Medical Officer of the Department of Health. The new health matrix settings take into account global TB prevalence rates, based on WHO data. I consider the new health matrix settings are reasonable and proportionate to the legitimate objective of reducing the incidence of TB in Australia.

As noted above, one aspect of the new health matrix settings is a move from a three month threshold to a six month threshold for screening high risk visa applicants. This change, while aimed at facilitating faster visa processing for a large number of visa applicants, also reflected clinical advice that moving to a six month stay screening threshold would not increase the risk of TB transmission.

One of the key purposes of the health requirement is to protect the community from public health risks. This goal is consistent with the International Covenant on Economic, Social and Cultural Rights, in particular, articles pertaining to the control of diseases and the creation of conditions which would assure medical service and medical attention in the event of sickness.

As the Committee notes, the Convention on the Rights of Persons with Disabilities (CRPD) refers to the right for persons with a disability not to be discriminated against on health grounds. The instrument's health requirement is consistent with the formal declaration of Australia's understanding of the CRPD. Australia's migration health requirement is universal.

Where a person has a specific medical condition (other than TB) this condition in itself will not result in failure to meet the health requirement. There is no explicit focus on disability, and this has not changed under the updated health matrix. As with any visa applicant with an ongoing health condition, a person with a disability may fail to meet the health requirement if a Medical Officer of the Commonwealth assesses their condition as likely to:

- result in significant health care and community service costs; or
- prejudice the access of Australians to health care or community services.

In addition, some visa subclasses allow for the Department to consider whether the health requirement should be waived, including for persons with a disability.

The Committee also noted the International Covenant on Civil and Political Rights (ICCPR), which promotes equality and prohibits discrimination on personal attributes. Under the health matrix settings, the types of health

examinations that visa applicants need to undertake depend on a number of factors including:

- the type of visa that they are applying for;
- the length of their intended stay in Australia;
- the applicant's country for the purpose of TB risk levels (including countries they may have visited);
- their intended activities in Australia; and
- any special circumstances that may be applicable.

Given the broad spectrum of factors which determine whether visa applicants must undertake immigration health examinations, the arrangements are not considered to discriminate against particular groups or personal attributes, or to unreasonably discriminate on the basis of disability, in light of the legitimate objective of reducing the incidence of TB in Australia.[6]

Committee response

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

2.299 The minister's response demonstrates that the health screening and medical test requirements that apply to certain visa applicants are based on objective medical and health science risk assessments.

2.300 **Accordingly, the committee considers that the instrument is compatible with the right to equality and non-discrimination.**

6 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 29 March 2016) 14-17.

Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441]

Portfolio: Communications
Authorising legislation: Radiocommunications Act 1992
Last day to disallow: 2 December 2015 (Senate)

Purpose

2.301 The Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 (27 MHz Class Licence) revokes and replaces the Radiocommunications (27 MHz Handphone Stations) Class Licence 2002 (2002 Class Licence).

2.302 The use of handphone stations on specified carrier frequencies in the 27 MHZ band is subject to the regulatory arrangements set out in the 27 MHz Class Licence. The 27 MHz Class Licence also sets out the conditions for operating 27 MHz handphone stations, which are typically used by bushwalkers or in the conduct of sporting events and other group activities.

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

Background

2.304 The committee considered the 27 MHz Class Licence in its *Thirtieth Report of the 44th Parliament* and requested further information from the Minister for Communications as to its compatibility with the right to freedom of expression.[1]

Conditions of 27 MHz Class Licence not to seriously alarm or affront a person

2.305 The 27 MHz Class Licence sets out the general conditions which apply to a person operating a 27 MHz headphone station, including that a person must not operate the station:

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purposes of harassing a person.

2.306 A person who operates the station in a way that causes a reasonable person to be 'seriously alarmed or seriously affronted' may be liable to imprisonment for up to two years.[2]

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1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 78-81.

2 See section 46 of the *Radiocommunications Act 1992*, which provides that a person must not operate a radiocommunications device other than as authorised by a class licence. Penalties for a breach of the class licence include, if the device is a radiocommunications transmitter, imprisonment for up to two years or 1500 penalty units; and, if it is not a transmitter, 20 penalty units.

2.307 The committee noted in its previous report that this condition limits the right to freedom of expression.

Right to freedom of expression

2.308 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR), and is described above at paragraphs [2.111] to [2.112].

Compatibility of the measure with the right to freedom of expression

2.309 The statement of compatibility acknowledges that the relevant condition of the class licence engages and limits the right to freedom of expression but argues that this limitation is justifiable 'in order to meet the legitimate objectives of protecting public order and public morality'.[3]

2.310 The right to freedom of expression includes a right to use expression 'that may be regarded as deeply offensive'.[4] In order to limit the right to freedom of expression it must be demonstrated that there is a specific threat that requires action which limits freedom of speech; and that there is a direct and immediate connection between the expression and the threat.[5]

2.311 The committee previously agreed that the protection of public order may be regarded as a legitimate objective for the purposes of international human rights law. However, the statement of compatibility does not explain how this is a pressing and substantial concern.

2.312 Furthermore, a condition prohibiting speech that could cause a person to be seriously alarmed or affronted may go much further than is necessary to maintain public order. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought, including whether there are less restrictive ways to achieve the same aim.

2.313 Maintaining public order is a basis on which it may be permissible to regulate speech in public places. Common public order limitations include prohibiting speech which may incite crime, violence or mass panic. Such speech is already criminalised under existing law in section 474.17 of the *Criminal Code Act 1995* (Criminal Code), and the statement of compatibility states that the conditions imposed by the instrument are consistent with this provision of the Criminal Code. However, as that provision would apply to speech in connection with the operation of a

3 Explanatory statement (ES), statement of compatibility (SOC) 6-7.

4 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

5 See UN Human Rights Committee, General comment No 34 (*Article 19: Freedoms of opinion and expression*), CCPR/C/GC/34, para 35.

27 MHz headphone station,[6] there appears no need to include the prohibition as a condition of the licence (breach of which becomes a criminal offence).

2.314 The committee previously noted that the statement of compatibility has not demonstrated that the conditions in the 27 MHz Class Licence not to seriously alarm or affront a person impose a necessary or proportionate limitation on the right to freedom of expression.

2.315 The committee therefore sought the advice of the Minister for Communications as to whether the conditions are a proportionate means to achieving the stated objective.

Minister's response

The conditions set out at paragraph 6(g) of the Class Licence (the licence condition) provide that a person must not operate a handphone station, being a radiocommunications device for the purposes of the *Radiocommunications Act 1992* (the Act):

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.

The Committee considers that the proposed conditions may be incompatible with the right to freedom of expression for users of these devices. However, the Committee acknowledges that this right may be subject to limitations, provided that such limitations pursue a legitimate objective such as the protection of public order or public morals.

I have addressed the Committee's concerns about these limitations in turn below.

1. Is the proposed measure in the Instruments aimed at achieving a legitimate objective?

As stated at page 6 of the Explanatory Statement for the Class Licence, the proposed measure aims to achieve two legitimate objectives: (i) protection of public order; and (ii) protection of public morals.

(i) Protection of public order

Handphone stations are radiocommunications transmitters that allow for point-to-multipoint communication. They may be used to communicate material to more than one person at a time. Persons who are not the intended recipients of a communication may also overhear the communication, either deliberately or fortuitously. These features create a risk that a handphone station may be misused. For example, a handphone station might conceivably be used to incite crime or violence or general

6 See definition of 'carriage service' in section 7 of the *Telecommunications Act 1997*.

panic, or it might be used to vilify a person or group of persons. Such communications may pose risks to public order.

Handphone stations are frequently used as a vital communication tool where no other carrier service is available, for instance, by bushwalkers, or by sporting participants in remote locations. It would be undesirable for legitimate users of handphone stations to be deterred from use of the service due to seriously alarming, seriously affronting or harassing communications by other users.

The licence condition (which is drafted to reflect the terms of the equivalent statutory licence condition applying generally to radiocommunications transmitters in paragraph 108(2)(d) of the Act is designed to address these risks to public order. The protection of public order under such circumstances is considered a legitimate justification for imposing a reasonably proportionate limit on the right to freedom of expression for users of devices authorised by the Class Licence.

(ii) Protection of public morals

The operation of a handphone station under the Class Licence may result in transmissions being received and heard by the public at large, including minors. Transmissions may be heard which are entirely unsolicited, as transmissions occur over publicly accessible spectrum, transmitters and receivers may be used for a wide variety of communication purposes, and transmissions from handphone stations are generally not encrypted or otherwise protected.

As a result, there may be circumstances in which such transmissions cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted, or to feel harassed, thereby posing a threat to the protection of public morals. The Class Licence advances the objective of protecting public morals, which is expressly identified as a permitted restriction on the right to freedom of expression (Article 19(3)(b) of the International Covenant on Civil and Political Rights).

The radiofrequency spectrum is a finite public resource, which is subject to competing demands. Hence, access to it is necessarily limited, and such access is regularly given subject to conditions about the matters and content that may be transmitted using the spectrum. It is also noted for completeness that this Class Licence, of itself, does not fetter any freedom of expression generally; it merely restrains the transmission of a particular type of communication on a specific device, namely, 27 MHz Handphone Stations.

The Australian Communications and Media Authority (ACMA) has a discretionary power to issue class licences which can authorise the use of particular radiocommunications devices in particular parts of the radiofrequency spectrum on a shared basis (section 132 of the Act), subject to compliance with the conditions of the class licence.

Class licences can be a particularly efficient method by which use of parts of the radiocommunications spectrum can be authorised, noting that class licences are not issued to individual users (that is, members of the community are able to avail themselves of the authorisation granted by a class licence), class licences do not involve licence fees, and accordingly class licences involve minimal administration on the part of operators of devices, and on the part of the Commonwealth.

In the absence of a relevant class licence made by the ACMA, users of handphone stations would need to individually apply to the ACMA for an apparatus licence (under section 99 of the Act) to authorise operation of that device, unless another class licence also authorised their use. In such circumstances it is relevant that paragraph 108(2)(d) of the Act imposes precisely the same limitation on the right to freedom of expression for apparatus licensees as that imposed by the licence condition at issue.

The Committee has previously observed that the inclusion of a limitation on the freedom of expression in one Australian law does not necessarily justify the inclusion of that limitation in another Australian law. In this case, however, there is a strong justification for the Class Licence to include the same condition as appears at paragraph 108(2)(d) of the Act. If handphone stations were not licensed by the Class Licence they would be licensed by individual licence. If they were licensed by individual licence they would be subject to the licence condition at paragraph 108(2)(d) of the Act. The class licensing method maximises the administrative convenience of licensees, and the Commonwealth, as it avoids any need for persons to make individual applications for a licence. But that choice of licensing method should not have the effect of allowing these radiocommunications transmitters to be any more liable to cause risks to public order or public morality than would occur under the default licensing method of individual licence. A licence condition that reflects paragraph 108(2)(d) of the Act therefore promotes a level playing field among like devices that have like purposes and uses, and it provides a uniform level of protection for the public with respect to these devices.

Effect of other laws

In its report the Committee has said (at [1.391]) that:

> [section 474.17 of the *Criminal Code 1996* (the Criminal Code)] makes it an offence for a person to use a carriage service in a way that a reasonable person would regard as being menacing, harassing or offensive. A 'carriage service' would include the operation of a 27 MHz headphone station. As there is already a broad offence in the Criminal Code there appears no need to include the provision as a condition of the licence (breach of which becomes a criminal offence).

As the Committee notes, a carriage service is defined in section 7 of the *Telecommunications Act 1997*; as 'a service for carrying

communications...'. As the use of handphone stations does not generally require the involvement of a 'carriage service', ordinarily, section 474.17 of the Criminal Code will not apply to the operation of handphone stations.

Even if the Criminal Code were to be applicable to prohibit the same behaviour, it is well recognised that licence conditions may usefully reflect provisions in the criminal law and may usefully supplement those criminal provisions (see for example the recent decision of the High Court in *ACMA v Today FM (Sydney) Pty Ltd* [2015] HCA 7).

A breach of the Class Licence constitutes the offence of operating a radiocommunications device otherwise than as authorised by a class licence without a reasonable excuse under section 46 of the Act. The ACMA is also empowered to issue an infringement notice for a breach. The penalties applicable are ordinarily appropriate and proportionate to the breach of the licence condition. The disincentive provided by the licence condition provides a disincentive for operators of handphone stations to make transmissions that breach the licence condition. The disincentive directly supports the objectives of protecting public order and public morals. Under a class licensing approach, the ACMA has no other powers that can be used to achieve these objectives.

2. Is there a rational connection between the limitation on the right to freedom of expression and these legitimate objectives?

The instrument proposes a limitation which provides a disincentive for handphone station users to make transmissions that breach the licence conditions. The disincentive directly supports the objectives of protecting public order and public morals. The ACMA has advised that aside from imposing a licence condition, it has no other powers that can be used to achieve the objectives.

3. Is the limitation a reasonable and proportionate measure for the achievement of the objective?

The Class Licence provides a standing authority for users of handphone stations to communicate on designated segments of the radiofrequency spectrum. The licence condition is a proportionate means by which the objectives can be achieved for the reasons outlined above.[7]

Committee response

2.316 **The committee thanks the Minister for Communications for his response.**

2.317 The committee notes the minister's advice that handphone stations are frequently used as a vital communication tool where no other carrier service is available, including for those in remote locations who may require emergency assistance. The committee also notes that the licence condition is designed to

7 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Minister for Communications, to the Hon Philip Ruddock MP (received 27 December 2015) 1-4.

address risks to public order and that the minister is of the view that the instrument imposes only a reasonably proportionate limitation on the right to freedom of expression for users of handphone devices. The committee considers that the minister's response has sufficiently justified this limitation for the purposes of international human rights law.

2.318 **Accordingly, the committee's assessment of the conditions in 27 MHz Class Licences not to seriously alarm or affront a person against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) is that the regulation is likely to be compatible with the right to freedom of expression.**

Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 [F2015L00876]

Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 [F2015L01114]

Portfolio: Communications
Authorising legislation: Radiocommunications Act 1992
Last day to disallow: 16 September 2015 (Senate)

Purpose

2.319 The Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 (CB Class Licence) revokes and replaces the Radiocommunications (Citizen Band Radio Stations) Class Licence 2002.

2.320 The Citizen Band (CB) radio service is a two-way communications service that may be used by any person in Australia. The operation of a CB radio station is subject to the regulatory arrangements set out in the CB Class Licence. The CB Class Licence sets out the conditions for operating CB stations.

2.321 The Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 revokes and replaces the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2008 (Overseas Amateurs Class Licence).

2.322 The Overseas Amateurs Class Licence authorises visiting overseas qualified persons to operate amateur stations in Australia and applies conditions to the operation of these stations.

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

Background

2.324 The committee previously considered the CB Class Licence and the Overseas Amateurs Class Licence in its *Twenty-sixth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Communications as to their compatibility with the right to freedom of expression.[1]

Condition of Class Licences not to seriously alarm or affront a person

2.325 Both the CB Class Licence and the Overseas Amateurs Class Licence set out the general conditions which apply to a person operating a CB radio or amateur station, including that a person must not operate the station:

(i) in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or

1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 16-19.

(ii) for the purpose of harassing a person.[2]

2.326 Section 46 of the *Radiocommunications Act 1992* provides that a person must not operate a radiocommunications device other than as authorised by a class licence. There are penalties for breach of the class licence, including, if the device is a radiocommunications transmitter, imprisonment for up to two years or 1500 penalty units, and if it is not a transmitter, 20 penalty units.

2.327 It appears that communication over a CB radio or amateur station may be considered to be over a radiocommunications transmitter,[3] rendering a person who operates a station liable to imprisonment for up to two years if they operate the station in a way that causes a reasonable person to be 'seriously alarmed or seriously affronted'.

2.328 The committee considers that making it an offence to breach a condition of a class licence that is to not seriously alarm or affront a person engages and limits the right to freedom of expression.

Right to freedom of expression

2.329 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR), and is described above at paragraphs [2.111] to [2.112].

Compatibility of the measure with the right to freedom of expression

2.330 The statement of compatibility for both instruments acknowledged that the relevant condition of the class licences engages and may limit the right to freedom of expression. However, both concluded that any such limitation is reasonable, necessary and proportionate.

2.331 The committee previously noted that the sole reason given in the statement of compatibility for the CB Class Licence as to why the condition is justifiable is that it has been in force for 13 years and has been previously used to investigate complaints and prosecute operators of CB stations. The existence of the condition under Australian domestic law is not relevant to an assessment of whether such a condition is justified under international human rights law. The statement of compatibility for the Overseas Amateur Class Licence provided no justification for why the limitation on the right to freedom of expression is justifiable.

2 Paragraph 6(f) of the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 and subsection 8(4) of the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015.

3 See subsection 7(2) of the *Radiocommunications Act 1992* which defines a 'radiocommunications transmitter' as a transmitter designed or intended for the purpose of radiocommunication. Section 6 defines 'radiocommunication' as radio emission or reception of radio emission for the purpose of communicating information. Subsection 8(2) defines a transmitter as anything designed, intended or capable of radio emission.

2.332 The right to freedom of expression includes a right to use expression 'that may be regarded as deeply offensive'.[4] The right to freedom of expression protects not only favourable information and ideas but also those that offend, shock or disturb because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.[5]

2.333 The committee previously considered that if the government wishes to limit the right to freedom of expression it must demonstrate there is a specific threat that requires action which limits freedom of speech, and it must be demonstrated there is a direct and immediate connection between the expression and the threat.[6]

2.334 The committee therefore sought further information from the Minister for Communications as to the legitimate objective of the measure; 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 Committee raised questions about conditions contained in the following Instruments made by the Australian Communications and Media Authority (ACMA):
>
> - the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015, made on 15 June 2015; and
> - the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015, made on 29 June 2015.
>
> The conditions (the 'proposed measure') require that a person operating a citizen band (CB) radio or amateur station must not operate the station:
>
> - in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
> - for the purpose of harassing a person.
>
> The Committee considers that the proposed measure limits the right to freedom of expression for users of these devices. However, this right may be subject to limitations, provided that such limitations pursue a legitimate objective such as protection of public order or public morals.
>
> I have addressed each of the Committee's concerns about these limitations in turn below.

4 See UN Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

5 *Handyside v United Kingdom* (1976) 1 EHRR 737.

6 See UN Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 35.

1. Is the proposed measure in the Instruments aimed at achieving a legitimate objective?

The proposed measure aims to achieve two legitimate objectives: (i) protection of public order; and (ii) protection of public morals.

(i) Protection of public order

There may be circumstances in which a device authorised by a class licence is used to incite crime, violence, or mass panic, and thereby causing a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted. The protection of public order under such circumstances is considered a legitimate objective for imposing a limit on the right to freedom of expression for users of devices authorised by the Instruments.

(ii) Protection of public morals

The operation of a transmitter under a class licence may result in transmissions being received and heard by the public at large, including minors. Hearing transmissions may be entirely unsolicited, as transmissions occur over publicly accessible spectrum, transmitters and receivers may be used for a wide variety of communication purposes, and transmissions may not be encrypted.

As a result, there may be circumstances in which such transmissions cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted, thereby posing a threat to the protection of public morals.

The radiofrequency spectrum is a finite public resource, which is subject to competing demands. Hence access to it is necessarily limited, and such access is regularly given subject to conditions about the matters and content that may be transmitted using the spectrum. For example, freedom of expression is limited by:

- paragraph 108(2)(d) of the *Radiocommunications Act 1992* (the Act), which imposes the same limitation on the right to freedom of expression for users of other communication devices that have been authorised under apparatus licences,
- the responsibilities of persons providing broadcasting services under the *Broadcasting Services Act 1992*.

The Committee has observed that the inclusion of a limitation on the freedom of expression in other Australian laws does not justify the inclusion of the limitation in the Instruments. Nevertheless, these examples are brought to the Committee's attention because they have the same aim of protecting public morals as the measures contained in the Instruments.

For these reasons, the conditions are aimed at achieving a legitimate objective of protecting public morals by minimising the risk that the general public will receive and hear unsolicited communications that might

seriously alarm or affront a person, where those communications are made using a scarce public resource.

2. Is there a rational connection between the limitation on the right to freedom of expression and these legitimate objectives?

The Instruments propose a limitation which provides a disincentive for licensees and authorised persons to make transmissions that breach the licence conditions. The disincentive directly supports the objectives of protecting public order and public morals. The ACMA has advised that aside from imposing a licence condition, it has no other powers that can be used to achieve the objectives.

3. Is the limitation a reasonable and proportionate measure for the achievement of the objective?

The Instruments provide a standing authority for users of citizen band and amateur radio stations to communicate on designated segments of the radio frequency spectrum.

The ACMA advises that the limitation is considered a reasonable and proportionate measure for achievement of the objectives for the following reasons:

(i) If authorisation for transmissions was provided not by the Instruments but instead by issuing apparatus licences to individual users, the same limitation on the right to freedom of expression would apply as specified under section 108(2)(d) of the Act.

(ii) The proposed measure is the only power available to the ACMA for the purpose of protecting public order and public morals in instances where transmissions are made using the radiofrequency spectrum, which is a scarce public resource.

(iii) The CB band of spectrum is a limited resource. There are numerous users wanting to utilise the CB band, both commercially (such as transport companies) and recreational (amateur radio users and visitors).

(iv) Transmissions occur over publicly accessible spectrum and can be heard at large by the community. Accordingly, it is possible for transmissions which use aggressive and offensive language to offend generally prevailing community standards. It is essential that users who broadcast offensive material do not exercise their right to freedom of speech or use this limited public resource in a manner that limits the freedom of speech of users who are broadcasting socially acceptable material that complies with general prevailing community standards.

(iv) The right to freedom of expression is only limited in relation to the content of a transmission made by a device authorised by the Instruments. The right is otherwise unfettered by the Instruments.

(v) A breach of the licence conditions in question may constitute the offence of operating a radiocommunications device otherwise than as authorised by a class licence without a reasonable excuse under section 46 of the Act. The penalty for such an offence is imprisonment of up to two

years if the offender is an individual or 1,500 penalty units otherwise. However, a person may, if served with an infringement notice by an authorised person under the Radiocommunications Regulations 1993, pay a penalty of two penalty units if the person is an individual, or three penalty units in any other case. If an infringement notice is not given, or is given but not paid, then the decision to prosecute a person for such an offence would be made by the Commonwealth Director of Public Prosecutions.[7]

Committee response

2.335 **The committee thanks the Minister for Communications for his response.**

2.336 The committee considers that the minister's response has sufficiently justified this limitation for the purposes of international human rights law.

2.337 **Accordingly, the committee's assessment of the conditions in the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 and the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 (the regulations) not to seriously alarm or affront a person against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) is that the regulations are likely to be compatible with the right to freedom of expression.**

Mr Laurie Ferguson MP
Deputy Chair

7 See Appendix 1, letter from Senator the Hon Mitch Fifield, Minister for Communications, to the Hon Philip Ruddock MP (received 17 March 2016) 1-4.

Appendix 1

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-029756

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 1 December 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747].

The committee's remarks are contained in its *Thirty-second Report of the 44th Parliament*.

I also refer to your letter of 2 November 2015, in which you sought an update on the progress of the response to the committee's remarks in its *Twenty-second Report of the 44th Parliament*, concerning the Australian Border Force Bill (now Act) 2015. I apologise for the delay in responding.

My response addressing the committee's remarks regarding the Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747] and the Australian Border Force Bill 2015 is attached.

Thank you for bringing the committee's views to my attention.

Yours sincerely

PETER DUTTON 22/03/16

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Australian Border Force Act 2015

Organisational suitability assessment (OSA)

1.46 The committee seeks further information as to the content and nature of any proposed OSA, including the information required to be disclosed as part of the assessment, which individuals will be required to complete the OSA and the consequences of an adverse OSA for that individual's employment. In light of this, the committee seeks further information as to the human rights compatibility of imposing an OSA requirement under the bill.

As part of measures to increase the Department's resistance to corruption and establish a strong integrity framework, the Secretary is able to direct Immigration and Border Protection (IBP) workers to undertake an organisational suitability assessment (OSA) (known as employment suitability screening) and, where an Employment Suitability Clearance (ESC) is held, to meet ongoing requirements. The requirement to obtain and maintain an ESC reflects the Department's operating environment.

The Committee states that 'It is unclear why such assessments are required across the department when such assessments are not routinely applied in other Commonwealth departments.'

The Australian Government's Protective Security Policy Framework (PSPF), and specifically the *Personnel Security Guidelines* (October 2014), requires Commonwealth agencies to undertake general employment screening to determine personnel's suitability to be entrusted with Australian Government resources as well as agency specific checks to mitigate any personnel security threats applicable to the agency that are not addressed by general employment screening.

Agencies are to identify checks necessary to mitigate additional agency personnel security risks where these are not addressed by minimum employment screening.

> 'Some examples of character checks may be, but are not limited to:
>
> - drug and alcohol testing
> - detailed financial probity checks, including wealth and credit checks
> - psychological assessment
> - agency specific questionnaires or other tests related to the industry, and
> - partial or full exclusions under Part VIIC of the *Crimes Act 1914* (Cth), the Spent Convictions Scheme relating to engagement in positions covered by specific legislations to which exemptions are given.'

Further, the PSPF provides that agencies '...are to manage and assess the ongoing suitability of all personnel'. The requirements of the PSPF regarding employment suitability screening are distinct from, and additional to, the requirement on agencies to ensure that personnel with ongoing access to Australian Government security classified resources hold security clearances at the appropriate levels. Employment suitability screening, known as OSA, was in place for a number of years for all staff of the former Australian Customs and Border Protection Service (ACBPS). The requirement to hold and maintain an ESC is the Department's additional employment

suitability screening measure, consistent with the PSPF and reflecting the particular vulnerabilities and risks faced by the Department, including the Australian Border Force (ABF).

The Department is responsible for managing the integrity of the Australian border, a national strategic asset, which requires significant trust. To retain the confidence of the Government and community the Department must maintain a culture resistant to corruption.

The ESC process seeks to identify integrity risks based on a person's character and the detection of any criminal associations. Employment suitability screening may require IBP workers to declare any family, friends or associates whose activities, for example a criminal history or associations with organised crime or an Outlaw Motorcycle Gang, may be relevant to the assessment of the worker's organisational suitability and the assessment of the worker's honesty, integrity and trustworthiness.

Noting the Department's role, the restrictions on Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) are therefore necessary in the interests of national security, public safety, public order and the protection of the rights and freedoms of others.

I acknowledge that some associations are unavoidable and it is intended that relevant policies would not require IBP workers to relinquish close familial ties. Together with the worker, my Department will conduct a risk assessment of the individual's circumstances and the risk posed by maintaining a declarable association with a family member.

I consider that restrictions imposed on IBP workers, such as having to cease an association or declare further contact with such persons, is proportionate to the interests of national security as there are procedures and protections in place to ensure that the right to freedom of association is not unduly restricted. For example, aftercare arrangements are put in place where risks identified during employment suitability screening can be adequately and cost effectively mitigated or managed. This provides support to employees in terms of offering an alternative to not being granted an ESC.

Furthermore, strict protocols and procedures for conducting employment suitability screening and rules of procedural fairness apply. Under the screening process arrangements, employees with an adverse decision are provided with the reason/s for the outcome and an opportunity to respond. Any responses are reviewed by the decision maker prior to making the decision. The only exception to this is if it relates to a matter otherwise protected by law.

The direction to obtain and maintain an ESC requires an employee to provide personal information about themselves and their associates in the form of a questionnaire so that screening can be undertaken to assess if an employee is suitable from an integrity and character perspective.

I consider the requirement to provide personal information, which may also impact on a person's reputation and that of other people, to be proportionate to the interests of national security as there are procedures and protections in place to ensure that the rights to privacy and reputation are not unduly restricted.

Personal information obtained from an ESC screening process may be accessed by members of the Employment Suitability Team, and members of the Integrity and Professional Standards Branch, on a strict 'need to know' basis and is stored in appropriately rated and secure containers and IT systems. It is essential for members of the Employment Suitability Team to disclose personal information to facilitate checks with a range of law enforcement, intelligence and regulatory agencies. Personal information collected, used, disclosed and stored during screening processes is in accordance with the *Privacy Act 1988* (the Privacy Act) and Part 6 of the *Australian Border Force Act 2015* (ABF Act).

Drug and alcohol testing

1.55 The committee considers that the imposition of a drug and alcohol testing regime across the Department of Immigration and Border Protection 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 requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective, particularly whether there are effective safeguards over the measures.

Preventing the movement of illicit substances and prohibited and restricted goods across the border is a core element of the Department's responsibilities. Where individuals are privately participating in activities that include the use and possession of illicit drugs, this behaviour is in conflict with official duties.

The introduction of drug and alcohol testing is part of a broader Drug and Alcohol Management Programme put in place by the Department. This programme meets the Australian standards for drug and alcohol testing and includes an education component to ensure IBP workers are aware of their responsibilities and rights. The Department has worked closely with staff and their representatives to develop policies that are transparent, fair and consistent and allow the Department to ensure the integrity of the process and the test results.

In the absence of a positive test, details of IBP workers subject to drug and alcohol testing will only be accessible to:

- members of the Drug and Alcohol Management Programme team;
- the laboratory technicians analysing the collected samples; and
- the Medical Review Officer.

Where an IBP worker returns a positive test, the matter is referred to the Integrity and Professional Standards Branch for assessment against the APS Code of Conduct.

In relation to drug and alcohol testing procedures, each sample is only identified by a reference number, therefore neither the laboratory staff nor the Medical Review Officer know the identity of the person being tested until the Medical Review Officer verifies a sample has returned a 'positive' test. Prior to a test being positive, only members of the Drug and Alcohol Management Programme team are able to match a reference number to an individual staff member.

Further, the information is only used by, or disclosed to, other workers/agencies in accordance with the Australian Privacy Principles. The medical provider is also required to comply with the requirements under the Privacy Act in collecting, using and disclosing personal information.

Prior to action being taken by the Department, the person being tested is given an opportunity to discuss the results with the Medical Review Officer. This information is used by the Medical Review Officer in determining whether a verified positive result is within acceptable parameters considering any declaration made by the individual being tested.

Any other information revealed about the person during this process is only transmitted to the Department where it is determined the information is likely to cause a significant hazard to the workplace and there is a direct relationship to the individual's functions and potential integrity. An example may include where a worker in a designated 'use of force' position has not declared that they are taking medications that the Medical Review Officer considers may impact on their ability to use a firearm.

The Committee states that whilst '…drug and alcohol testing is not uncommon for law enforcement agencies, it would seem unusual for such a regime to apply across a public service department.... It is not clear…why immigration workers not engaged in the ABF should be subject to such a regime.'

Drug and alcohol testing was introduced to the former ACBPS with the amendment of the *Customs Administration Act 1985* in 2012. The powers introduced into that Act mirror the powers provided now in the ABF Act. Those powers facilitated a testing regime that applied to the whole of the former ACBPS workforce, and not just persons in frontline, operational positions. It is important to note other agencies that conduct drug and alcohol testing such as the Australian Crime Commission and the Australian Federal Police test their entire workforce, not just operational staff.

Whilst the ABF carries out significant law enforcement functions, including detecting and disrupting the importation of prohibited narcotics, the Department underpins and supports the ABF's operation in every way. Additionally there is ready and fluid movement of personnel between the Department and the ABF. As such, the risk posed to the integrity of the ABF's functional effectiveness and reputation is not sufficiently managed by restricting drug and alcohol testing to ABF personnel only. Were an employee of the Department to be found to have used a prohibited narcotic, whether that person is working in the ABF or in another departmental role, the reputational risk to the Department as a whole is the same. And from a personnel security risk perspective, an officer in the information technology or intelligence divisions using prohibited narcotics poses just as significant a vulnerability as a frontline officer working in an airport or a cargo examination facility.

The testing regime is proportionate to the interests of ensuring the integrity and reputation of the Department as a whole, thus enhancing community trust in the Department's capacity for managing the integrity of the Australian border, a national strategic asset. To retain the confidence of the Government and community, the Department must maintain a culture resistant to corruption.

The requirement to provide personal information is considered to be proportionate to the interests of national security as there are procedures and protections in place to ensure that the rights to privacy and reputation are not unduly restricted.

The absence of sufficient safeguards and lack of limitations on intrusiveness and the retention of records

The *Australian Border Force (Alcohol and Drug Tests) Rule 2015* (the Rule) requires that a drug or alcohol test conducted for section 34, 35 or 36 of the ABF Act be conducted in a respectful manner, and in circumstances affording reasonable privacy to the IBP worker. The Rule requires that tests must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the test, and that the test must not involve the removal of more clothing than is necessary for the conduct of the test, and more visual inspection that is necessary for the conduct of the test. Further, if practicable, the test must be conducted by a person of the same sex as the IBP worker. In collecting a hair sample for a drug test, the authorised tester must use the least painful technique known and available, must only collect the amount of hair necessary for the conduct of the test, and cannot collect the sample from the IBP worker's genital or anal area or buttocks.

The Rule limits the amount of information that may be collected from a drug or alcohol test conducted for section 34, 35 or 36 of the ABF Act to information relating to the detection of alcohol or prohibited drugs. A body sample or other record relevant to a test must be kept in a secure location unless destroyed in accordance with the Rule. A positive body sample (one that does indicate the presence of alcohol or prohibited drugs) must be destroyed no later than two years from the day of the test. A negative body sample must be destroyed no later than 28 days after the day of the test. The two year retention period for a positive test allows for disciplinary action and any contest of such actions that may follow a positive result. Other records relating to an alcohol or drug test may be retained until such time as the IBP worker to whom the record relates ceases, for any reason to be an IBP worker.

The lack of criteria about what the Secretary or ABF Commissioner might consider in prescribing a prohibited drug

The concern of the committee is noted; however, it is not always appropriate to be overly prescriptive in primary legislation. I consider that the benefits of providing a definition are outweighed by the risks arising from evolving and changing nature of the drug environment.

Providing a definition of a 'prohibited drug' will confine the ability of the Department to meet the challenges presented by new drugs and will undermine the ability of the Department to maintain a drug free workplace. Defining the term by legislative instrument will provide a lawful and flexible mechanism to allow the Secretary and ABF Commissioner to respond quickly to this ever-changing environment.

Further, this instrument is a disallowable instrument in accordance with the *Legislative Instruments Act 2003* and is subject to scrutiny by Parliament. Any determination made by the Secretary or ABF Commissioner will be subject to oversight by Parliament.

Declaration of serious misconduct

1.60 The committee considers that excluding provisions of the Fair Work Act engages and limits the right to just and favourable conditions of work. The committee considers that the statement of compatibility has not explained the legitimate objective of the measure. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether Part 4 of the bill is compatible with the right to just and favourable conditions of work, 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.

Section 32 of the ABF Act provides that the Secretary or the ABF Commissioner may make a written declaration of serious misconduct where the Secretary or the ABF Commissioner reasonably believes that an employee's conduct or behaviour amounts to serious misconduct and is having or is likely to have a damaging effect on the professional self-respect or morale of some or all of the APS employees in the Department or the reputation of the Department. This power may only be exercised once a person's employment has been terminated by the Secretary or delegate, and does not reduce the obligation on the Department to accord the person a fair process in determining whether or not they have breached the Code of Conduct, and, if they have, whether they should be dismissed as a sanction for that breach.

The declaration cannot be used for behaviour that falls short of the definition of serious misconduct. Serious misconduct is defined as corrupt conduct engaged in, a serious abuse of power, or a serious dereliction of duty, or any other seriously reprehensible act or behaviour, whether or not acting, or purporting to act, in the course of the worker's duties. This definition is consistent with the definition that was in the *Customs Administration Act 1985*, and the definition currently in the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979*.

It is intended that the serious misconduct declaration will minimise the risk of reinstatement. Although reinstatement may be rarely ordered in practice, formally under the *Fair Work Act 2009* it is the remedy of first resort: see s. 390. Therefore, the application of the Fair Work Act may result in the person having to be reinstated, and reinstated relatively quickly. This poses significant risks to the Government and the community in light of the expanded law enforcement role of the Department, and that the workforce is exposed to increased attempts by criminal elements to penetrate, compromise and corrupt officers. In the first place, if the Fair Work Commission's review of a dismissal were to result in a person being reinstated, this would send a mixed signal to the community and the workforce about the tolerance of serious misconduct within the Department. Avoiding sending this message, and enhancing the ABF's capability to deal with serious misconduct, should be upheld as a legitimate objective in the same way the limitation on Part 3-2 of the Fair Work Act was upheld when it was introduced in section 15A of the *Customs Administration Act 1985*. In the second place, to the extent that the Fair Work Commission's unfair

dismissal jurisdiction operates speedily, so that a person can be reinstated within a couple of months, there is a risk that a person could be returned to the workforce before the Department has been able, for example, to implement measures to prevent the particular mechanism for corruption exploited by the person being reinstated. Equally, there is a risk that a person, who, for example, has engaged in seriously reprehensible behaviour, could be returned to the workforce before morale in the Department, or the Department's reputation in the community, has had a chance to recover.

The limitation regarding Part 3-2 of the Fair Work Act is reasonable and proportionate because alternative avenues remain to seek remedies (though only exceptionally a remedy similar to reinstatement) under Part 3-1 (general protections claims). The ABF Commissioner's written declaration of serious misconduct will be a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The option of judicial review under ADJR Act should be considered an adequate alternative because it provides a mechanism to ensure that the decision to terminate employment was reasonable in the circumstances, with less chance that the Government and the community is exposed to the risk that an employee who has engaged in corrupt conduct is reinstated to a position of public trust and confidence.

This provision mirrors the declaration provision that applied to former ACBPS employees, both those in operational roles and non-operational roles, under section 15A of the Customs Administration Act and it is proposed to replicate its effect across the integrated Department. Section 15A of the Customs Administration Act was modelled on the declaration of serious misconduct provisions applicable to Australian Crime Commission and Australian Federal Police staff. The provision was introduced into the Customs Administration Act in 2012 as part of a series of measures designed to increase the resistance of the ACBPS to corruption and to enhance the range of tools available to ACBPS to respond to suspected corruption. At this time the Committee scrutinised this provision and was satisfied that this measure is compatible with the right to an effective remedy. It is therefore appropriate to reiterate that while Article 2(3)(a) of the ICCPR is based on the premise that any person who has their rights or freedoms violated shall have an effective remedy, Article 2(3)(b) qualifies this right more prescriptively. Article 2(3)(b) states that the right shall be *'...determined by competent judicial, administrative or legislative authorities, or by any competent authority provided for by the legal system of the state and to develop the possibilities of judicial remedy.'* In the same way that former ACBPS workers were still considered to have an avenue to seek redress for their dismissal through the ADJR Act, workers affected by section 32 of the ABF Act have the same avenue to develop the possibilities of judicial remedy to their dismissal.

Delaying the date of resignation

1.66 The committee considers that giving the secretary and the ABFC the power to delay resignation to complete an investigation into serious misconduct engages and limits the right to just and favourable conditions of work. The committee considers that the statement of compatibility has not explained the legitimate objective of the measure. The committee therefore

seeks the advice of the Minister for Immigration and Border Protection as to whether Part 3 of the bill is compatible with the right to just and favourable conditions of work, 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.**

Provisions in the ABF Act allow the Secretary or ABF Commissioner to defer an employee's date of resignation by up to 90 days from written notification of resignation by the employee where the Secretary or ABF Commissioner reasonably believes an employee has engaged in serious misconduct or is being investigated for such conduct. This enables the finalisation of any investigation, determination of breach of the APS Code of Conduct and consideration of whether to impose the sanction of termination of employment.

Under current provisions of the Public Service Act, an investigation into a breach of the APS Code of Conduct can continue after an APS employee has resigned. However, there is no provision to apply a sanction to the person once they are no longer an employee. This provision allows the resignation to be delayed so that any investigation can be concluded, and where warranted, a sanction can be applied.

It enables the Department to address incidences of serious misconduct, including corruption, through an investigation and subsequently to terminate an employee if serious misconduct is found to have occurred. This is considered an important demonstration to employees, the Government and the wider community of the Department's commitment to professionalism and high standards of integrity and its unwillingness to tolerate conduct that threatens these values.

The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Rights in work include the enjoyment of just and favourable conditions of work. I consider that this measure does not unduly restrict the right to work or rights in work because the effect of this provision would not require the employee to continue or resume duties during the period of investigation. It is intended that an employee who is being investigated for serious misconduct would be suspended from duties in accordance with section 28 of the Public Service Act and regulation 3.10 of the *Public Service Regulations 1999*.

Reporting of serious misconduct

1.69 In order to assess the compatibility of a direction that may require immigration and border protection workers to declare their associations, the committee requests a copy of the draft order and detailed information as to how the department proposes to implement the order in practice.

The provision of the ABF Act which enables the ABF Commissioner to issue directions requiring an IBP worker to report alleged serious misconduct or alleged criminal activity, by or involving an IBP worker, replicates a similar power that applied to employees of the former ACBPS under the Customs Administration Act. The

Customs Administration Act provision was introduced in 2012 as part of a package of integrity measures designed to increase the resistance of the ACBPS to corruption and to enhance the range of tools available to the ACBPS to respond to suspected corruption. At the time of the proposed amendments to the Customs Administration Act in 2012, the Committee scrutinised this provision and was satisfied that this measure is compatible with the right to minimum guarantees in criminal proceedings.

The former ACBPS Chief Executive Officer issued a direction in reliance on the Customs Administration Act provision in late 2012. That direction operated without incident, and was supported by internal guidelines and instructions.

On 1 July 2015, the Department relevantly published an Associated Document to the Instruction and Guideline on Employment Suitability Screening, regarding Declarable Associations which provides further information, as does the Secretary's Direction (under subsection 55(1) of the ABF Act) on Integrity Measures. These documents are available on the Department's website at the following link:

http://www.border.gov.au/about/access-accountability/integrity

1.77 The committee considers that the provisions that require an immigration and border protection worker to disclose information at the direction of the departmental secretary of ABFC [sic] even if that information would incriminate them, engages and limits the right to a fair trial. The committee considers that the statement of compatibility has not justified the abrogation of the protection against self-incrimination. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the limitations on the right to freedom from self-incrimination are compatible with 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 a reasonable and proportionate measure for the achievement of that objective.**

The intention of the power of the Secretary and the ABF Commissioner to impose mandatory reporting requirements is to promote full disclosure by IBP workers of misconduct which they observe or are involved in, so that action can be taken against IBP workers involved in corruption. Mandatory reporting contributes to a culture that does not ignore or condone corruption, serious misconduct or illegal activities, and where staff are supported to speak up. It is important that the Department be able to act on and undertake further investigations in relation to information obtained under these powers.

The effect of a derivative use immunity would be to ensure that any information derived by the Department, or another law enforcement agency, from a self-incriminatory disclosure could never be used to take action against the person who made that disclosure. Due to the nature of corruption offences, there are often few or no witnesses other than those directly involved in the corrupt conduct, and it may be difficult to obtain evidence other than that derived from the person's admissions.

If a person makes admissions of corrupt conduct under this provision, and that admission is substantiated by further investigations undertaken based on that admission, it is important that appropriate action can be taken against the person.

The ABF Act provides for the Secretary or the ABF Commissioner to be able to issue directions about mandatory reporting as well as other matters regarding the administration and control of the Department and the ABF. In the course of considering the application of the abrogation of the privilege against self-incrimination, a deliberate decision was taken to limit the breadth of orders to which the potential provision would apply. This reflected the approach under the Customs Administration Act. I consider that the current provision provides a balance between the public benefit in compelling the provision of information concerning possible corrupt activity affecting the Department and the privilege against self-incrimination.

Secrecy and disclosure

1.87 The committee considers that as the secrecy offence provision contains an evidentiary burden on the accused that the provision engages and limits the right to a fair trial. This has not been addressed in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the offence provisions which include a reverse evidentiary burden is compatible with 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 a reasonable and proportionate measure for the achievement of that objective.**

Part 6 of the ABF Act does not change or alter what any criminal prosecution of an alleged breach must prove. An individual who is subject to a prosecution remains innocent until found guilty by a court and the offence in no way limits a defendant's right to a fair trial or limits their right to be presumed innocent. The onus remains on the prosecution to prove each element of the offence beyond reasonable doubt. If the defendant is claiming a defence to a breach of the prohibition on recording or disclosure of protected information, he or she bears the evidential burden in relation to whether one or more of the exceptions applied to his or her recording or disclosure. This evidential burden of proof in relation to exceptions to an offence is set out in subsection 13.3(3) of the *Criminal Code*, not Part 6 of the ABF Act. That is that any defendant who wishes to deny criminal responsibility bears an evidential burden in relation to that matter. This evidential burden applies to all offences across the Commonwealth. An evidential burden in relation to a matter means the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The secrecy and disclosure provisions of Part 6 of the ABF Act reflect section 16 of the Customs Administration Act which regulated the disclosure of protected information and provided an offence of prohibited disclosure of protected information punishable by a maximum penalty of two years imprisonment. As the Explanatory

Memorandum for the ABF Act noted, the Department, including the ABF, creates, receives and uses critical and important information on a daily basis, including critical intelligence and personal information, much of which is sensitive and complex. As such, it is appropriate that measures that were in place when the ABCPS was a separate agency be applied to the Department as a whole. As noted above with respect to alcohol and drug testing, the Department underpins and supports the ABF's operation in every way and as such, the receipt, creation and use of sensitive and complex information is not limited to personnel in the ABF, but rather are spread throughout the Department. For these reasons, I consider that the secrecy offence pursues a legitimate aim. That is to ensure the integrity of the Department's handling of protected information by appropriately deterring other entrusted persons from engaging in conduct which leads them to breach the prohibition.

Given that aim of the secrecy offence, I consider that the burden to be borne by a defendant in denying criminal responsibility by adducing or pointing to evidence that suggests a reasonable possibility that an exception exists to a given disclosure, is reasonable and proportionate to achieving the aim of the secrecy offence. I further note that the provision is consistent with those of other agencies with law enforcement and national security responsibilities, such as the AFP.

For these reasons, I consider that the new strict liability offence is not inconsistent with the presumption of innocence set out in article 14(2) of the ICCPR.

1.93 The committee considers that the secrecy offence provision engages and may limit the right to an effective remedy as public interest disclosure of potential human rights abuses by employees or contractors of the department may be the only way in which potential human rights abuses come to the attention of the public and the relevant authorities. The engagement of the right to an effective remedy is not addressed in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the offence provisions is [sic] compatible with the right to an effective remedy, 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.**

The *Public Interest Disclosure Act 2013* (PID Act) provides protection to 'whistleblowers' who provide information in breach of the provisions of Part 6 of the proposed ABF Act, where the disclosures are made in accordance with the PID Act. This protection is the same as that which was provided previously in respect of breaches of section 16 of the Customs Administration Act.

The secrecy offence provided by Part 6 of the ABF Act provides several exemptions to the offence, including if the disclosure is done in accordance with Part 6 itself, or if the disclosure is required or authorised by or under a law of the Commonwealth, State or Territory. The PID Act will, in certain circumstances, protect an entrusted person who discloses protected information in contravention of Part 6 of the ABF Act

(for example if the disclosure was made by an entrusted person who was not authorised to make the disclosure under sections 44 and 45 of the ABF Act).

Under the PID Act, the disclosure must relate to 'disclosable conduct'. 'Disclosable conduct' is set out in section 29 and includes, for example, conduct engaged in by a public official in connection with their position as a public official that contravenes a law of the Commonwealth. The disclosure must also be a 'public interest disclosure', the requirements for which are set out in section 26 the PID Act. For example, a person may only make an external disclosure provided all of the following requirements are met:

(a) the discloser previously made an internal disclosure regarding the information being disclosed externally; and

(b) the discloser believes that either:

the investigation (under Part 3) was inadequate; or

the response to an investigation was inadequate; or

the investigation was not completed within the time limit (90 days, or longer if extension

granted - section 52 of the PID Act); and

(c) disclosure is not, on balance, contrary to the public interest (see section 26(3) of the PID Act); and

(d) no more information is publically disclosed than is reasonably necessary to identify the instance(s) of disclosable conduct; and

(e) the information does not consist of, or include intelligence information (defined in section 41 of the PID Act); and

(f) none of the conduct with which the disclosure is concerned relates to an intelligence agency.

The PID Act provides immunity from any civil, criminal or administrative liability for making the disclosure in accordance the PID Act. Therefore, even if disclosure under the PID Act breaches Part 6 of the ABF Act, the entrusted person would not be subject to criminal liability for the offence under Part 6.

1.98 The committee considers that the offence provision limits the right to freedom of expression as it would restain [sic] an individual from discussing information gained in the course of their work with the department, including discussions that may be in the public interest. The limitation of this right was not justified in the statement of compatibility. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the bill is compatible with the right to freedom of opinion and expression, 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.**

By restricting 'entrusted persons' from communicating protected information, the secrecy and disclosure provisions limit freedom of expression. However, this restriction is considered necessary for the protection of public order and Australia's national security as the Department and the ABF within it will regularly create, receive and use sensitive and complex information including intelligence and personal information.

I consider that this measure is a proportionate and reasonable way to achieve this objective as the provision includes a comprehensive framework to regulate the disclosure of this information in appropriately controlled circumstances.

Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747]

1.229 As stated above, the committee understands and supports the importance of protecting the Australian community from public health risks and containing public expenditure on health care and services; and considers that appropriate health checks are required in order to better promote the right to health. However, as the instrument is not accompanied by a statement of compatibility, the committee does not have enough information before it to establish if the instrument does impact disproportionately on persons with disabilities and, if so, whether any such disproportionate effect is justifiable.

1.230 The committee considers that the requirement for medical assessments for temporary visa applicants engages and may limit the right to equality and non-discrimination under articles 2 and 26 of International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities.

1.231 Noting that the instrument was not accompanied by a statement of compatibility, 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.**

The Committee has sought comment regarding recent changes to the health examinations that applicants for an Australian visa are required to complete in order to determine whether they meet the immigration health requirement.

These changes are aimed at achieving a legitimate objective

Almost all applicants for a visa to Australia are required to meet the health requirement in order to:

- protect the Australian community from public health risks (principally, active Tuberculosis – TB);
- contain public expenditure on health care and community services; and
- safeguard access to health services in short supply.

The Government applies a risk based approach to determine which visa applicants must complete immigration health examinations. This approach is known as the 'health matrix'. Health matrix settings are based on a number of factors including, but not limited to, the applicant's country of citizenship and its TB incidence rate, their intended activities in Australia and their proposed length of stay. The health matrix settings are reviewed and updated periodically.

A key focus of the health matrix is to ensure that immigration screening arrangements remain appropriately targeted and that Australia's low incidence of TB can be maintained. TB continues to be a serious worldwide public health threat and is now the greatest killer worldwide due to a single infectious agent. Australia has one of the lowest TB rates in the world despite increasingly large numbers of migrants from affected countries. The health matrix is important to the effectiveness of these processes.

Rational connection between the limitation and objective

It is noted that the particular instrument referred to has since been revoked, and replaced by instrument IMMI 15/144 [F2015L01826]; however, the replacing instrument has the same effect. The updates to the health matrix are designed to:

- more efficiently facilitate visa grant for hundreds of thousands of temporary entrants on a yearly basis while continuing to safeguard the Australian community from public health threats (in particular, TB);
- focus resources on higher risk cohorts with stay durations of six months or more, rather than on higher volume, shorter stay caseloads, such as Visitor visa holders, about whom clinical advice indicates are considered less likely to present with active TB while onshore; and
- align Australia's health screening settings more closely with those of our Five Country Conference (FCC) partners, which also have low rates of TB.

The Committee may wish to note that, as a result of these changes, the Department of Immigration and Border Protection (the Department) expects that approximately 40,000 less visa applicants will need to undertake immigration health examinations. This is primarily because, under the previous settings, high risk visa applicants were required to undertake a medical assessment if they were planning to stay in Australia for *three months or more*. Under the new settings, high risk visa applicants only need to undertake medical assessments if they intend to stay in Australia for *six months or more*. For low risk applicants, the settings continue to provide that, under ordinary circumstances, no health examinations are required for temporary visa applicants, regardless of the intended stay period.

As a result of updated TB data (which is informed by World Health Organization (WHO) data), and the shift to a two-tier health matrix, a small number of countries were reassigned to the high risk level, where they had previously been considered low or medium risk. These countries, places or former countries include: *Anguilla, Antarctica, Brazil, Colombia, Fiji, Greenland, Honduras, Libya, Maldives, Martinique, Panama, Singapore, St Barthélemy, St Martin, St Pierre and Miquelon, St Vincent/Grenadine, Suriname, Venezuela and Yugoslavia.*

As per current arrangements, additional health examinations may be requested based on relevant information known to the Department – for example, a declaration that the applicant may need medical treatment in Australia, or an intention to work in or visit a healthcare facility during their stay.

A reasonable and proportional measure for the achievement of that objective

The changes to the health matrix were informed by clinical expertise, and were endorsed by the National Tuberculosis Advisory Committee (NTAC) as well as the Chief Medical Officer of the Department of Health. The new health matrix settings take into account global TB prevalence rates, based on WHO data. I consider the new health matrix settings are reasonable and proportionate to the legitimate objective of reducing the incidence of TB in Australia.

As noted above, one aspect of the new health matrix settings is a move from a three month threshold to a six month threshold for screening high risk visa applicants. This change, while aimed at facilitating faster visa processing for a large number of visa applicants, also reflected clinical advice that moving to a six month stay screening threshold would not increase the risk of TB transmission.

One of the key purposes of the health requirement is to protect the community from public health risks. This goal is consistent with the International Covenant on Economic, Social and Cultural Rights, in particular, articles pertaining to the control of diseases and the creation of conditions which would assure medical service and medical attention in the event of sickness.

As the Committee notes, the Convention on the Rights of Persons with Disabilities (CRPD) refers to the right for persons with a disability not to be discriminated against on health grounds. The instrument's health requirement is consistent with the formal declaration of Australia's understanding of the CRPD. Australia's migration health requirement is universal.

Where a person has a specific medical condition (other than TB) this condition in itself will not result in failure to meet the health requirement. There is no explicit focus on disability, and this has not changed under the updated health matrix. As with any visa applicant with an ongoing health condition, a person with a disability may fail to meet the health requirement if a Medical Officer of the Commonwealth assesses their condition as likely to:

- result in significant health care and community service costs; or
- prejudice the access of Australians to health care or community services.

In addition, some visa subclasses allow for the Department to consider whether the health requirement should be waived, including for persons with a disability.

The Committee also noted the International Covenant on Civil and Political Rights (ICCPR), which promotes equality and prohibits discrimination on personal attributes. Under the health matrix settings, the types of health examinations that visa applicants need to undertake depend on a number of factors including:

- the type of visa that they are applying for;
- the length of their intended stay in Australia;
- the applicant's country for the purpose of TB risk levels (including countries they may have visited);
- their intended activities in Australia; and
- any special circumstances that may be applicable.

Given the broad spectrum of factors which determine whether visa applicants must undertake immigration health examinations, the arrangements are not considered to discriminate against particular groups or personal attributes, or to unreasonably discriminate on the basis of disability, in light of the legitimate objective of reducing the incidence of TB in Australia.

The Hon Christian Porter MP
Minister for Social Services

MC15-013667

15 MAR 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 11 August 2015, seeking advice from the former Minister of Social Services, the Hon Scott Morrison MP, in relation to the matters raised in the Joint Committee on Human Rights' (the committee's) Twenty-fifth Report of the 44th Parliament. The committee has requested additional advice in order to further consider the impact of the proposed amendments to Paid Parental Leave (PPL) payments included in the Fairer Paid Parental Leave Bill 2015 on the right to social security, right to work and the right to maternity leave, and the right to equality and non-discrimination. I am replying to your letter as this matter now falls within my portfolio responsibilities. I regret the delay in responding.

Schedule 1 – Adjustment for primary carer pay, etc.

The objective of the proposed amendments included in Schedule 1 of the Bill is to create savings. As you are aware, the Australian Government remains committed to returning the Budget to surplus as soon as possible and as a result, I have had to look for areas where money can be saved.

Currently, new parents (usually birth mothers) are able to receive payments under the PPL scheme of up to 18 weeks at the rate of the National Minimum Wage (that is, up to $11,826) regardless of whether they also receive primary carer pay[1] from their employer.

Given the tight budgetary position of the Government and the need to apportion payments to families in the most fair and effective manner, the current arrangement is no longer sustainable and expenditure will be more effective in other areas. Expanding government investment in areas such as child care helps advance rights relating to choice, independence and the opportunity to work. There is widespread community support for this investment, but we need to fund this from somewhere.

[1] *Primary carer pay* is an employer payment under the terms of an employee's employment payable because the employee is expecting to give birth, or to be the primary carer for a child who has not yet turned one or who has been adopted by the employee or entrusted to their care as part of an adoption process.

The proposed amendments in this Bill will target PPL to those new parents who need it most because they do not have access, or have only limited access, to paid leave from their employer to care for a newborn or recently adopted child. This change will deliver almost $1 billion in savings that can be redirected to other key areas to support families, such as child care.

Right to social security

The committee's report explains that access to social security is required when a person has no other income and has insufficient means to support themselves and their dependants. Analysis by my Department of data from the PPL evaluation[2] indicates that 53 per cent of new parents will not be affected by this measure and therefore will not have their right to social security limited in any way. Of the remaining parents, their rate of PPL will be reduced in accordance with the primary carer pay that they receive from their employer. While I accept that this will result in a reduction in the support that they receive through the PPL scheme, it does not mean that these parents will have insufficient means to support themselves and their dependants. These new parents will have at least the same amount of paid parental leave as those new parents who are supported through the PPL scheme. Given this, and given the crucial objective to create savings to allow expenditure in other key areas of benefit to families, I see this as a reasonable and necessary change and am confident that there are sufficient protections in place through the provision of income support and family assistance to support the social security rights of these parents.

Right to work and the right to maternity leave

The proposed amendments do not interfere with the existing rights under the *Fair Work Act 2009* to access 12 months of unpaid parental leave without loss of employment or seniority within the workplace, noting that Australia has a reservation in relation to Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women.

The evaluation of the PPL scheme found that, following the introduction of PPL, higher income mothers did not significantly change the amount of leave they took after the birth or adoption of their child. In contrast, mothers who were on lower incomes, self-employed or casually employed significantly extended the time they took off work after the birth of their child.[3]

Further analysis undertaken by my Department using the PPL evaluation survey data shows that those mothers with higher incomes are more likely to have access to primary carer pay and that mothers who were on lower incomes, self-employed or casually employed were less likely to have access to primary carer pay.

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[2] The analysis of the impact of the measure on PLP claimants used PPL evaluation survey data that was undertaken as part of the overall PPL evaluation. The analysis was based on responses from a two wave survey of over 4,000 mothers who had a baby in October or November 2011. Surveys were undertaken when the babies were about 7 months old and again when the babies were 13 months old. The impact assessment factored in incomes changes (i.e. incomes were increased to 2014-15 values). The estimates of numbers affected were derived by extrapolating information from PPL evaluation survey data to the PPL population as a whole. The PPL evaluation survey data was sample data that was nationally representative of PPL eligible mothers.

[3] PPL Evaluation, final report, pages 4-5, available at: https://www.dss.gov.au/our-responsibilities/families-and-children/programmes-services/paid-parental-leave-scheme/paid-parental-leave-evaluation-phase-4-report

As detailed earlier, there is a substantial concern in the community and in government that access to affordable quality child care is a barrier to participation for many women. Increasing workforce participation and, through this, opportunity, is a priority approach for all working age people. As the safety net already provided by the scheme will remain in place for women most in need, the measure is considered reasonable and proportionate because it will contribute savings to be redirected to deliver other measures considered in the community to be more effective ways of increasing participation opportunity – and therefore the progressive realisation of rights. As identified in the 2015 Intergenerational Report, increasing workforce participation is a core priority for maintaining and improving standards of living.

Right to equality and non-discrimination
The changes detailed in this Bill preserve the existing safety net of the value of 18 weeks' payment at the National Minimum Wage for eligible primary carers, primarily benefiting mothers. The changes do not interfere with the existing rights under the *Fair Work Act 2009* to access 12 months of unpaid parental leave without loss of employment or seniority within the workplace, leaving the key protection against discrimination in place. The continuation of the PPL scheme remains a clear reminder that it is appropriate and desirable to take time out from the workplace to care for a newborn or newly adopted child.

Evening out the access to paid maternity leave is considered reasonable and proportionate as it contributes savings to other measures that are beneficial to women. Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity.

Schedule 2 – employer opt-in
The report indicates that the Committee previously sought further information from the Minister for Small Business in relation to the compatibility of the opt-in measure with the right to social security, right to an adequate standard of living, right to work and right to equality and non-discrimination, as part of the Paid Parental Leave Amendment Bill 2014.

I understand that the Committee concluded its consideration of these matters as a result of the information provided by the Minister. I note and thank the Committee for its advice that it is usual expectation that such additional information should be included in future statements of compatibility for similar measures, as in the case of this Bill.

Thank you for raising these matters.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001513

15 MAR 2016

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

Dear Mr Philip Ruddock

Thank you for your letter of 23 February 2016 regarding the Parliamentary Joint Committee on Human Rights request for further advice on the *Shipping Legislation Amendment Bill 2015* (the Bill).

I note the Committee's assessment that the Bill raises questions as to whether its measures are a justified limitation on the right to just and favourable conditions of work.

While I note the further questions raised in the report, I can only reiterate that the Australian Government considered that the measures contained in the Bill were reasonable, necessary and proportionate to achieving the legitimate objective of ensuring efficient and reliable coastal shipping services as part of the national economy.

The Bill would have resulted in significant positive impacts across the Australian economy. With regards to Australian jobs specifically, a more competitive and efficient coastal shipping industry as a result of the Bill would have led to more jobs in the whole economy, as well as in the on-shore maritime industry specifically.

In addition, a cost benefit analysis commissioned by the Department of Infrastructure and Regional Development measured the impact of the proposed reforms as being an economic benefit of $667.4 million over a 20 year period. The economic benefits therefore justify the measures contained in the Bill. Unfortunately, however, the Bill was defeated in the Senate in November 2015.

Thank you again for taking the time to write and inform me of your concerns on this matter.

Yours sincerely

DARREN CHESTER

The Hon Christian Porter MP
Minister for Social Services

MC15-014051

15 MAR 2016

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 10 November 2015 seeking advice regarding the human rights compatibility of the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015. I appreciate the time you have taken to bring these matters to my attention.

The Committee requested clarification on three aspects of the measures proposed in the Bill. Please find below the requested details.

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.

The objective of the family payment reform measures is to ensure that the family payments system remains sustainable in the long term. The United Nations Committee on Economic, Cultural and Social Rights recognises that a social security scheme should be sustainable, and that the conditions for benefits must be reasonable and proportionate.

The Australian income support system relies more heavily on income testing and directs a higher share of benefits to lower-income groups than any other country in the Organisation for Economic Cooperation and Development (OECD).

As a result, Australia has one of the most targeted and efficient systems of social security benefits of any OECD country. Australia gives over 12 times more in transfer payments to the poorest fifth of households than to the wealthiest fifth of households (see insidestory.org.au/how-fair-is-australias-welfare-state).

As outlined in the McClure review, despite this highly effective targeting, demographic changes are expected to place pressure on the budget, meaning it is important to ensure that costs are constrained. Similarly, the report notes there is also an opportunity to contribute to economic growth through measures that promote greater levels of participation and improved labour force productivity.

The need to constrain costs is supported by analysis of the 2015-16 Budget by Dr Shane Oliver, the Chief Economist of AMP Capital. This analysis highlighted that government spending increased rapidly between 2006-07 and 2008-09 and has not been unwound, meaning that current government spending was exceeding revenue. Without corrective action, this situation will impact the ability of the economy to respond to any future downturns or to withstand the impacts of demographic shifts that are expected to create further pressure on government spending (see www.ampcapital.com/olivers-insights/may-2015/the-2015-16-australian-budget).

Whether there is a rational connection between the limitation and the objective

While overall spending on social welfare continues to increase as a share of Gross Domestic Product (GDP), Australia still spends comparably less than the OECD average, largely as a result of this targeted approach. Australian spending on social welfare increased from 10.2 per cent of GDP in 1980 to 19 per cent in 2014, compared to the OECD average of 15.4 per in 1980 and 21.6 per cent in 2014.

However, when considering just family assistance payments, Australian spending has been consistently above the OECD average as a share of GDP.

This increasing share can also be seen in the composition of social spending from 1980 to 2009. As a share of GDP, government spending on family assistance in Australia has tripled from 0.9 per cent in in 1980 to 2.7 per cent in 2012, the most recent year for which comparable data is available (see OECD social expenditure database stats.oecd.org).

The number of families who receive Family Tax Benefit has declined over time, down from 1.72 million in 2010-11 to 1.62 million in 2012-13. Despite this decline in the number of recipients, the cost continues to rise with expenditure increasing by almost a billion dollars over the last three financial years for which data is available, up from $18.9 billion in 2010-11 to $19.8 billion in 2012-13.

Whether the limitation is a reasonable and proportionate measure for the achievement of that objective

The Australian Government supports families with the direct costs of raising dependent children through Family Tax Benefit Part A or youth income support payments, with a family's rate of assistance determined by family income. These payments have the primary objective to ensure that all children have access to a basic acceptable standard of living.

Family assistance provides additional support to families with one main income through Family Tax Benefit Part B to recognise and support the role of parents and other carers as carers and members of the workforce. The design of Family Tax Benefit Part B has a workforce participation focus and is not based on a family income test, but a primary earner and a secondary earner income test.

The level of financial support provided by Family Tax Benefit Part B is higher for families with a youngest child aged four and under in recognition of the higher need for parental provision of direct care of children, and reduced when a youngest child turns five (moving into compulsory education) and primary carers have a greater capacity to move into the workforce or increase their workforce participation.

Where a youngest child has reached the age of 13, the Government considers it appropriate to expect primary carers to engage in the workforce, or increase their workforce participation. While this measure will reduce a family's rate of family assistance once their youngest child turns 13, this measure does not limit an individual's right to social security and they will retain access to income support or social security payments for themselves, and assistance for dependent children through Family Tax Benefit Part A or youth income support payments. The proposed changes also acknowledge that grandparent and single parent carers may have more difficulty increasing workforce participation, and this is why these families would continue to receive a level of assistance once the relevant children turn 13.

Under current rules, Family Tax Benefit customers need to provide estimated annual income to receive their entitlement by fortnightly instalment, with their actual entitlement determined after an entitlement year through the reconciliation process. The Family Tax Benefit supplements were announced in 2004 (when there was a budget surplus of over $13 billion) in response to high levels of reconciliation debt experienced by the Family Tax Benefit population. This debt was often due to families not being able to accurately predict changes in income or changes in circumstances such as a return to work. In comparison, individuals in receipt of income support have their entitlement determined on base year parental income (verified income from a previous financial year) and fortnightly personal income.
The phasing out of the Family Tax Benefit supplements recognises that the Government's investment in service delivery reform such as Single Touch Payroll will provide real time verification of a customer's income, which will improve the accuracy of income reporting and negate the need for an end-of-year reconciliation process for Family Tax Benefit and the supplements to offset the risk of debt.

The proposal reduces the annual Family Tax Benefit Part A package available to a family but increases the level of indexed fortnightly assistance, ensuring that families will not experience a reduction in fortnightly assistance and will continue to be able to meet the day-to-day costs of raising their children.

In the context of ensuring the long-term sustainability of the family payments system in the current budget position, the changes proposed are both reasonable and proportionate measures.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Christian Porter MP
Minister for Social Services

MC16-001683

15 MAR 2016

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
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Dear ~~Mr Ruddock~~ Philip

Thank you for your letter of 2 February 2016 regarding the committee's consideration of the Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015 in its *Thirty-third Report of the 44th Parliament* and the committee's request for my advice about the human rights compatibility of this bill.

I note from the committee's report that it is seeking my specific advice on the proposed changes in the bill concerning study requirements for Youth Allowance (student) or Austudy.

My advice on the matters referred to in paragraphs 1.72 and 1.73 of the committee's report (page 16) is at **Attachment A.**

I thank the committee for its work and for seeking my advice on these matters.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' 33rd report, has sought advice from the Minister of Social Services on whether measures contained in Schedule 3 of the Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015 (the Bill) are justified in their limitation of human rights, as defined in the Act. Schedule 3 seeks to amend the *Social Security Act 1991* such that in assessing a qualification for Youth Allowance (student) or Austudy, two or more courses of education for a person cannot be aggregated to satisfy the requirement to undertake full-time study.

The Committee has requested further justification of the measure's limitation on human rights based on evidence of how the measure's stated objective is addressing a substantial concern and achieving a legitimate objective; the connection between the limitation on human rights and this objective, and whether the limitation is reasonable and proportionate. This document provides responses to the Committee's request for advice on these matters.

Right to social security

This measure engages the right to social security under article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by restricting the make-up of a full-time study workload to a single course or courses that are offered together under a formal arrangement by the relevant tertiary institution as one course of study.

The intent of the requirement that a student be undertaking a full-time study workload in order to qualify for student income support (Youth Allowance (student) or Austudy) is to ensure government support is provided to the recipient for a standard duration of time that will allow them to complete their course of education and enter the workforce. Under article 4 of the ICESR, economic, social and cultural rights may be subject to only such limitations that are compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society. The targeting of social security payments to those who are in need is an important element in the sustainability of Australia's welfare system.

Social security assistance is available to full-time students subject to their completing their course within a standard duration determined by the full-time workload. Income support for students is not available to those who are undertaking a part-time study workload as they have the capacity to self-support by taking up paid work opportunities in addition to their study. Should a student choose to enter into two or more part-time courses of study, which may be in unrelated or non-complementary areas, they will not complete their study within a standard full-time study timeframe (three or four years) and study may go on for an extended period.

To the extent that this measure may limit the right social security, this limitation is reasonable and proportionate to the Government's objective of targeting social security assistance for students to those who are undertaking a specific course of study, for a limited period of time, in order to obtain specific skills and qualifications and enter the workforce.

The right to education

Article 13 of the ICESCR guarantees the right to education. This measure does not limit a person's right to education "for the full development of human personality and sense of dignity" as described in article 13 of the ICESCR. However it does place a limitation on a student's access to social security, beyond the acquisition of skills and qualifications in a reasonable timeframe that will enable them to enter the workforce.

This measure does not place a limitation on people undertaking combined courses where a formal arrangement exists to offer the course as one course of study, with two qualifications/awards (for example, a combined Bachelor of Commerce/Bachelor of Finance or dual/double degrees), which have related/complementary subjects and hence provide formal qualifications that enhance a person's employment and career prospects.

The proposed amendments affirm the objective of government income support for students, which is to support people undertaking full-time study in a course that will provide them with a qualification within the standard duration of a course. Income support for tertiary students is designed to support their right to education to the extent that it allows them to gain formal qualifications to be able to enter the workforce.

The proposed changes are reasonable and proportionate for the achievement of the objective

The proposed changes preclude financial support to students that are studying in such a manner that they will not gain formal qualifications from their part-time courses within the allowable time for one of the courses.

The proposed changes are proportionate and will only affect a small number of students enrolled part-time in more than one course. Under the 'allowable time' rules, a student is only eligible to receive student payments for the standard full-time duration of their course, plus an additional semester or a year depending on the length of the course units. For example, a student undertaking a three-year Bachelor level course may be eligible to receive Austudy payments for a maximum period of three and a half years, based on a course with units of six months in length.

The limitation that this Bill seeks to apply is reasonable and proportionate for encouraging students seeking income support to configure their studies to qualify them for employment in their chosen field within a reasonable timeframe.

The Hon Christian Porter MP
Minister for Social Services

12 FEB 2016

MC15-012890

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

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter of 13 October 2015 on behalf of the Parliamentary Joint Committee on Human Rights regarding the human rights compatibility of the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015. I appreciate the time you have taken to bring this matter to my attention.

In your letter you raise an assertion that the removal of the 'conscientious objector' exemption to the immunisation requirements may engage and limit the human right to freedom of thought, conscience and religion. You note that the statement of compatibility which accompanies the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 does not provide information on whether there is a rational connection between this possible limitation and the objective of encouraging immunisation and thereby preventing the spread of infectious diseases.

The rationale of the changes made by the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 is to effect practical changes that reflect the Australian Government's policy position that immunisation is an important public health measure for children, their families and the community. The aim of this policy is to further increase immunisation rates in the Australian community and therefore increase the right to health of the overwhelming majority of individual Australians by providing high community rates of immunisation against infectious diseases. This new policy will strengthen the definition relating to conscientious objection and introduce a link between vaccination and some welfare benefits, as a mechanism designed to reinforce the importance of immunisation as a matter of public education and increase rates of vaccination to enhance the protection of public health. These outcomes are sought to be achieved by providing a level of encouragement and incentive for families to more thoroughly inform themselves about the importance of immunising their children and then pursue the course of action to immunise their children.

The Government recognises that parents have the right to decide not to vaccinate their children. Nothing in the present policy approach prevents such a decision being made, however, if they make such a decision as an objector to vaccinations, their decision will mean they are no longer eligible for some government financial assistance. Importantly, an individual is not prohibited from maintaining their vaccination objection; although they will not receive some family assistance they may otherwise receive. For example, the Family Tax Benefit Part A supplement is currently $726 per year. This is a relatively small financial cost to the vaccination objectors family, particularly when compared to the cost that the spread of crippling, debilitating and deadly diseases has on our health

system and community and particularly when it is noted this is public tax-payer funded welfare money.

The financial consequences of losing access to Child Care Benefit and Child Care Rebate are not insubstantial, however, this is a proportionate policy reasonably matched to the purpose of ensuring the highest possible immunisation rates at the country's child care and early learning centres.

Additionally, you have asked that I advise whether this possible limitation to the human right to freedom of thought, conscience and religion is reasonable and proportionate for the achievement of the objective of encouraging vaccination, in particular that it is the least right restrictive approach to achieving the aim of this new policy. As noted above, there is no limitation whatsoever on freedom of thought or conscience, rather the Government has determined to no longer allocate taxpayer funded welfare payments to reward freely made decisions that diminish public health outcomes.

Further, it should be noted that article 18(3) of the International Covenant on Civil and Political Rights states that a freedom to manifest religion or beliefs may be limited by law when it is necessary to protect public safety and the health of others. It is the Government's view that when an individual decides not to vaccinate their child they are putting their child and the community at risk of infectious diseases. Following these changes, the only exemptions will be those on medical grounds i.e. where the child is unable to be vaccinated or unable to benefit from vaccination.

The Government has previously introduced policy which has improved immunisation coverage in Australia, for example through the initial linkages between immunisation and family assistance payments. However, allowing vaccination objectors to be exempt from these requirements has allowed an increase in vaccination objectors from 0.23 per cent of the population in 1999, to 1.77 per cent in 2014. This suggests that this exemption is encouraging a section of the population to avoid the vaccine requirement.

Additionally, successive governments have placed mutual obligations on recipients of social security payments. The rationale for this is that mutual obligation encourages behaviours beneficial to individuals and the broader community. For example, in order to receive Family Tax Benefit for teenagers aged between 16 and 19 years, they must be enrolled in full-time secondary study. This is to encourage teenagers to stay in school and obtain their Year 12 Certificate, as evidence shows that those teenagers who finish their education or get a trade are better off in the long term.

The overwhelming body of medical and scientific evidence supports the promotion of vaccination for the prevention of potentially crippling, debilitating and deadly diseases. By allowing the continuation of an exemption from immunisation as a vaccination objector, the Government would contradict its position that immunisation is an important public health policy. The choice not to vaccinate on the grounds of vaccination objection is neither supported by public health policy nor medical research. It is therefore important that these views, which put others' right to health at risk, should not be encouraged or accepted by Government.

It is my view that the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 is compatible with human rights because it advances the protection of the right to physical health, and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Thank you again for raising this matter with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of The House
Member for Gippsland

PDR ID: MC16-001432

17 MAR 2016

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

Dear Mr Ruddock

Thank you for your letter of 25 February 2016 seeking advice about the compatibility of the following legislative instruments with Australia's human rights obligations:

Aviation Transport Security (Prohibited Cargo – Yemen) Instrument 2015 [F2015L02056];
Aviation Transport Security (Prohibited Cargo – Somalia) Instrument 2015 [F2015L02057];
Aviation Transport Security (Prohibited Cargo – Egypt) Instrument 2015 [F2015L02058];
Aviation Transport Security (Prohibited Cargo – Bangladesh) Instrument 2015 [F2015L02072]; and
Aviation Transport Security (Prohibited Cargo – Syria) Instrument 2015 [F2015L02073];

The Committee has sought my advice as to:

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

I thank the Committee for raising these matters and offer the following information in reply.

In December 2015, the then Deputy Prime Minister and Minister for Infrastructure and Regional Development, the Hon Warren Truss MP, exercised powers under Part 4, Division 6A of the *Aviation Transport Security Act 2004* to prohibit air cargo originating from, or transiting through Yemen, Somalia, Egypt, Bangladesh and Syria.

The prohibitions are a preventive security measure, based on the Australian Government's understanding of the aviation security threat and risk environments in these countries. In assessing the potential risks, the Government has drawn on information from intelligence sources and international partners.

The prohibitions on air cargo from Syria, Egypt, Yemen and Somalia are commensurate with bans imposed by like-minded countries, including the United States and Canada. The prohibition on air cargo from Bangladesh is based on advice from the UK Department for Transport regarding poor aviation security practices at Hazrat Shahjalal Airport in Dhaka in addition to intelligence reporting of a specific terrorist threat relating to air cargo.

Although Australia does not have direct flights from any of the countries subject to the restrictions, international air cargo arrangements are complex, with cargo subject to trans-shipment and consolidation along the supply chain. This means that high-risk air cargo originating from, or transiting through, these countries could be transported to Australia.

The prohibitions apply to air cargo only. Cargo sent to third countries by sea, rail, or land freight is not restricted and the measures do not apply to passengers or their baggage. Consequently, people living in Australia who are originally from the affected countries may continue to receive goods from these countries via other transport means. I am advised that a number of exporters are using these alternative arrangements to ship goods originating from these countries to Australia.

The Government believes the action taken is a necessary precautionary measure that addresses air cargo security risks without imposing undue restrictions on the international movement of goods. The Government is monitoring air cargo security developments closely and will review the prohibitions as necessary.

I trust that this advice is of use to the Committee.

Yours sincerely

DARREN CHESTER

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MINISTER ASSISTING THE PRIME MINISTER FOR DIGITAL GOVERNMENT
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

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

Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441]

Dear Chair Philip

Thank you for your recent letter concerning the Parliamentary Joint Committee on Human Rights (the Committee)'s consideration of the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2015* instrument made by the Australian Communications and Media Authority (ACMA) on 4 September 2015.

The conditions set out at paragraph 6(g) of the Class Licence (the licence condition) provide that a person must not operate a handphone station, being a radiocommunications device for the purposes of the *Radiocommunications Act 1992* (the Act):

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.

The Committee considers that the proposed conditions may be incompatible with the right to freedom of expression for users of these devices. However, the Committee acknowledges that this right may be subject to limitations, provided that such limitations pursue a legitimate objective such as the protection of public order or public morals.

I have addressed the Committee's concerns about these limitations in turn below.

1. Is the proposed measure in the Instruments aimed at achieving a legitimate objective?

As stated at page 6 of the Explanatory Statement for the Class Licence, the proposed measure aims to achieve two legitimate objectives: (i) protection of public order; and (ii) protection of public morals.

(i) Protection of public order

Handphone stations are radiocommunications transmitters that allow for point-to-multipoint communication. They may be used to communicate material to more than one person at a time. Persons who are not the intended recipients of a communication may also overhear the communication, either deliberately or fortuitously. These features create a risk that a handphone station may be misused. For example, a handphone station might conceivably be used to incite crime or violence or general panic, or it might be used to vilify a person or group of persons. Such communications may pose risks to public order.

Handphone stations are frequently used as a vital communication tool where no other carrier service is available, for instance, by bushwalkers, or by sporting participants in remote locations. It would be undesirable for legitimate users of handphone stations to be deterred from use of the service due to seriously alarming, seriously affronting or harassing communications by other users.

The licence condition (which is drafted to reflect the terms of the equivalent statutory licence condition applying generally to radiocommunications transmitters in paragraph 108(2)(d) of the Act is designed to address these risks to public order. The protection of public order under such circumstances is considered a legitimate justification for imposing a reasonably proportionate limit on the right to freedom of expression for users of devices authorised by the Class Licence.

(ii) Protection of public morals

The operation of a handphone station under the Class Licence may result in transmissions being received and heard by the public at large, including minors. Transmissions may be heard which are entirely unsolicited, as transmissions occur over publicly accessible spectrum, transmitters and receivers may be used for a wide variety of communication purposes, and transmissions from handphone stations are generally not encrypted or otherwise protected.

As a result, there may be circumstances in which such transmissions cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted, or to feel harassed, thereby posing a threat to the protection of public morals. The Class Licence advances the objective of protecting public morals, which is expressly identified as a permitted restriction on the right to freedom of expression (Article 19(3)(b) of the International Covenant on Civil and Political Rights).

The radiofrequency spectrum is a finite public resource, which is subject to competing demands. Hence, access to it is necessarily limited, and such access is regularly given subject to conditions about the matters and content that may be transmitted using the spectrum. It is also noted for completeness that this Class Licence, of itself, does not fetter any freedom of expression generally; it merely restrains the transmission of a particular type of communication on a specific device, namely, 27 MHz Handphone Stations.

The Australian Communications and Media Authority (ACMA) has a discretionary power to issue class licences which can authorise the use of particular radiocommunications devices in particular parts of the radiofrequency spectrum on a shared basis (section 132 of the Act), subject to compliance with the conditions of the class licence.

Class licences can be a particularly efficient method by which use of parts of the radiocommunications spectrum can be authorised, noting that class licences are not issued to individual users (that is, members of the community are able to avail themselves of the authorisation granted by a class licence), class licences do not involve licence fees, and accordingly class licences involve minimal administration on the part of operators of devices, and on the part of the Commonwealth.

In the absence of a relevant class licence made by the ACMA, users of handphone stations would need to individually apply to the ACMA for an apparatus licence (under section 99 of the Act) to authorise operation of that device, unless another class licence also authorised their use. In such circumstances it is relevant that paragraph 108(2)(d) of the Act imposes precisely the same limitation on the right to freedom of expression for apparatus licensees as that imposed by the licence condition at issue.

The Committee has previously observed that the inclusion of a limitation on the freedom of expression in one Australian law does not necessarily justify the inclusion of that limitation in another Australian law. In this case, however, there is a strong justification for the Class Licence to include the same condition as appears at paragraph 108(2)(d) of the Act. If handphone stations were not licensed by the Class Licence they would be licensed by individual licence. If they were licensed by individual licence they would be subject to the licence condition at paragraph 108(2)(d) of the Act. The class licensing method maximises the administrative convenience of licensees, and the Commonwealth, as it avoids any need for persons to make individual applications for a licence. But that choice of licensing method should not have the effect of allowing these radiocommunications transmitters to be any more liable to cause risks to public order or public morality than would occur under the default licensing method of individual licence. A licence condition that reflects paragraph 108(2)(d) of the Act therefore promotes a level playing field among like devices that have like purposes and uses, and it provides a uniform level of protection for the public with respect to these devices.

Effect of other laws

In its report the Committee has said (at [1.391]) that:

> [section 474.17 of the *Criminal Code 1996* (the Criminal Code)] makes it an offence for a person to use a carriage service in a way that a reasonable person would regard as being menacing, harassing or offensive. A 'carriage service' would include the operation of a 27 MHz headphone station. As there is already a broad offence in the Criminal Code there appears no need to include the provision as a condition of the licence (breach of which becomes a criminal offence).

As the Committee notes, a carriage service is defined in section 7 of the *Telecommunications Act 1997*; as 'a service for carrying communications…'. As the use of handphone stations does not generally require the involvement of a 'carriage service', ordinarily, section 474.17 of the Criminal Code will not apply to the operation of handphone stations.

Even if the Criminal Code were to be applicable to prohibit the same behaviour, it is well recognised that licence conditions may usefully reflect provisions in the criminal law and may usefully supplement those criminal provisions (see for example the recent decision of

the High Court in *ACMA* v *Today FM (Sydney) Pty Ltd* [2015] HCA 7).

A breach of the Class Licence constitutes the offence of operating a radiocommunications device otherwise than as authorised by a class licence without a reasonable excuse under section 46 of the Act. The ACMA is also empowered to issue an infringement notice for a breach. The penalties applicable are ordinarily appropriate and proportionate to the breach of the licence condition. The disincentive provided by the licence condition provides a disincentive for operators of handphone stations to make transmissions that breach the licence condition. The disincentive directly supports the objectives of protecting public order and public morals. Under a class licensing approach, the ACMA has no other powers that can be used to achieve these objectives.

2. Is there a rational connection between the limitation on the right to freedom of expression and these legitimate objectives?

The instrument proposes a limitation which provides a disincentive for handphone station users to make transmissions that breach the licence conditions. The disincentive directly supports the objectives of protecting public order and public morals. The ACMA has advised that aside from imposing a licence condition, it has no other powers that can be used to achieve the objectives.

3. Is the limitation a reasonable and proportionate measure for the achievement of the objective?

The Class Licence provides a standing authority for users of handphone stations to communicate on designated segments of the radiofrequency spectrum. The licence condition is a proportionate means by which the objectives can be achieved for the reasons outlined above.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD

13/12/15

SENATOR THE HON MITCH FIFIELD

MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Human rights compatibility of Radiocommunications Class Licences

Philip

Dear Mr Ruddock

Thank you for your letter of 2 November 2015 concerning the twenty-sixth human rights scrutiny report of the Parliamentary Joint Committee on Human Rights (the Committee). I apologise for the delay in responding.

The Committee raised questions about conditions contained in the following Instruments made by the Australian Communications and Media Authority (ACMA):

- the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015, made on 15 June 2015; and
- the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015, made on 29 June 2015.

The conditions (the 'proposed measure') require that a person operating a citizen band (CB) radio or amateur station must not operate the station:

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.

The Committee considers that the proposed measure limits the right to freedom of expression for users of these devices. However, this right may be subject to limitations, provided that such limitations pursue a legitimate objective such as protection of public order or public morals.

I have addressed each of the Committee's concerns about these limitations in turn below.

1. Is the proposed measure in the Instruments aimed at achieving a legitimate objective?

The proposed measure aims to achieve two legitimate objectives: (i) protection of public order; and (ii) protection of public morals.

(i) Protection of public order
There may be circumstances in which a device authorised by a class licence is used to incite crime, violence, or mass panic, and thereby causing a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted. The protection of public order under such circumstances is considered a legitimate objective for imposing a limit on the right to freedom of expression for users of devices authorised by the Instruments.

(ii) Protection of public morals
The operation of a transmitter under a class licence may result in transmissions being received and heard by the public at large, including minors. Hearing transmissions may be entirely unsolicited, as transmissions occur over publicly accessible spectrum, transmitters and receivers may be used for a wide variety of communication purposes, and transmissions may not be encrypted.

As a result, there may be circumstances in which such transmissions cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or affronted, thereby posing a threat to the protection of public morals.

The radiofrequency spectrum is a finite public resource, which is subject to competing demands. Hence access to it is necessarily limited, and such access is regularly given subject to conditions about the matters and content that may be transmitted using the spectrum. For example, freedom of expression is limited by:

- paragraph 108(2)(d) of the *Radiocommunications Act 1992* (the Act), which imposes the same limitation on the right to freedom of expression for users of other communication devices that have been authorised under apparatus licences,
- the responsibilities of persons providing broadcasting services under the *Broadcasting Services Act 1992*.

The Committee has observed that the inclusion of a limitation on the freedom of expression in other Australian laws does not justify the inclusion of the limitation in the Instruments. Nevertheless, these examples are brought to the Committee's attention because they have the same aim of protecting public morals as the measures contained in the Instruments.

For these reasons, the conditions are aimed at achieving a legitimate objective of protecting public morals by minimising the risk that the general public will receive and hear unsolicited communications that might seriously alarm or affront a person, where those communications are made using a scarce public resource.

2. Is there a rational connection between the limitation on the right to freedom of expression and these legitimate objectives?

The Instruments propose a limitation which provides a disincentive for licensees and authorised persons to make transmissions that breach the licence conditions. The disincentive directly supports the objectives of protecting public order and public morals. The ACMA has advised that aside from imposing a licence condition, it has no other powers that can be used to achieve the objectives.

3. Is the limitation a reasonable and proportionate measure for the achievement of the objective?

The Instruments provide a standing authority for users of citizen band and amateur radio stations to communicate on designated segments of the radiofrequency spectrum.

The ACMA advises that the limitation is considered a reasonable and proportionate measure for achievement of the objectives for the following reasons:

(i) If authorisation for transmissions was provided not by the Instruments but instead by issuing apparatus licences to individual users, the same limitation on the right to freedom of expression would apply as specified under section 108(2)(d) of the Act.

(ii) The proposed measure is the only power available to the ACMA for the purpose of protecting public order and public morals in instances where transmissions are made using the radiofrequency spectrum, which is a scarce public resource.

(iii) The CB band of spectrum is a limited resource. There are numerous users wanting to utilise the CB band, both commercially (such as transport companies) and recreational (amateur radio users and visitors).

(iv) Transmissions occur over publicly accessible spectrum and can be heard at large by the community. Accordingly, it is possible for transmissions which use aggressive and offensive language to offend generally prevailing community standards. It is essential that users who broadcast offensive material do not exercise their right to freedom of speech or use this limited public resource in a manner that limits the freedom of speech of users who are broadcasting socially acceptable material that complies with general prevailing community standards.

(iv) The right to freedom of expression is only limited in relation to the content of a transmission made by a device authorised by the Instruments. The right is otherwise unfettered by the Instruments.

(v) A breach of the licence conditions in question may constitute the offence of operating a radiocommunications device otherwise than as authorised by a class licence without a reasonable excuse under section 46 of the Act. The penalty for such an offence is imprisonment of up to two years if the offender is an individual or 1,500 penalty units otherwise. However, a person may, if served with an infringement notice by an authorised person under the *Radiocommunications Regulations 1993*, pay a penalty of two penalty units if the person is an individual, or three penalty units in any other case. If an infringement notice is not given, or is given but not paid, then the decision to prosecute a person for such an offence would be made by the Commonwealth Director of Public Prosecutions.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD

17/3/16

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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