

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 18 to 19 April 2016 and legislative instruments received from 18 March to 14 April 2016.

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 bill and concluded that it either does not raise human rights concerns; or it does not require additional comment as it promotes human rights or contains justifiable limitations on human rights (and may contain both justifiable limitations on rights and promotion of human rights):

- Statute Law Revision Bill (No. 3) 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

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.

contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Previously considered measures

1.9 The following bill implements measures which the committee has previously considered limit human rights and the committee refers to its previous comments:

- Fair Work (Registered Organisations) Amendment Bill 2014 [No. 3].²

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 relation to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014:

- Migration Act 1958—Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [F2016L00455]; and
- Migration Act 1958—Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [F2016L00456].³

1.11 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—Declinable Transactions) Amendment Determination (No. 1) 2016 [F2016L00493]; and
- Social Security (Administration) (Excluded circumstances—Queensland Commission) Amendment Specification 2016 [F2016L00500].⁴

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)

2 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 63-65; *Ninth Report of the 44th Parliament* (15 July 2014) 21-28; and *Twenty-second Report of the 44th Parliament* (13 May 2015) 47-52.

3 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 149-194.

4 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).

regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*);⁵ 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*).⁶

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

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

Response required

1.13 The committee seeks a response or further information from the relevant minister with respect to the following bill.

Road Safety Remuneration Repeal Bill 2016

Portfolio: Employment

Introduced: House of Representatives, 18 April 2016

Purpose

1.14 The Road Safety Remuneration Repeal Bill 2016 (the bill) sought to repeal the *Road Safety Remuneration Act 2012* (RSR Act) in order to abolish the Road Safety Remuneration Tribunal (RSRT). The repeal of the RSR Act also abolishes all orders made by the RSRT, such as orders in relation to driver remuneration and minimum rates of pay.

1.15 The bill also grants the Minister for Employment the power to make rules dealing with transitional arrangements.

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

Background

1.17 The Road Safety Remuneration Repeal Bill 2016 was introduced and passed by both Houses of Parliament on 18 April 2016, receiving Royal Assent on 19 April 2016 and becoming the *Road Safety Remuneration Repeal Act 2016* (RSR Repeal Act). As such, the committee was unable to consider the bill before its passage through parliament.

1.18 The Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016 was also introduced on 18 April 2016, and seeks to suspend the operation of the Contractor Driver Minimum Payments Order 2016, and any subsequent orders that may be made by the Road Safety Remuneration Tribunal, until 1 January 2017. This bill is currently before the House of Representatives; however, as the RSR Repeal Act has now abolished the tribunal and all its orders, it will not proceed.

Abolition of Road Safety Remuneration Tribunal orders

1.19 The RSR Repeal Act repealed the RSR Act and all orders made under the RSR Act. Two orders were made by the RSRT which are now therefore no longer in effect:

- the Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014 (Order 1); and
- the Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Order 2) (together, the orders).

1.20 The primary human rights issue raised by the legislation is the right to just and favourable conditions of work, and that is the focus of the committee's analysis.

Right to just and favourable conditions of work

1.21 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).¹

1.22 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. The right to work applies broadly to those in employment type arrangements and extends to independent contractors.

1.23 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to the right to work. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) 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.

1.24 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.

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

1.25 As set out above, prior to its abolition by the RSR Repeal Act, the RSRT made two orders. Order 1 set out certain minimum conditions, but not minimum payments, for contractor drivers in the described industries of transport for supermarkets and long distance transportation. Order 2 set out the minimum rates of pay for contractor drivers in the described industries.

1.26 The orders promoted the right to just and favourable conditions of work as they improved, through the imposition of minimum standards of conditions and payments, the wages and working conditions of contractors in the described industries. The orders also sought to improve the occupational health and safety of

1 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.

contractors in the industry. In particular, the orders sought to change the way payments were structured in order to address economic factors that:

...create an incentive for truck drivers to drive fast, work long hours and use illicit substances to stay awake. These economic factors include, low rates of pay, incentive based payment methods (such as per kilometre or per trip), unpaid working time and demurrage. Other factors include the hyper-competitive nature of the industry and the low bargaining power faced by drivers.²

1.27 The orders therefore sought to promote multiple aspects of the right to just and favourable conditions of work.

1.28 By abolishing the RSRT and repealing the orders, the RSR Repeal Act engages and limits the right to just and favourable conditions of work by removing the minimum protections provided by the RSRT and its orders. The statement of compatibility to the bill explains that:

To the extent that the Bill may limit enjoyment of the right to just and favourable conditions of work, it pursues the reasonable objective of repealing the main Act to prevent any unnecessary and irreversible negative impacts on the road transport industry, particularly on the viability of owner drivers and small transport operators. The repeal of the main Act is a necessary and proportionate response to these concerns.³

1.29 The committee considers that removing a negative economic impact on owner drivers and small transport operators may be a legitimate objective for the purposes of international human rights law.

1.30 To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data.⁴

1.31 In terms of the financial impact of the orders, little information is provided in the statement of compatibility to explain, and provide evidence to support, the statement that the orders would have a negative impact on the road transport industry, particularly on the viability of owner drivers and small transport operators. The statement of compatibility explains that 'overwhelmingly the industry including owner drivers and small road transport business oppose' the orders, but does not

2 Road Safety Remuneration Tribunal (RSRT), Decision—Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (2015) RSRTFB 15 [6], available at: <http://www.rprt.gov.au/default/assets/File/decisions-files/2015rsrtfb15.pdf>.

3 Explanatory memorandum (EM), statement of compatibility (SOC) v.

4 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues.

provide a detailed description of those stakeholders nor their particular interest in the orders.

1.32 The statement of compatibility notes that 800 submissions were presented to the RSRT. However, those submissions covered a wide range of views and not all were opposed to the orders. The RSRT undertook research and consultation as well as public hearings between 2012 and 2015 both prior to, and following, the publication of a draft Order 2. The RSRT 'published a significant amount of research material, including currently applicable minimum rates; and commissioned and published a KPMG Research Project Report containing a cost model and minimum payments'.⁵

1.33 Further, in explaining how it arrived at the payment rates in Order 2, the RSRT stated that:

The minimum payments under any RSRO [road safety remuneration order] in these trip examples, even though they exclude rest time payments, are less than the trip rates at which witnesses indicated they may substitute contractor drivers for employee drivers.⁶

1.34 In order to justify the RSR Repeal Act as pursuing a legitimate objective, more information could be provided to explain the economic impact of the RSRT's orders and the reasons why it would financially harm contractor drivers notwithstanding the research and consultation undertaken by the RSRT.

1.35 In terms of the occupational health and safety aspects of the orders, the statement of compatibility explains that:

Two independent reviews, one by Jaguar Consulting of April 2014 and one by PricewaterhouseCoopers of January 2016, concluded that there is limited evidence of a link between safety and remuneration and that the main Act [Road Safety Act] has not delivered any tangible safety benefits.⁷

1.36 However, the PricewaterhouseCoopers report that the statement of compatibility relies on did find that:

There are four major studies that find a statistical link between remuneration and road safety... These studies indicate that a 1 per cent increase in remuneration can lead to a 0.06 per cent to 3.4 per cent decrease in road accident numbers involving crashes.⁸

5 RSRT, *Summary of decision [2016] RSRTFB 6 Application*, available at: <http://www.rsrt.gov.au/index.cfm/decisions-statements-orders/summaries/2016rsrtfb6/>.

6 RSRT, Decision—Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (2015) RSRTFB 15 [167].

7 EM, SOC, v.

8 PwC, *Review of the Road Safety Remuneration System Final Report* (January 2016) 78, available at: https://docs.employment.gov.au/system/files/doc/other/2016_review_of_the_rsrs.pdf.

1.37 Noting these studies, the PricewaterhouseCoopers report concluded that 'directly comparing remuneration and safety does demonstrate statistically significant correlations. However, results vary substantially'.⁹

1.38 Prior to publishing Order 2, the RSRT found that there was no new evidence to refute the findings of a 2008 National Transport Commission report that:

confirms that there is a link between how and how much truck drivers are paid and poor safety outcomes. The NTC believes that there is sufficient evidence which points to a link between rates and methods of payments, and a variety of on-road behaviours which are acknowledged contributors to truck crashes.¹⁰

1.39 This report highlights that rates of payment based on kilometres travelled rather than hours worked, led to increased fatigue and speeding in circumstances where drivers were delayed by poor scheduling of loads, and delays in loading and unloading.¹¹

1.40 Accordingly, there would at the very least appear to be a credible link between the payment rate and methodologies of truck drivers and road safety.

1.41 The statement of compatibility states that the RSRT 'has not delivered any tangible safety benefits' and notes significant regulatory overlap with other laws and regulations. The RSRT was only in operation for a short period and Order 2 was due to come into force in April 2016. Accordingly, it was too early to assess the effectiveness of the tribunal and its orders in improving road safety prior to its abolition by the RSR Repeal Act.

1.42 The statement of compatibility highlights that there is significant regulatory overlap between the RSRT and other laws and regulations that protect occupational health and safety. However, no specific information or analysis is provided to demonstrate that, in the absence of the RSRT, existing laws and regulations will provide equivalent protection to truck drivers and other road users.

1.43 Thus while removing negative economic impacts on owner drivers and small transport operators is capable of being a legitimate objective, more evidence and analysis is required on the points raised above to establish that the RSR Repeal Act achieves this objective for the purposes of international human rights law. In addition, in order for the limitation on the right to just and favourable conditions of work imposed by the RSR Repeal Act to be proportionate, it must be the least rights restrictive approach. Accordingly, it is necessary to explain why abolishing the RSRT

9 PwC, *Review of the Road Safety Remuneration System Final Report* (January 2016) 78-79 .

10 National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* (October 2008) 17, available at: <http://www.ntc.gov.au/archive/safe-payments>.

11 National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* (October 2008) 5.

and its orders is the most effective and least rights restrictive way to protect the economic interests of owner drivers.

1.44 As set out above, the RSR Repeal Act engages and limits the right to just and favourable conditions of work. The statement of compatibility does not fully justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment 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.**

Advice only

1.45 The committee draws the following instrument to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

PAYG Withholding Variation: Variation of amount to be withheld from indigenous artists when an ABN is not provided [F2016L00358]

Portfolio: Treasury

Authorising legislation: Taxation Administration Act 1953

Last day to disallow: 29 June 2016 (Senate) [tabled in the Senate 18 April 2016]

Purpose

1.46 The PAYG Withholding Variation: Variation of amount to be withheld from indigenous artists when an ABN is not provided [F2016L00358] (the instrument) repeals and replaces a previous PAYG Withholding Variation to continue to provide that no tax is to be withheld from payments made to indigenous artists for artistic works where the artist lives in a remote area and does not quote an Australian Business Number (ABN).

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

Measures bestowing a benefit on a particular group on the basis of race

1.48 The instrument provides that the withholding amount for indigenous artists who live or work in certain remote areas, and do not quote an ABN, will be nil. The instrument provides a benefit to indigenous artists in remote locations by ensuring that they are able to receive the full value of payments received for artistic works without having withholding tax deducted. While the instrument does not change the tax liability for income earned, it is designed to make it easier for indigenous artists in remote areas to manage their tax affairs and as such confers a benefit on those to whom the instrument applies. As the instrument applies only to indigenous artists, the instrument engages the right to equality and non-discrimination.

Right to equality and non-discrimination

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

1.50 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

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

1.52 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further describes the content of these rights and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

1.53 Pursuant to Article 1(4) of the ICERD, where a measure is taken for the sole purpose of advancing a disadvantaged racial or ethnic group in order to ensure such a group equal enjoyment or exercise of human rights and fundamental freedoms, this shall not be deemed racial discrimination, provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

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

1.54 The statement of compatibility for the instrument states:

This legislative instrument does not engage any of the applicable rights or freedoms because the new instrument is of a minor or machinery nature.³

1.55 However, the instrument, by applying to a particular group, distinguished on the basis of a protected status, engages the right to equality and non-discrimination. Nevertheless, the instrument is clearly beneficial to the indigenous artists to whom it applies, as the instrument maker appears to have recognised in the explanatory statement:

This provides a less onerous arrangement for those artists who, for reasons such as age, language, level of education and isolation, may not be able to fully engage with the complexities of the taxation system. Often the relevant artistic works are a joint product of a number of contributing artists, which further complicates the taxation treatment which may apply.⁴

1.56 The measure may therefore be classified as a 'special measure' as defined by article 1(4) of ICERD, as it may assist indigenous artists to pursue work and artistic

1 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

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

3 Statement of compatibility [1].

4 Explanatory statement [2].

pursuits. Even if the instrument is not characterised as a special measure, the committee considers that this differential treatment is otherwise justified as it pursues the legitimate objective of ensuring that compliance with the tax system does not undermine indigenous artists' ability to pursue their rights to work and culture, and is rationally connected and proportionate to that objective.

1.57 While the measure is compatible with human rights, the absence of any human rights analysis in the statement of compatibility should be addressed. It is important for legislation proponents and instrument makers to identify measures that support or promote human rights, as well as providing justifications for measures that limit rights.

1.58 Additionally, it is important for instrument makers to identify that when legislation clearly provides that a group is to receive differential treatment on the basis of a protected status, such as race, this needs to be acknowledged and justified in the statement of compatibility. This is particularly important as one of the considerations in determining whether a limitation on a right is proportionate, is considering whether any affected groups are particularly vulnerable.

1.59 The committee draws this matter to the Treasurer's attention; and recommends that the statements of compatibility for future instruments that provide a benefit to indigenous people address how the instrument engages and is compatible with the right to equality and non-discrimination.