



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.¹ **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 27 and 30 March 2017 (consideration of 2 bills from this period has been deferred);¹
 - legislative instruments received between 10 March and 6 April 2017 (consideration of 5 legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its examination of the previously deferred Civil Law and Justice Legislation Amendment Bill 2017 and makes no further comment on the bill.³

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.⁴ Instruments raising human rights concerns are identified in this chapter.

1.5 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 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 21.

4 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.

1.6 In addition to the bill above, the committee has also concluded its examination of the previously deferred National Disability Insurance Scheme (Plan Management) Amendment Rules 2017 [F2017L00073] and makes no further comment on the instrument.⁵

5 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

Response required

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

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

Purpose	Seeks to make a range of amendments to the <i>Australian Federal Police Act 1979</i> , <i>Crimes Act 1914</i> , and the <i>Criminal Code Act 1995</i> including clarifying the functions of the Australian Federal Police to enable cooperation with international organisations, and non-government organisations; clarifying the custody notification obligations of investigating officials when they intend to question an Aboriginal person or Torres Strait Islander; creating separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations in the <i>Crimes Act 1914</i>
Portfolio	Justice
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment (see Appendix 2)
Status	Seeking additional information

Functions of the Australian Federal Police – assistance and sharing information

1.8 Schedule 1 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) seeks to make amendments to the *Australian Federal Police Act 1979* (AFP Act) to enable the Australian Federal Police (AFP) to provide assistance and cooperation to international organisations and non-government organisations in relation to the provision of police services or police support services.

1.9 Under section 4 of the AFP Act 'police services' is defined as services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise. 'Police support services' means services related to: (a) the provision of police services by an Australian or foreign law enforcement agency; or (b) the provision of services by an Australian or foreign intelligence or security agency; or (c) the provision of services by an Australian or foreign regulatory agency.

Compatibility of the measure with the human rights

1.10 The statement of compatibility states that this measure allows for information sharing with a range of bodies such as Interpol, United Nations organisations and non-government organisations (NGOs) and accordingly:

...may engage the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as the amendments to the AFP Act provide for information sharing with international organisations, including international judicial bodies.¹

1.11 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.12 The statement of compatibility states that the objective of the measure is to ensure:

the AFP can engage fully with international organisations, including judicial bodies, and NGOs, in relation to the provision of police services and police support services.²

1.13 This is likely to be, in broad terms, a legitimate objective for the purposes of international human rights law. However, there are questions about the adequacy of safeguards that are in place with respect to AFP assistance and cooperation with such bodies including the sharing of information.

1.14 First, in respect of the right to privacy, the statement of compatibility notes that the use and disclosure of information will be subject to existing protections under the *Privacy Act 1988* (Privacy Act). However, it is not readily apparent from the statement of compatibility the extent to which the minister considers that the existing safeguards in the Privacy Act will apply with respect to AFP sharing of information with international organisations and NGOs.

1.15 The relevant principle under the Privacy Act pertaining to the use or disclosure of personal information (Australian Privacy Principle 6) contains a broad exception to the general requirement that an agency must not use or disclose 'personal information' for a secondary purpose, where the use or disclosure of information is 'required or authorised by or under an Australian law'.³ The statement of compatibility does not address whether the measure would constitute an authorisation for the purposes of Australian Privacy Principle 6.2. The legislation does not state that it provides an authorisation for the purpose of any Australian Privacy

1 Explanatory memorandum (EM) 8.

2 EM 8.

3 Australian Privacy Principle 6.2 (b).

Principle (by contrast to express statements to that effect included in some other legislation).⁴

1.16 There is a further exception for the use or disclosure of information that is reasonably necessary for enforcement activities conducted by or on behalf of an enforcement body. This exception would appear not to apply as the definition of 'enforcement body' under the Privacy Act does not extend beyond Australian agencies or other bodies. However, the statement of compatibility does not address whether the minister considers that information sharing with international organisations and NGOs may fall within this exception.

1.17 Second, the sharing of information overseas in the context of law enforcement raises concerns in respect of the right to life.

1.18 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or identified risks. While the International Covenant on Civil and Political Rights (ICCPR) does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state. As the United Nations Human Rights Committee (UNHRC) has made clear, this not only prohibits deporting or extraditing a person to a country where they may face the death penalty, but also prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UNHRC stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.⁵

1.19 The sharing of information internationally under the proposed function in schedule 1 could accordingly engage the right to life. This issue is not addressed in the statement of compatibility.

1.20 Third, a related issue potentially raised by the measure is the possibility that sharing of information, or cooperation in investigation, may result in torture, or cruel, inhuman and degrading treatment or punishment. It is noted that the right to be free from torture and cruel, inhuman and degrading treatment is absolute under

4 See, for example, *National Health Security Act 2007* section 19; *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* section 70.34; *Tax Agent Services Act 2009* section 70.34; *Product Stewardship Act 2011* section 60.

5 Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

international law and can never be subject to permissible limitations.⁶ This issue was not addressed in the statement of compatibility, including any relevant safeguards.

Committee comment

1.21 The preceding analysis raises questions as to whether the measure is compatible with the right to privacy, the right to life and the prohibition on torture, cruel, inhuman and degrading treatment.

1.22 In relation to the right to privacy, the committee therefore seeks the advice of the Minister for Justice as to the proportionality of the measure including the availability of effective and adequate safeguards, including the extent to which the provisions of the *Privacy Act 1988* will act as a safeguard against the use and disclosure of personal information for a secondary purpose.

1.23 In relation the right to life, the committee seeks the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

1.24 In relation to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).

6 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) UN Doc HRI/GEN/1, [3].

Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	<p>This bill seeks to amend several Acts relating to defence to:</p> <ul style="list-style-type: none"> • allow a positive test result for prohibited substances to be disregarded under certain circumstances; • simplify termination provisions to align with the new Defence Regulation 2016 [F2016L01568]; • ensure greater protections for all Reservists in relation to their employment and education; • include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation; and • align a small number of provisions in the <i>Australian Defence Force Cover Act 2015</i> with other military superannuation schemes and provide clarity in definitions
Portfolio	Defence
Introduced	House of Representatives, 29 March 2017
Rights	Fair trial; to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see Appendix 2)
Status	Seeking additional information

Civil penalty provisions

1.25 Schedule 2, Part 2 of the Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend the *Defence Reserve Service (Protection) Act 2001* (the Act) so that various existing criminal offences in the Act are also civil penalty provisions. The range of existing criminal offences to which the new civil penalty provisions would apply relate to discrimination in employment and partnerships, and discrimination against commission agents and contractors. Each of these criminal offences carries a penalty of 30 penalty units (currently \$5400). The proposed corresponding civil penalty would be 100 penalty units (currently \$18,000).¹

1.26 Schedule 2, Part 2 of the bill also seeks to amend the Act to introduce a new offence provision. The offence in proposed section 76B relates to victimisation of a person for reasons that include where the person has made a complaint, given

1 If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 100 penalty units would be \$21,000.

information or documents, or brought proceedings under the Act. Contravention of proposed section 76B would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

1.27 Schedule 2, Part 3 of the bill also seeks to amend the Act to introduce three new offence provisions. The new offence in proposed section 18A relates to dissolving a partnership, expelling a partner from a partnership, requiring a partner to forfeit their share in a partnership, or subjecting another partner to detriment concerning the partnership. The new offence in proposed section 23A prohibits the harassment of a protected worker,² partner or protected co-worker,³ if it is engaged in because the subject of the harassment may volunteer to render defence service, is rendering defence service, or has previously rendered defence service.

1.28 Contravention of proposed sections 76B, 18A and 23A would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

Compatibility of the measure with criminal process rights

1.29 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.30 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.⁴ Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be

2 Protected worker is defined as being an employee, commission agent or contractor, a person seeking to become an employee, commission agent or contractor, or an officer or employee of a commission agent or contractor. See explanatory memorandum (EM) 32.

3 The definition of protected co-worker incorporates relationships where people are working together, even if they are not strictly employed by the same person. See EM 32.

4 *Guidance Note 2* – see Appendix 4.

presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) apply.⁵

1.31 It is acknowledged that, as set out in the statement of compatibility, many of the civil penalty provisions are intended to promote the right to safe and healthy working conditions and 'enhance the anti-discrimination protections in the Act, and introduce new anti-victimisation and anti-harassment provisions.'⁶

1.32 As mentioned above, the committee's *Guidance Note 2* sets out detailed guidance in relation to civil penalty provisions and provides that '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 international human rights law'.⁷

1.33 However, the statement of compatibility has not addressed whether the civil penalty provisions might be considered 'criminal' for the purposes of international human rights law.

1.34 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look at its classification in domestic law. As the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.35 The second step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalties. In this regard, the explanatory memorandum explains:

Civil penalty provisions provide a less cumbersome and technical enforcement process than criminal prosecutions. Contraventions of the Act can be insidious and indirect, making it difficult to prove an offence beyond reasonable doubt. For example, establishing that an employee was dismissed or disadvantaged for a prohibited reasons will often be very difficult to prove to the criminal standard, whereas the standard of proof for a civil penalty could be met. Including a civil penalty regime will provide an important deterrent to indirect discrimination against Reserve members. Civil penalties are also more appropriate when dealing with government employers, who are not liable to criminal remedies.⁸

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

6 Statement of compatibility (SOC) 9.

7 *Guidance Note 2* – see Appendix 4.

8 EM 28.

1.36 Civil penalty provisions are more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity; and apply to the public in general. The reference to the deterrent effect of the proposed regime is therefore relevant and may indicate that the provisions are 'criminal' for the purposes of international human rights law. On the other hand, there is no indication that the regime is intended to be punitive, and it appears restricted to a particular employment context rather than applying to the public in general.

1.37 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision relative to the penalty that may be imposed for a corresponding criminal offence is relevant.

1.38 The amount of the pecuniary penalties that would be imposed under the proposed civil penalty provisions in the bill is 100 penalty units (currently \$18000). The penalties that would be imposed for the corresponding criminal offences is 30 penalty units (currently \$5400). As such, the civil penalties that would be imposed for the same offences under the Act are substantially higher than the penalties that may be imposed for the corresponding criminal offences (currently \$12600 higher). These higher penalties may indicate that the civil penalties could be considered 'criminal'.

1.39 The above analysis therefore raises questions about whether the civil penalties may be considered 'criminal' for the purposes of international human rights law. As set out above, the consequence of the provisions being 'criminal' would be that the civil penalty provisions in the bill must be shown to be consistent with the criminal process rights set out in articles 14 and 15 of the ICCPR. The statement of compatibility has not provided information to address whether each of the proposed civil penalty provisions may be considered 'criminal', and if so, whether the measures accord with criminal process rights. Accordingly, it is difficult to fully assess the human rights compatibility of the civil penalties without this further information.

Committee comment

1.40 The committee draws the attention of the Minister for Defence to its *Guidance Note 2* and seeks the advice of the minister as to whether:

- **the civil penalty provisions introduced by the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**

- if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).

Fair Work Amendment (Corrupting Benefits) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Fair Work Act 2009</i> to:</p> <ul style="list-style-type: none"> • make it a criminal offence to give a registered organisation, or a person associated with a registered organisation a corrupting benefit; • make it a criminal offence to receive or solicit a corrupting benefit; • make it a criminal offence for a national system employer other than an employee organisation to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries; • make it a criminal offence to solicit, receive, obtain or agree or obtain any such prohibited payment; • require full disclosure by employers and unions of financial benefits they stand to gain under an enterprise agreement before employee vote on the agreement
Portfolio	Employment
Introduced	House of Representatives, 22 March 2017
Rights	Fair trial; not to be tried and punished twice (double jeopardy) (see Appendix 2)
Status	Seeking additional information

New offences and concurrent operation of state laws

1.41 The Fair Work Amendment (Corrupting Benefits) Bill 2017 (the bill) proposes to introduce a number of offence provisions, including in relation to the giving, receiving or soliciting of 'corrupting benefits' or making certain payments. Proposed section 536C provides that the new part introducing these offences does not exclude or limit the concurrent operation of a state or territory law. It states that even if an act or omission (or similar act or omission) would constitute an offence under this proposed Part and would constitute an offence or be subject to a civil penalty under state or territory law, these offence provisions can operate concurrently.

Compatibility of the measure with the right to a fair trial

1.42 A specific guarantee of the right to a fair trial in the determination of a criminal charge includes the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy) (see, article 14(7) of the International Covenant on Civil and Political Rights (ICCPR)).

1.43 The effect of proposed section 536C of the *Fair Work Act 2009* appears to be that a person could be liable to be tried and punished for an act or omission under a state or territory law as well under this proposed Commonwealth law. Accordingly, the right not to be tried and punished twice for an offence is engaged and may be limited by the measure.

1.44 It is not clear if any state or territory offences (for example, criminalising corrupt benefits) may be the same or substantially the same offences as the new offences proposed (for example, the corrupting benefits offences), and if so, what effect proposed section 536C may have on the right not to be tried or punished again for the same offence.

1.45 It is noted that section 4C of the *Crimes Act 1914* provides that a person is not liable for being tried and punished twice under Commonwealth law if they have been punished for that offence under the law of a state or the law of a territory. While this is an important safeguard, it does not address possible prosecution under a state or territory law after being prosecuted under commonwealth law.

1.46 This matter is not addressed in the statement of compatibility. The committee's usual expectation is that, where a human right is engaged, the statement of compatibility provide a reasoned explanation of why the measure is compatible with that right. This conforms with the committee's *Guidance Note 1*, and the Attorney-General's Department's guidance on the preparation of statements of compatibility.

1.47 The United Nations Human Rights Committee, in General Comment 32, provides the following guidance to nation states with respect to the right not to be tried and punished twice for the same offence under article 14(7) of the ICCPR:

Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.

The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.

This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant. Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.¹

Committee comment

1.48 The preceding analysis raises questions about the compatibility of the measure with the right to a fair trial and in particular the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted. The statement of compatibility has not identified or addressed this potential limitation.

1.49 The committee therefore seeks the advice of the Minister for Employment as to whether the measure limits the right not to be tried and punished twice for an offence which is the same, or substantially the same, as an offence for which the person has already been finally convicted or acquitted.

Strict liability offences

1.50 Proposed section 536F makes it an offence for a national system employer to give cash or an in kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (2) states that strict liability applies to paragraphs (1)(a), (c) and (d) of the offence, namely:

- that the defendant is a national system employer other than an employee organisation;
- that the other person (to whom cash or in kind payments are made) is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
- that the defendant, a spouse, or associated entity of the defendant or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

1.51 The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

1 UN Human Rights Committee, *General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN.Doc CCPR/C/GC/32 (2007).

1.52 In addition, proposed section 536G makes it an offence to receive or solicit a cash or in kind payment. Proposed subsection (2) states that strict liability applies to paragraph 1(c) which provides that if the provider of the cash or in kind payment were to provide the benefit to the defendant or another person, the provider or another person would commit an offence against subsection 536F(1). The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

Compatibility of the measures with the right to be presumed innocent

1.53 As set out above, article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements). Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is available to the defendant. Strict liability may apply to whole offences or to elements of offences.

1.54 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.²

1.55 While the statement of compatibility acknowledges that the offences engage and limit the right to be presumed innocent, it argues that this limitation is permissible. The statement of compatibility argues that that the attachment of strict liability is necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.³ However, the statement of compatibility does not explain how the imposition of strict liability is effective to achieve, or a proportionate means of achieving, this objective.⁴ Further information from the minister in this regard will assist the committee to conclude whether the measure permissibly limits the right to be presumed innocent.

Committee comment

1.56 Noting that strict liability offences engage and limit the right to be presumed innocent, the preceding analysis raises questions about whether the strict liability offences are a permissible limitation on this right.

2 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

3 Statement of compatibility (SOC) viii.

4 See, SOC viii.

1.57 The committee draws to the attention of the Minister for Employment its *Guidance Note 2* which sets out information specific to strict liability offences.

1.58 The committee requests the further advice of the minister as to:

- how the strict liability offence is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Purpose	Amends the <i>Fair Work Act 2009</i> to: <ul style="list-style-type: none"> • increase maximum civil penalties for certain serious contraventions of the Act; • hold franchisors and holding companies responsible for certain contraventions of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them; • clarify the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work; • provide the Fair Work Ombudsman with evidence-gathering powers similar to those available to corporate regulators such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission
Portfolio	Employment
Introduced	House of Representatives, 1 March 2017
Rights	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself; privacy (see Appendix 2)
Status	Seeking additional information

Civil penalty provisions

1.59 Schedule 1, Part 1 of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) would increase the maximum civil penalties for failure to comply with certain provisions of the *Fair Work Act 2009* (Fair Work Act) and would introduce a new civil penalty provision for 'serious contraventions' of certain existing provisions of the Fair Work Act.¹ The maximum penalty for a 'serious contravention' would be 600 penalty units (\$108,000).²

1.60 Proposed section 557A provides that a contravention is a 'serious contravention' if the conduct was deliberate and part of a systematic pattern of

1 See proposed section 539(2).

2 See proposed section 539(2). If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 600 penalty units would be \$126,000.

conduct relating to one or more persons. The range of existing civil penalty provisions to which the 'serious contravention' provision would apply are mostly in respect of conduct by employers, however, some of the provisions also apply to individual persons including employees.³ Depending on the particular civil penalty provision under the Fair Work Act, there may be a range of persons and organisations that may seek to have a civil penalty imposed including an employee, an employer, an employee organisation, an employer organisation or an inspector.⁴

1.61 Schedule 1, Part 2-5 of the bill would also introduce a number of new civil penalty provisions which can apply to individuals including for failing to comply with a notice from the Fair Work Ombudsman (FWO), hindering or obstructing the FWO or providing false information or documents.⁵

Compatibility of the measure with criminal process rights

1.62 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the increased civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.63 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out

3 The range of existing civil penalty provisions to which the 'serious contravention' provision would apply include: for an employer contravening national employment standards (section 44 of the Fair Work Act); for a person contravening a term of a modern award (section 45 of the Fair Work Act); for a person contravening a term of an enterprise agreement (section 50 of the Fair Work Act); for a person contravening a workplace determination (section 280 of the Fair Work Act); for an employer contravening a national minimum wage order (section 293 of the Fair Work Act); for an employer contravening a term of an equal remuneration order (section 305 of the Fair Work Act); for an employer failing to comply with requirements regarding the method and frequency of payments (section 323 of the Fair Work Act); for an employer requiring an employee to unreasonably spend any part of an amount payable in relation to the performance of work (section 325 of the Fair Work Act); for an employer to fail to comply with obligations with respect to annual earnings (section 328 of the Fair Work Act); for an employer failing to comply with requirements to make and keep certain employee records; (section 535 of the Fair Work Act); for an employer failing to comply with requirements with respect to payslips (section 536 of the Fair Work Act).

4 See Fair Work Act section 539.

5 See proposed sections 712(B)(1); 717(1); 718A(1).

some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.⁶

1.64 Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) and the right not to incriminate oneself apply.⁷

1.65 The statement of compatibility usefully refers to the committee's *Guidance Note 2* and undertakes an assessment of whether the civil penalty provisions in the bill should be considered to be 'criminal' for the purposes of international human rights law.⁸ The provisions are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.66 In relation to the nature and purpose of the penalty, a penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context and proceedings are instituted by a public authority with statutory powers of enforcement. In this regard, the statement of compatibility argues that the nature of the penalty means that it should not be considered 'criminal':

The penalties only apply to the regulatory regime of the Fair Work Act (e.g. employers), rather than to the public in general. While the FWO has enforcement powers, in many cases enforcement does not rest solely with the FWO. Proceedings in relation to the underpayment of wages or record keeping failures for example may also be brought by an affected employee or union...These factors all suggest that the civil penalties imposed by the Fair Work Act are civil rather than criminal in nature.⁹

1.67 This argument supports the civil character of the relevant provisions under international human rights law, however a countervailing consideration is that the Fair Work Act governs terms of employment very broadly, such that it is unclear whether the regime can categorically be said not to apply to the public in general.

6 *Guidance Note 2* – see Appendix 4.

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

8 Explanatory memorandum (EM), Statement of compatibility (SOC) 3.

9 EM, SOC 3-4.

1.68 In relation to the severity of the penalty, a penalty is likely to be considered criminal for the purposes of international human rights law if it carries a term of imprisonment or a substantial pecuniary sanction. A maximum penalty of 600 penalty units (\$108,000)¹⁰ is proposed in relation to a number of the provisions. In relation to the severity of the penalty, the statement of compatibility argues that the provisions should not be considered 'criminal' as:

The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there is no sanction of imprisonment for non-payment of penalties. Only courts may apply a pecuniary penalty. The pecuniary penalties are set at levels which are considered to be consistent with the nature and severity of the corresponding contraventions.¹¹

1.69 Further, according to the explanatory memorandum, the severity of the increased or new penalties proposed in the bill are aimed at addressing concerns about the preventing the exploitation of vulnerable workers.¹² The explanatory memorandum states that the bill:

...addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.¹³

1.70 This provides one argument as to why the penalties may be considered civil, rather than criminal, in nature insofar as they apply to employers found to have contravened the relevant protections in the Fair Work Act. However, there is a significant, broader range of conduct in respect of which the increased or new civil penalties will apply. While most of the provisions apply to employers, some of the provisions may apply to individuals including employees.

1.71 For example, the failure of an individual employee together with other employees to comply with a workplace determination may result in the application of a significant civil penalty of 600 penalty units (\$108,000), a 10-fold increase from the current maximum penalty of 60 penalty units.¹⁴ The potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of

10 If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 600 penalty units would be \$126,000.

11 EM, SOC 5.

12 See EM i; EM, SOC 5.

13 EM i.

14 See item 8; see also section 280 of the Fair Work Act.

international human rights law. It is unclear how the application of this substantial increase in the civil penalty to any contravention of a term of a workplace determination by 'a person' addresses the concerns regarding exploitation of vulnerable workers by employers identified in the explanatory memorandum.

1.72 Accordingly, the statement of compatibility has not provided sufficient information to address whether those increased civil penalties proposed in the bill which apply to individuals including employees may be considered criminal and, if so, whether the measure accords with the right to a fair trial.

Committee comment

1.73 The committee seeks the advice of the Minister for Employment as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*), addressing in particular:

- **whether the severity of the civil penalties that may be imposed on individuals including employees is such that the penalties may be considered criminal;**
- **whether the increases in the maximum civil penalties could be limited so as to, not apply, or to be reduced, in respect of individuals including employees; and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).**

Requirement to comply with Fair Work Ombudsman Notice – coercive information-gathering powers

1.74 The bill proposes to provide the FWO with a range of evidence gathering powers. Proposed section 712A would empower the FWO to require a person, by notice (FWO notice) to give information, produce documents or attend before the FWO to answer questions where the FWO reasonably believes the person has information or documents relevant to an investigation.¹⁵ Failure to comply with the FWO notice may result in a civil penalty of 600 penalty units (\$108,000).¹⁶

1.75 Under proposed section 713(1) a person is not excused from giving information, producing a record or document or answering a question under the

15 See proposed section 712B.

16 See proposed section 712B; EM 17.

FWO notice on the basis that to do so might tend to incriminate the person.¹⁷ Proposed section 713(3) provides that information provided by an individual under a FWO notice is not admissible in evidence against the individual in proceedings. This is subject to exceptions in relation to failures to comply with the FWO notice and false and misleading information. It is also subject to exceptions for particular criminal offences under the Criminal Code under section 137.1 or 137.2 relating to false and misleading information and section 149.1 in relation the obstruction of Commonwealth officials.¹⁸

Compatibility of the measure with the right to privacy

1.76 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

1.77 The breadth of this power to compel individuals to provide information including private and confidential information and attend for questioning is a serious and extensive limitation on the right to privacy. The power applies even in respect of information which may tend to incriminate the individual and serious penalties may be imposed for non-compliance.¹⁹

1.78 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.79 The statement of compatibility acknowledges that the powers would engage the right to privacy and identifies the objective of the powers as:

...helping to achieve positive investigative outcomes where existing powers have been demonstrated to fall short...New powers will enable the most serious cases involving the exploitation of vulnerable workers to be properly [sic] investigated and help ensure the lawful payment of wages.²⁰

1.80 In broad terms achieving positive investigative outcomes in relation to serious cases of exploitation and ensuring the lawful payment of wages is likely to be a legitimate objective for the purposes of international human rights law.

1.81 However, the statement of compatibility provides very limited information as to whether the measure will be rationally connected to, or a proportionate way of,

17 See proposed section 713.

18 See proposed section 713.

19 See proposed section 713(1).

20 EM, SOC 6.

achieving this objective. There is no reasoning or evidence provided as to how it is anticipated that the powers will be effective in achieving their objective.

1.82 Instead the statement of compatibility states that the new powers are similar to those provided in other regimes, but provides no further details as to the effectiveness of these existing powers. It is noted that the fact some other bodies may have coercive evidence gathering powers does not mean those regimes are justifiable limits on the right to privacy, nor does it necessarily mean that such powers will be justifiable limits in this particular context. The committee has previously considered similar coercive evidence gathering powers in the workplace relations context for the building and construction industry, and could not conclude that such powers were compatible with the right to privacy.²¹ The committee's consideration of similar measures and its previous concerns about human rights compatibility were not addressed in the statement of compatibility.

1.83 To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. However, there are serious questions about whether such powers constitute a proportionate limit on the right to privacy in this case.

1.84 First, the breadth of the powers in question seems to be much broader than necessary to address the stated objective of the measure. The powers are not limited to achieving positive investigative outcomes in relation to the exploitation of workers and ensuring the lawful payment of wages. Rather the information that might be compelled applies to a broad range of industrial matters. This could include, for example, matters relating to the regulation of industrial action by employees. Accordingly, the proposed powers appear to be insufficiently circumscribed with reference to the stated objective of the measure.

1.85 Second, the statement of compatibility argues that the 'FWO's graduated approach to compliance and enforcement means that these powers will only be used where other co-operative approaches [sic] have failed or are inappropriate.²² However, no such restriction on the use of these powers is contained in the bill. This means that the powers could be used in a much broader range of circumstances and accordingly raises further questions about whether the measure as drafted is sufficiently circumscribed.

1.86 Third, it is unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limit on human rights. The statement of compatibility

21 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66; Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

22 EM, SOC 6.

addresses some safeguards that may be available in relation to the exercise of the measure including providing 14 days' notice to a person and permitting a person's lawyer to be present during questioning. However, the absence of external review of an FWO notice at the time it is made may substantially reduce the adequacy of these safeguards. For example, there is no requirement that an application be made to the Administrative Appeals Tribunal (AAT) for the grant of a notice as was the case with previous legislation which regulated particular industries. It is noted that such a process could assist to ensure a FWO notice is necessary in an individual case.²³ The statement of compatibility does not address the apparent lack of external safeguards that would apply *prior* to issuing an FWO notice, nor what oversight mechanisms will exist in relation to the regime.

1.87 Fourth, as noted above, the committee has previously considered similar coercive evidence gathering powers in the workplace relations context and could not conclude that such powers were compatible with the right to privacy.²⁴ Australia has also been criticised for similar coercive information gathering powers by international treaty monitoring bodies on the basis of the breadth of the powers conferred and the absence of adequate safeguards on a number of occasions.²⁵

1.88 Fifth, it is unclear whether such extensive coercive powers, which go beyond those that are usually available to police in the context of criminal investigations, are proportionate to the investigation of industrial matters. It is noted in this respect that section 713(1) also abrogates the privilege against self-incrimination. The question arises as to whether the measure is the least rights restrictive way of achieving the stated objective of the measure as required to be a permissible limit on the right to privacy.

23 See *Fair Work (Building Industry) Act 2012* section 45 (now repealed).

24 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66; Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

25 International Labour Organization, Committee on Freedom of Association, Case No 2326 (Australia), June 2006; See Committee on Freedom of Association, Case No 2326 (Australia), Report in which the committee requests to be kept informed of development - Report No 338, November 2005, paras 454-456; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, paras 21-24; Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, p 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

Committee comment

1.89 The preceding analysis raises questions about the compatibility of proposed coercive powers to compel individuals to provide information and attend for questioning with the right to privacy.

1.90 The committee therefore seeks the advice of the Minister for Employment as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including with regard to the matters set out at [1.82] to [1.88].

Compatibility of the measure with the right to not to incriminate oneself

1.91 The specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

1.92 Proposed section 713(1) engages and limits this right by providing that a person is not excused from giving information, producing a record or document or answering a question under a FWO notice on the basis that to do so might tend to incriminate that person.

1.93 While the right not to incriminate oneself may be permissibly limited provided the limitation is appropriately justified, this right was not assessed in the statement of compatibility so no justification was provided. The committee's usual expectation where a measure limits 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, is rationally connected to that objective and is a proportionate way to achieve that objective. This conforms with the committee's *Guidance Note 1*,²⁶ and the Attorney-General's Department's guidance on the preparation of statements of compatibility.²⁷

1.94 While the statement of compatibility does not provide an assessment of the measure against the right not to incriminate oneself, the explanatory memorandum provides some relevant information:

Abrogating the privilege against self-incrimination is necessary to ensure the FWO has all the available, relevant information to properly carry out its statutory functions. It is particularly important to address non-

26 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) – Appendix 4.

27 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues* at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf>.

compliance by those determined to disregard workplace laws... those who may be best placed to give information about possible contraventions of workplace laws may have had some level of involvement in those contraventions or may have contravened another law. If the privilege is not abrogated, there may be no reason for such individuals to provide information to the FWO.²⁸

1.95 It can readily be accepted that the removal of the privilege against self-incrimination means that more information might be obtained by the FWO to carry out its functions. However, without further information, this explanation does not sufficiently identify a legitimate objective, that is, one which addresses a pressing and substantial concern, for the purposes of international human rights law.²⁹

1.96 Assuming that the measure pursues the stated objective in relation to the right to privacy, outlined above, of achieving positive investigative outcomes in relation to serious cases of exploitation and ensuring the lawful payment of wages, there remain questions as to whether the measure is rationally connected to and a proportionate means of achieving that objective.

1.97 The availability of use and derivative use immunities can be one important factor in determining whether the limit on the right not to incriminate oneself is proportionate. It is noted that partial use immunity would be provided for criminal offences, meaning no information or documents obtained under a FWO notice would be admissible in evidence in proceedings subject to exceptions.³⁰ However, no derivative use immunity is provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a derivative use immunity raises questions about whether the measure is the least rights restrictive way of achieving its objective.

1.98 While not addressed in the statement of compatibility, the explanatory memorandum provides some information as to why a derivative use immunity has not been provided:

Provision of a derivative use immunity means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings, even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently.³¹

28 EM 19.

29 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) – Appendix 4.

30 See proposed section 713(3).

31 EM 21.

1.99 It is noted, however, that administrative difficulties, in and of themselves, are unlikely to be a sufficient reason for not providing a derivative use immunity, if this is otherwise a less rights restrictive way of achieving the objective of the measure.

Committee comment

1.100 The preceding analysis raises questions about the compatibility of the coercive information gathering powers in the bill with the right not to incriminate oneself.

1.101 The statement of compatibility has not identified or addressed the limitation on the right not to incriminate oneself. The committee therefore seeks the advice of the Minister for Employment as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and
- whether a derivative use immunity could be included in proposed section 713(3) to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents under a FWO notice cannot be used in evidence against that person.

Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	Seeks to amend various Acts administered by the Prime Minister to update outdated provisions; repeal two Acts; align annual reporting requirements of the Auditor-General with his or her responsibility to the Parliament; and provide new powers to royal commissions to require a person to provide information or a statement in writing; and increases the penalty from six months' to two years' imprisonment for failure of a witness to attend a royal commission
Portfolio	Indigenous Affairs
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; reputation; fair trial; not to incriminate oneself (see Appendix 2)
Status	Seeking additional information

Background

1.102 The Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend several provisions of the *Royal Commissions Act 1902* (RC Act). The committee has previously raised concerns in relation to the powers of royal commissions as they affect a range of human rights including the right to a fair trial, the right not to incriminate oneself, the right to privacy and reputation, right to freedom of expression, right to liberty and the right to freedom of assembly.¹

Coercive powers of Royal Commissions—increased penalty for failing to attend a Royal Commission as a witness

1.103 Section 3 of the RC Act provides that a person served with a summons to appear as a witness before a royal commission shall not fail to attend unless excused or released. The bill seeks to increase the maximum penalty for a failure to attend from six months' imprisonment or a \$1000 fine to two years' imprisonment.

1 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; and *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third report of 2013* (13 March 2013); and *Seventh report of 2013* (5 June 2013) 91.

1.104 Section 6A(2) of the RC Act provides that a person appearing as a witness is not excused from answering a question on the ground that the answer might tend to incriminate that person.

Compatibility of the measure with the right not to incriminate oneself

1.105 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.106 The RC Act is designed to enable the establishment of royal commissions with significant information gathering powers but not law enforcement powers. Royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts. Accordingly, the investigative functions of a royal commission sit, in part, outside the protections of the right to a fair trial as a royal commission is not determining a criminal charge but undertaking a broader examination of an issue.

1.107 However, the right to a fair trial, and more particularly the right not to incriminate oneself, is directly relevant where a person is required to give information to a royal commission which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. By increasing the penalty for a witness who fails to attend and give evidence to a royal commission in circumstances where the witness will not be afforded the privilege against self-incrimination, the measure engages and limits the right not to incriminate oneself. Current section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions (DPP) in these circumstances.

1.108 While the right not to incriminate oneself may be subject to permissible limitations in a range of circumstances, the statement of compatibility does not acknowledge that this right is engaged and limited, so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.109 The statement of compatibility briefly discusses the abrogation of the right not to incriminate oneself (although without acknowledging the limitation placed upon that right), and the availability of a 'use' immunity such that where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person.²

1.110 The availability of immunities is relevant to whether a measure is a proportionate limitation on the right not to incriminate oneself. However, it is noted that no 'derivative use' immunity is provided in this case and this may be relevant to

2 Explanatory memorandum (EM) 5. See section 6DD.

the question of whether the limitation is proportionate.³ This issue was not addressed in the statement of compatibility.

1.111 Furthermore, the statement of compatibility does not acknowledge the committee's previous concerns, stated on a number of occasions, with respect to related powers and the effect that strengthening these powers may have.⁴

Committee comment

1.112 The statement of compatibility does not acknowledge that the measure engages and limits the right not to incriminate oneself and therefore does not provide an assessment of whether that limitation is justifiable. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether a derivative use immunity would be workable.**

Compatibility of the measure with the right to privacy

1.113 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

1.114 By increasing the penalty for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

1.115 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.116 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and

3 A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

4 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

Committee comment

1.117 The statement of compatibility has not identified or addressed the limitation on the right to privacy imposed by the measure. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Coercive powers of Royal Commissions—Power to require person to give information or statement in writing

1.118 The bill seeks to amend section 2(3B) of the RC Act to give a royal commission the power to issue a notice requiring a person to give information or a statement in writing.

1.119 Section 6A(1) of the RC Act provides that a person is not excused from producing a document or other thing on the basis that it might incriminate that person.

1.120 Section 6P of the RC Act provides that a royal commission is empowered to disclose evidence relating to a contravention of the law to certain persons and bodies including the police and the DPP.

Compatibility of the measure with the right to privacy

1.121 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information and the right to control the dissemination of information about one's private life.

1.122 As the measure would provide powers for a royal commission to require, on a compulsory basis, a person to give a written statement or written information (including private and confidential information), the measure engages and limits the right to privacy. It does so in circumstances where the person providing the document is not afforded the privilege against self-incrimination.⁵

1.123 Information provided under such powers may be disclosed to the police or DPP under section 6P of the RC Act. By expanding the range of information that may be compulsorily acquired and then subject to disclosure, the measure further engages and limits the right to privacy.

5 RC Act section 6A(1).

1.124 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected and proportionate to achieving that objective.

1.125 The statement of compatibility acknowledges that the measure engages and limits the right to privacy but argues that the limitation is permissible on the basis that:

The collection and use of that personal information is a proportionate limitation of the right to privacy in pursuit of a legitimate objective to ensure a Royal Commission can fully inquire into, and report on, matters of public importance.⁶

1.126 In broad terms, ensuring that a royal commission can fully inquire into matters of public importance is likely to be a legitimate objective for the purposes of international human rights law. As noted above, royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts.

1.127 The compulsory provision of information is also likely to be rationally connected to this objective as the collection of further information may assist the royal commission's inquiry function. However, the statement of compatibility has not demonstrated that the measure imposes a proportionate limitation on the right to privacy in pursuit of that legitimate objective. In particular, the statement of compatibility has provided no information about why the measure is necessary to achieve the legitimate objective nor addressed whether there are adequate safeguards in place with respect to the exercise of this power.

1.128 Additionally, as noted above, the statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures that expand existing powers.⁷

Committee comment

1.129 The committee therefore seeks the advice of the Minister for Indigenous Affairs as to whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including the availability of less rights restrictive measures and the existence of relevant safeguards).

6 EM 5.

7 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

Compatibility of the measure with the right not to incriminate oneself

1.130 As set out above, article 14 of the ICPPR protects the right not to incriminate oneself. The measure engages and limits this right as the requirement to give information or a statement in writing applies regardless of whether such information might incriminate the person.

1.131 It is noted in this respect that such information may be disclosed to the police or DPP under existing powers.⁸ By expanding the range of information that may be compulsorily acquired and then subject to disclosure, in circumstances where the person was not afforded the privilege against self-incrimination, the measure further engages and limits the right not to incriminate oneself.

1.132 The statement of compatibility does not acknowledge that this right is engaged and limited so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.133 As set out above, the legitimate objective of the measure appears to be 'to ensure a Royal Commission can fully inquire into, and report on, matters of public importance'.⁹ The measure also appears to be rationally connected to this legitimate objective.

1.134 However, the statement of compatibility has not demonstrated that the measure imposes a proportionate limitation on the right not to incriminate oneself in pursuit of that legitimate objective. As set out above at [1.110], the availability of immunities is relevant to whether a measure is a proportionate limitation on the right not to incriminate oneself. However, no 'derivative use' immunity is provided in the RC Act and this may be relevant to the question of whether the limitation is proportionate.

Committee comment

1.135 The statement of compatibility does not acknowledge that the measure engages and limits the right not to incriminate oneself and therefore does not provide an assessment of whether that limitation is justifiable. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether a derivative use immunity would be workable.**

Compatibility of the coercive powers of royal commissions with multiple rights

1.136 In addition to the right not to incriminate oneself and the right to privacy, the committee has previously raised concerns in relation to the powers of royal

8 RC Act section 6P.

9 EM 5.

commissions including against the right to reputation, the right to freedom of expression, the right to liberty and the right to freedom of assembly on a number of occasions.¹⁰ The statement of compatibility does not acknowledge or address the committee's previous concerns with respect to related powers.

1.137 The Australian Law Reform Commission also identified a number of human rights concerns in relation to royal commissions in its 2009 report, *Making Inquiries: A statutory framework*.¹¹

1.138 The existing RC Act was legislated prior to the establishment of the committee, and for that reason, has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of amendments without the benefit of a foundational human rights assessment of the RC Act from the Minister for Indigenous Affairs.

Committee comment

1.139 The committee seeks the advice of the Minister for Indigenous Affairs as to whether a foundational assessment of the *Royal Commissions Act 1902* could be undertaken to determine its compatibility with human rights (including in respect of matters previously raised by the committee).

10 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

11 See Australian Law Reform Commission, *Making Inquiries: A statutory framework* (2009).

Social Services Legislation Amendment Bill 2017

Purpose	Contains a number of reintroduced measures including extension of the ordinary waiting period to persons claiming youth allowance (other) or parenting payments
Portfolio	Social Services
Introduced	Senate, 22 March 2017
Right	Social security (see Appendix 2)
Status	Seeking additional information

Background

1.140 The Social Services Legislation Amendment Bill 2017 (the bill) contains a number of reintroduced measures which have previously been examined by the committee. The following schedules to the bill have previously been found to be compatible with human rights:

- Schedule 1—Indexation;¹
- Schedule 2—Automation of income stream review processes;² and
- Schedule 4—Family tax benefit.³

1.141 In relation to Schedule 3—Ordinary Waiting Periods, the committee previously considered this measure in a number of reintroduced bills.⁴ In its *Twelfth report of the 44th Parliament* the committee concluded that the measure, as well as

1 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 51.

2 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 52.

3 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 94-95.

4 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 78-80; and *Twelfth report of the 44th Parliament* (24 September 2014) 61-62. The measure has since been included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014, Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2016 and Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017.

a number of other measures contained in the bill, was compatible with the right to social security and the right to an adequate standard of living on the basis of budget constraints articulated at the time constituting a legitimate objective for the purposes of international human rights law.

1.142 The bill passed both Houses of Parliament on 29 March 2017 and received Royal Assent on 12 April 2017.

Schedule 3—Ordinary Waiting Periods

1.143 Schedule 3 of the bill extends the ordinary waiting period to youth allowance (other) and the parenting payment. The ordinary waiting period is a one-week period that new claimants must serve before they are able to start accessing payments, and currently applies to recipients of newstart allowance and sickness allowance. A number of exemptions and waivers are available in certain circumstances, including for persons experiencing severe financial hardship.

Compatibility of the measure with the right to social security and right to an adequate standard of living

1.144 The right to social security 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. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.

1.145 The committee has previously considered that the measure engages and limits the right to social security and an adequate standard of living. This is because, in imposing a waiting period for further recipients of social security payments, the measure is a retrogressive measure or backward step for the purposes of international human rights law.⁵

1.146 As noted above at [1.141], the committee concluded at that time that the measures were likely to be compatible in the context of budgetary constraints constituting a legitimate objective for the purposes of international human rights law.⁶

1.147 As set out in the committee's *Guidance Note 1*, in order 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. The statement of compatibility does not explain how the

5 For more information on retrogressive measures see *Guidance Note 1* at Appendix 4.

6 See Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 61-62.

measure still pursues the same pressing or substantial concern of budgetary restraints as it did during the committee's consideration of the measure more than two years ago.

1.148 The statement of compatibility sets out an objective of the measures as 'ensuring a sustainable and well-targeted payment system'.⁷ While this may be considered legitimate 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. Further, while some information is provided about emergency payments where a person is unable to meet basic necessities during the waiting period, it is noted that the qualifying criteria for these emergency payments is also being tightened by the bill.⁸ In this context, it is unclear whether there will be persons who are left without means of meeting basic necessities during the waiting period. The availability of emergency payments will affect the proportionality of the limitation.

Committee comment

1.149 The preceding analysis indicates that the right to social security and right to an adequate standard of living are engaged and limited by the measure. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

1.150 The committee therefore seeks further advice from the Minister for Social Services as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

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

1.151 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 parenting payments, and social security payments more broadly, reductions to access to such payments under the bill would

7 Explanatory memorandum (EM), statement of compatibility (SOC) 26.

8 EM, SOC 23.

disproportionately impact upon this group and the right to equality and non-discrimination is therefore also engaged.

1.152 The statement of compatibility acknowledges the engagement of this right, and sets out that:

As more than 90 per cent of parenting payment recipients are women, the changes may more significantly impact on women in that regard. However, the changes are reasonable and proportionate to achieving the legitimate objective of providing consistency across similar working age payments by ensuring that all new claimants meet their own living costs for a short period before receiving Government assistance, where they are able.⁹

1.153 As noted above at [1.147], for the purposes of international human rights law a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. It has not been set out in the statement of compatibility why 'providing consistency across payments' is a legitimate objective, or why it is necessary to extend the ordinary waiting period to recipients of further social security payments at this time.

Committee comment

1.154 The right to equality and non-discrimination (indirect discrimination) is engaged and limited by the measure by reason of its particular impact on women. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

1.155 The committee therefore seeks further advice from the Minister for Social Services as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Treasury Laws Amendment (2017 Measures No. 1) Bill 2017

Purpose	Amends the <i>Income Tax Assessment Act 1997</i> to ensure that investors who invest through an interposed trust are able to access the certain capital gain concessions; and the <i>Australian Securities and Investments Commission Act 2001</i> to specify that the sharing of confidential information by the Australian Securities and Investments Commission with the Commissioner of Taxation is authorised use and disclosure of that information
Portfolio	Treasury
Introduced	House of Representatives, 16 February 2017
Right	Privacy (see Appendix 2)
Status	Seeking additional information

Background

1.156 The bill passed both Houses of Parliament on 27 March 2017.

Sharing of confidential information with the Commissioner of Taxation

1.157 Schedule 2 of the Treasury Laws Amendment (2017 Measures No. 1) Bill 2017 (the bill) amended subsection 127(2A) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to allow the Australian Securities and Investments Commission (ASIC) to share confidential information with the Commissioner for Taxation (commissioner) without first needing to be satisfied that doing so would enable or assist the commissioner to perform or exercise their functions or powers.

Compatibility of the measure with the right to privacy

1.158 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of personal and confidential information.

1.159 Schedule 2 of the bill engages and limits the right to privacy by allowing ASIC to share confidential information with the commissioner. The right to privacy may be subject to permissible limitations where it pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective.

1.160 The statement of compatibility recognises that the right to privacy is engaged, but explains the measure as follows:

The amendment to the process for ASIC to share information with the Commissioner of Taxation mirrors the existing power for the Commissioner of Taxation to share confidential information with ASIC under Division 355 of Schedule 1 to the *Taxation Administration Act 1953*.

Mirroring the information sharing process between ASIC and the Commissioner of Taxation will enable effective and timely collaboration during investigations into illegal and high risk activities. The amendment is a reasonable change as it will allow ASIC and the Commissioner of Taxation to more effectively work together to ensure compliance with corporate and taxation laws.

Furthermore, the amendment is appropriate as it will ensure that the process for ASIC to share confidential information with the Commissioner of Taxation is consistent with the process for ASIC to share confidential information with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the relevant Minister.

...A simpler and more efficient information sharing arrangement between ASIC and the Commissioner of Taxation is justified as it will benefit the community by enabling better monitoring of illegal and other high-risk activities by the Commissioner of Taxation and strengthen corporate compliance with taxation law.¹

1.161 Under the existing law, the ASIC may share confidential information with the commissioner if the ASIC is satisfied that the information will enable or assist the commissioner to perform or exercise their functions or powers. This approach would appear to have allowed for the sharing of confidential information in fairly broad terms.

1.162 The objective of the measure appears to be to enable the commissioner to 'conduct timely compliance activity and better protect the integrity of Australia's tax system'.² While this objective may be legitimate for the purposes of international human rights law, the statement of compatibility does not provide information to demonstrate how the existing law was not sufficiently simple or effective. It is therefore unclear whether the limitation on the right to privacy is proportionate to the stated objective; in particular, it is unclear whether the measure is the least rights restrictive approach to achieving the objective of the measure. In order to be a permissible limit on the right to privacy, regimes that permit the disclosure of personal and confidential information need to be sufficiently circumscribed. Disclosure of information should be restricted to that private and confidential information which is strictly necessary to achieve the stated objective of the measure.

1.163 The removal of the requirement for there to be an assessment by ASIC that sharing confidential information would enable or assist the commissioner to fulfil their functions raises the concern that the measure may not be sufficiently circumscribed. The statement of compatibility does not explain why such an assessment is not required, or is inappropriate.

1 Explanatory memorandum (EM), statement of compatibility (SOC) 18-19.

2 EM, SOC 18.

1.164 Nor does the statement of compatibility identify whether sufficient safeguards are in place to ensure that the unnecessary sharing of personal or confidential information will not have an adverse effect on individuals whose information has been shared. The assessment previously required by ASIC may have assisted to ensure that only necessary sharing of information took place. The statement of compatibility identifies safeguards which remain under the proposed legislation, including restrictions on the scope of information that can be requested by the commissioner, and Division 355 of Schedule 1 to the *Taxation Administration Act 1953*, which makes the unauthorised disclosure of confidential information an offence. However, these safeguards alone do not appear to be sufficient to demonstrate that the limitation on the right to privacy is proportionate in light of the concerns raised above.

Committee comment

1.165 The right to privacy is engaged and limited by the ability for the Australian Securities and Investments Commission to share confidential information with the Commissioner for Taxation without first needing to be satisfied that doing so would enable or assist the Commissioner for Taxation to perform or exercise their functions or powers. The preceding analysis raises questions as to whether the measure is a proportionate limit on the right to privacy including whether there are the less rights restrictive ways to achieve the stated objective of the measure.

1.166 Accordingly, the committee requests the advice of the Treasurer as to whether:

- **there are less rights restrictive ways to achieve the objective of the measure; and**
- **there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved.**

Advice only

1.167 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Banking and Financial Services Commission of Inquiry Bill 2017

Purpose	Seeks to establish a parliamentary inquiry into the banking and financial services sector that reports to Parliament on particular matters
Sponsors	Senators Whish-Wilson, Hanson, Hinch, Lambie, Roberts and Xenophon
Introduced	Senate, 23 March 2017
Rights	Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see Appendix 2)
Status	Advice only

Requirement to provide evidence in circumstances where the privilege against self-incrimination is not provided

1.168 The Banking and Financial Services Commission of Inquiry Bill 2017 (the bill) seeks to establish a Parliamentary Commission of Inquiry (Commission) into the banking and financial services sector. Part 3 of the bill would confer wide powers on the Commission to inquire into and report to the Parliament in relation to the banking and financial services industry. These powers include summoning witnesses and requiring witnesses to answer questions or provide documents or things, powers of arrest and powers to issue search warrants.

1.169 Proposed section 17 creates an offence of failure by witnesses to attend a hearing or produce documents, which is subject to a penalty of imprisonment for six months. Section 33 permits the Commission to disclose information or evidence relating to a contravention of a law to certain persons and bodies including the police.

Compatibility of the measure with the right to not to incriminate oneself

1.170 Specific guarantees of the right to a fair trial in the determination of a criminal charge, guaranteed by article 14 the International Covenant on Civil and Political Rights (ICCPR), include the right not to incriminate oneself (article 14(3)(g)).

1.171 Requiring a witness to answer questions even if it may incriminate them engages and limits the right not to incriminate oneself. This right may be subject to

permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not address this limitation on the right not to incriminate oneself.

1.172 Additionally, the bill does not appear to provide any use or derivative use immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness.¹ The inclusion of use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself.

Compatibility of the measure with the right to privacy

1.173 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

1.174 By creating an offence for failure to appear as a witness and answer questions, the measure engages and limits the right to privacy. While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.175 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

Contempt of Commission

1.176 Proposed section 26 of the bill provides that a person commits an offence if they:

- wilfully disturb or disrupt a hearing of the Commission;
- make any statement that is false or defamatory of the Commission; or
- commit any wilful contempt of the Commission.

1.177 The penalty for the offence is imprisonment for up to 12 months.

1 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.

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

1.178 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.179 Prohibiting any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not provide any analysis or justification for the limitation on the freedom of expression and the right to freedom of assembly. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, set out in paragraph [1.8] above.

1.180 It is not clear whether the restriction imposed may have the effect of criminalising forms of expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of, or objection to, the Commission and its activities and may be overly broad.

Issue of arrest warrants by the Commission

1.181 Proposed section 12 of the bill provides that if a person served with a summons to attend before the Commission as a witness fails to attend in accordance with the summons, the member of the Commission may issue a warrant to arrest the person.

1.182 This warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of the member of the Commission. Proposed section 13 enables the Commission to issue search warrants.

Compatibility of the measure with the right to liberty

1.183 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.184 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty.

1.185 The statement of compatibility does not provide an assessment of how this measure engages and limits the right to liberty. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, set out in paragraph [1.175] above.

1.186 It is noted that, while the *Royal Commissions Act 1902* (RC Act) provides a power for royal commissions to issue arrest warrants, the committee has previously raised human rights concerns in relation to these powers.²

Issue of search warrants by the Commission

1.187 Proposed section 13 would enable the Commission to issue search warrants.

Compatibility of the measure with the right to privacy

1.188 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The power of the Commission to issue search and entry warrants engages and limits the right to privacy. The statement of compatibility does not provide an assessment of how this measure engages and limits the right to privacy.

1.189 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, set out in paragraph [1.175] above.

1.190 It is noted that the RC Act does not contain a power equivalent to that in proposed section 13 of the bill to issue search warrants. Rather, royal commissions or their members may apply to a judge of a prescribed court for the issue of a search warrant.³ This indicates that the power may be broader than is necessary.

Committee comment

1.191 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponents and the Parliament.

1.192 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponents.

2 This committee has previously sought further information as to whether the arrest powers in the *Royal Commissions Act 1902* are compatible with the prohibition against arbitrary detention; see Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 48; and *Seventh Report of 2013* (5 June 2013) 91-92. See also the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework (ALRC Report 111)* (10 February 2010) para 11.48 and Recommendation 11-3.

3 See *Royal Commissions Act 1902*, subsection 4(1).

Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017

Purpose	Seeks to amend the <i>Criminal Code Act 1995</i> to prohibit the wearing of full face coverings in public places under the jurisdiction of the Commonwealth if the threat level under the National Terrorism Threat Advisory System is higher than 'possible'
Sponsor	Senator Lambie
Introduced	Senate, 8 February 2017
Rights	Freedom of thought and religion; equality and non-discrimination (see Appendix 2)
Status	Advice only

Prohibition on wearing face coverings

1.193 The Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017 (the bill) seeks to create a new Part 9.10 in the *Criminal Code Act 1995* (the Criminal Code) to make unlawful the wearing of full face coverings in public places which are under the jurisdiction of the Commonwealth if the threat level under the National Terrorism Threat Advisory System is higher than 'possible'. Proposed Part 9.10 also creates an offence if a person compels another person to wear a full face covering in a public place, which is subject to imprisonment for six months or 200 penalty units (or imprisonment for 12 months or 400 penalty units if the other person is under 18).

1.194 A 'public place' is defined in the bill as any place to which the public has access as of right or by invitation, and includes the interior of a vehicle that is in a public place. It does not include a place of worship, or a place where a marriage or civil ceremony is being held.

1.195 Certain exemptions would apply to persons who are wearing a full face covering for prescribed purposes including in relation to their occupation; for safety reasons; for participation in recreational or sporting activities; or for a genuine artistic purpose.

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

1.196 The right to exercise one's religious or other belief or opinion includes the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress). 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 (as a legitimate objective).

1.197 By prohibiting the wearing of full face coverings in public places, the bill engages and may limit the right to freedom of thought and religion, as certain individuals may wear this form of dress as a religious practice, that is, in the exercise of religious belief.

1.198 The statement of compatibility acknowledges that religious freedoms may be impacted by the measures, and sets out the purpose of the bill as to increase national security and public safety. While national security and public safety may be considered a legitimate objective for the purposes of international human rights law, it is not clear how the measures would be effective to achieve, or a proportionate means of achieving, this objective.

1.199 No evidence is provided in the statement of compatibility as to how the introduction of the new offences will enhance public safety or prevent the occurrence of violent acts which threaten national security. Further, no information has been provided which links the wearing of full face coverings to the carrying out of violent acts, or any occasions where such acts have occurred in Australia which may indicate that the wearing of face coverings could constitute a substantial threat to public safety. The statement of compatibility notes that:

When people have the intention of committing a crime, in many cases, they attempt to conceal their identity so they have the best chance of evading the law.¹

1.200 It is noted that there may be many ways in which a person can conceal their identity, including, but not limited to, the wearing of a full face covering. It is not explained why full face coverings alone must be the subject of such provisions aimed at preventing the concealment of one's identity.

1.201 Even if the measure were effective to achieve its stated objective, concerns arise as to whether the measure is a proportionate limit on freedom of thought and religion. To criminalise the wearing of religious dress in public is a serious limitation on the exercise of religious belief. While there are a number of prescribed exemptions for persons wearing a full face covering in certain circumstances, it is noted that none of these exemptions apply for the purposes of genuine religious belief. It is noted that in order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.

1.202 Further, the scope of the offence is not readily apparent from the offence provision. Under proposed section 395.2 an offence would only exist once the minister has made, by legislative instrument, a declaration stating that the national security threat level has been raised. It does not seem reasonable to expect members of the public to monitor the making of such declarations in order to know

1 Explanatory memorandum (EM), statement of compatibility (SOC) 4.

when their wearing of a full face covering may or may not be prohibited. This proposed section imposes a significant burden on persons who may choose to wear face coverings on a regular basis for religious purposes. The Senate Committee for the Scrutiny of Bills has previously commented on this provision and noted that it 'is desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear so those who are subject to the offence may readily ascertain their obligations'.² Having clear, accessible and precise legislative provisions, so that people know the legal consequences of their actions, is also an important principle of international human rights law.

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

1.203 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR (see Appendix 2). 'Discrimination' under the ICCPR encompasses measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).³ 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 protected attribute (for example, race, sex or religion).⁴

1.204 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As a large number of the persons affected by the proposed measures would be women from religious backgrounds, and Muslim backgrounds in particular, the measure would appear to disproportionately impact on this group, thereby engaging the right to equality and non-discrimination.

1.205 The statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged by the measures. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which requires that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

2 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2017* (22 March 2017) 71.

3 The prohibited grounds of discrimination or 'protected attributes' include 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: UN Human Rights Committee, *General Comment 18, Non-discrimination* (1989).

4 *Althammer v Austria* HRC 998/01 [10.2]. See above, for a list of 'personal attributes'.

Committee comment

1.206 The committee draws the human rights implications of the bill in respect of the right to freedom of thought and religion and the right to equality and non-discrimination to the attention of the legislation proponent and the Parliament.

1.207 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the right to freedom of thought and religion and the right to equality and non-discrimination.

Human Rights Legislation Amendment Bill 2017

Purpose	<p>Previously sought to amend section 18C of the <i>Racial Discrimination Act 1975</i> to replace the words 'offend', 'insult' and 'humiliate' with 'harass' (resulting in the formulation 'harass or intimidate'), and provide that an assessment of whether an act is reasonably likely to harass or intimidate a person or group of persons is made against the standard of a reasonable member of the Australian community;</p> <p>Amends the <i>Australian Human Rights Commission Act 1986</i> to introduce a number of changes to the process for how the Australian Human Rights Commission handles complaints of unlawful discrimination and the ability of a person alleging unlawful discrimination to apply to court</p>
Portfolio	Attorney-General
Introduced	Senate, 22 March 2017
Rights	Freedom of expression; equality and non-discrimination; freedom from serious forms of discriminatory speech; effective remedy (see Appendix 2)
Status	Advice only

Background

1.208 On 8 November 2016, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights the following matters for inquiry and report:

- whether the operation of Part IIA of the *Racial Discrimination Act 1975* (RDA) (Cth) (including sections 18C and 18D) impose unreasonable restrictions on freedom of speech; and
- whether the complaints-handling procedures of the Australian Human Rights Commission (AHRC) should be reformed.

1.209 The committee approached this inquiry broadly by looking at a range of policy matters in relation to these terms of reference rather than approaching it as a technical scrutiny inquiry.

1.210 The committee received approximately 11 500 items, including approximately 10 600 form letters; 418 items accepted by the committee as submissions and published; and approximately 450 items accepted by the committee as correspondence.

1.211 The committee also held nine public hearings from 12 December 2016 through to 20 February 2017: two in Canberra, and one in every other state and territory capital city.

1.212 The committee tabled its final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, on 28 February 2017.¹

1.213 Some of the matters in this bill relate to issues raised in the course of the committee's inquiry and the committee's final report including its recommendations.

1.214 The committee's scrutiny of the Human Rights Legislation Amendment Bill 2017 (the bill) below is undertaken as a technical assessment of the compatibility of the bill with seven core international human rights treaties and in accordance with its functions under section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.215 The bill (subject to amendment) finally passed both Houses of Parliament on 31 March 2017 and received Royal Assent on 12 April 2017.

Proposed amendment to conduct prohibited under section 18C of the RDA

1.216 Currently section 18C(1) of the RDA provides that it is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people;
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.²

1.217 Schedule 1 of the bill sought to remove the words 'offend', 'insult' and 'humiliate' from section 18C(1)(a) of the RDA and replace them with 'harass'.³

1.218 Schedule 1 of the bill further sought to amend the test, as judicially interpreted, of whether an act is 'reasonably likely, in all the circumstances' to have the specified effect. The bill sought to provide that an assessment of whether an act is reasonably likely to harass or intimidate a person or group of people should be

1 See Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017). For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

2 Section 18C is contained in Part IIA of the RDA. The title to that section, 'Prohibition of Offensive Behaviour Based on Racial Hatred', is to be taken into account when interpreting the content of specific provisions in that part: *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615 [34].

3 Schedule 1, item 3 (at time of first reading).

made against the standard of a reasonable member of the Australian community, rather than a reasonable member of the targeted group.⁴

1.219 Amendments were successfully moved in the Senate to remove Schedule 1 (containing these amendments) from the bill. The bill ultimately passed both Houses of Parliament without the proposed changes to section 18C.

Right to freedom of expression and the right to be free from serious forms of discriminatory expression

1.220 The proposed amendment to section 18C raised Australia's obligations to protect freedom of expression and its obligations to protect against racial discrimination, including incitement to racial hatred.

1.221 In order to assess the human rights implications of the proposed amendment to section 18C of the RDA, it is therefore necessary to understand the scope of Australia's obligations under international law, the balance struck by the current law, and the manner and the extent to which the bill proposes to alter that balance.

Right to freedom of expression

1.222 The International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), place obligations on States in relation to the right to freedom of expression (or freedom of speech) and the right to be free from racial discrimination, including racial 'hate speech' or serious forms of racially discriminatory speech.⁵

1.223 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, restriction or limitation.⁶

1.224 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.⁷ The right may be subject to limitations, and is subject to specific parameters (discussed further below).

1.225 The United Nations (UN) Human Rights Council has emphasised the importance of the right to freedom of expression:

The exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its

4 Schedule 1, item 4 (at time of first reading).

5 International Covenant on Civil and Political Rights (ICCPR), articles 19, 20 and 26; and International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 4.

6 ICCPR, article 19. Part IIA of the RDA does not limit the right to hold opinions.

7 ICCPR, article 19(2).

protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.⁸

1.226 Article 19(3) of the ICCPR provides that the exercise of the right to freedom of expression 'carries with it special duties and responsibilities' and the right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),⁹ or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must:

- be prescribed by law;
- pursue a legitimate objective;
- be rationally connected to the achievement of that objective; and
- be a proportionate means of achieving that objective.¹⁰

The right to freedom from discrimination and compulsory limitations on the right to freedom of expression

1.227 Under article 20(2) of the ICCPR, parties to the treaty are required to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Additionally, parties to the treaty are required under article 26 of the ICCPR to prohibit, and provide effective protection against, discrimination on grounds including race, colour and national origin.

1.228 Article 4(a) of the CERD requires states to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...¹¹

8 UN Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble. At: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16 (viewed 8 December 2016).

9 '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.

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

11 Where each of the treaty provisions above refer to prohibition by law, and offence punishable by law, they refer to criminal prohibition. Although Australia has ratified these treaties, Australia has made reservations in relation to both the ICCPR and CERD in relation to its inability to legislate for criminal prohibitions on race hate speech.

1.229 The provisions contained in articles 20(2) of the ICCPR and article 4 of the CERD (commonly referred to as racial 'hate speech' provisions),¹² are understood as constituting compulsory limitations on the right to freedom of expression.¹³ As noted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, such 'very specific limitations are legitimate if they are necessary in order for [the signatory to the treaty]...to fulfil an obligation to prohibit certain expressions on the grounds that they cause serious injury to the human rights of others.'¹⁴

1.230 The UN Committee on the Elimination of Racial Discrimination (UNCERD), the treaty monitoring body established under the CERD, has consistently held that article 4 of the CERD requires comprehensive legislative action to implement its terms:¹⁵

As a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively.¹⁶

1.231 The UNCERD also noted that the prohibition on 'hate speech' is integral to the elimination of racial discrimination in all of its forms.¹⁷ In relation to article 4 of the CERD, the UNCERD has recommended that parties to the treaty should:

declare and effectively sanction as offences punishable by law:

- (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;
- (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

12 See, UN Committee on the Elimination of Racial Discrimination (UNCERD), *General recommendation 35: Combating racist hate speech* (26 September 2013) 3.

13 See, ICCPR article 20, CERD article 4. See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23 (last accessed 15 February 2017). See also submissions to the Parliamentary Joint Committee on Human Rights' inquiry, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

14 See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23 (last accessed 15 February 2017).

15 UNCERD *General Recommendation 1* (5th session, 1972), *General Recommendation 7* (32nd session, 1985), *General Recommendation 15* (42nd session, 1993).

16 UNCERD, *General recommendation 35: Combating racist hate speech* (26 September 2013) [45].

17 UNCERD, *General Recommendation 15* (42nd session, 1993).

- (c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
- (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;
- (e) Participation in organizations and activities which promote and incite racial discrimination.¹⁸

1.232 It is clear that there is some latitude between the acts which are protected under article 19(2) of the ICCPR, and those acts which are required to be prohibited under article 4(a) of CERD, and articles 20(2) and 26 of the ICCPR set out above. In other words, there is legitimate scope for Australia to determine the appropriate balance between the obligation to provide protections against serious forms of discriminatory speech and the right to freedom of expression.

Background to, and enactment of, Part IIA of the RDA

1.233 Protection against forms of discriminatory speech on the basis of race were introduced into Part IIA of the RDA in 1995 through the passage of the Racial Hatred Bill 1994 (Racial Hatred Bill).

1.234 The introduction of such legislative protections against certain forms of racially discriminatory speech was informed by recommendations and findings by a number of significant inquiries which had identified gaps in legal protections available to victims of racism.¹⁹

1.235 The introduction of such legislative protections was also informed by Australia's obligations under the ICCPR and the CERD which, as set out above, impose specific obligations on states to prohibit certain serious forms of racially discriminatory expression.²⁰ Australia ratified the CERD and the ICCPR in 1975 and 1980 respectively.²¹

1.236 The explanatory memorandum to the Racial Hatred Bill 1994 (EM 1994) explained that the Racial Hatred Bill was intended to support social cohesion and close a gap in legal protection for victims of racist speech which had been identified by significant inquiries:

18 See, UNCERD, *General recommendation 35: Combating racist hate speech* (26 September 2013) 3.

19 See, Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech, 15 November 1994, 3336; and Australian Law Reform Council, *Multiculturalism and the Law* (1991).

20 ICCPR article 20, CERD article 4. See, also, Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard* (16 November 1994) 3341.

21 ICCPR Entry into force for Australia 13 November 1980; CERD Entry into force for Australia 30 November 1975; Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech (15 November 1994) 3336.

The Bill closes a gap in the legal protection available to the victims of extreme racist behaviour. The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.²²

1.237 While acknowledging the importance of freedom of speech, the 1994 EM states that 'the right to free speech must be balanced against other rights and interests.'²³

1.238 The 1994 EM further states that the provisions now contained in Part IIA of the RDA were intended to provide a balance between freedom of speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.²⁴ The 1994 EM noted that the drafting of the bill was intended to allow scope for public debate about important issues:

...not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.²⁵

1.239 Part IIA of the RDA has remained in the same form since the passage of the Racial Hatred Bill in 1995.

Scope of Part IIA of the RDA

1.240 At the federal level, Part IIA of the RDA is the legislative protection against racial vilification. Part IIA (comprising sections 18A – 18E) of the RDA provides the framework for protecting against forms of expression on the basis of race.

1.241 As set out above, section 18C of the RDA contains the operative provision making specified conduct unlawful, as a civil wrong. It provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people;
 - and

22 EM 1994, 1.

23 EM 1994, 1.

24 EM 1994, 1.

25 EM 1994, 1.

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

1.242 The scope of section 18C cannot be understood without consideration of section 18D. Section 18D operates to provide some 'exemptions' or defences from section 18C of the RDA. Section 18D of the RDA provides:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work;
or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Meaning and scope of conduct caught

1.243 The meaning and scope of section 18C of the RDA has been the subject of judicial consideration. While the need for statutory interpretation is unremarkable in itself, in this instance the interpretation given to section 18C plays a significant role because in general usage the words 'insult' and 'offend' may be employed in relation to conduct with effects that range from severe to slight.

Legal meaning of 'offend, insult, humiliate or intimidate'

1.244 The judicial interpretation of section 18C has commonly treated the terms 'offend, insult, humiliate or intimidate' in a collective manner rather than defining the words separately. Judicial interpretation has also read 18C together with the title of Part IIA ('Prohibition of offensive behaviour based on racial hatred') and in light of Australia's international obligations.²⁶ Kiefel J,²⁷ in *Creek v Cairns Post*,²⁸ held that section 18C applies only to conduct having 'profound and serious effects, not to be likened to mere slights'.²⁹ This standard has been affirmed in a series of cases.³⁰

26 *Creek v Cairns Post* [2001] FCA 1007 [16].

27 Kiefel J is now the Chief Justice of the High Court.

28 [2001] FCA 1007.

29 [2001] FCA 1007 [16].

1.245 Therefore, the meaning that has been given to the composite phrase in section 18C by the courts is narrower than the broader meaning that the individual words may carry in general speech, such that section 18C captures only more serious forms of conduct engaged in on the basis of the subject's race.

Nature of the test

1.246 Under section 18C of the RDA the conduct complained of must be 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate'.³¹ This has been judicially interpreted as importing an 'objective test' rather than 'subjective test' in relation to conduct.³² It means that the determinative question is not whether subjectively the particular complainant was 'insulted, offended, intimidated or humiliated'. The question is whether the act was reasonably likely to have a 'profound and serious effect', in all the circumstances.

1.247 The form of the objective test that has been applied by the courts in the context of section 18C of the RDA is one in which the 'reasonable person' has the relevant racial or ethnic characteristics of the particular complainant, that is, the test requires assessing the likely effect of the conduct on a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.³³

Application to public conduct

1.248 Part IIA only applies to conduct 'otherwise than in private'. This means that there is no prohibition on expressing views that 'offend, insult, humiliate or intimidate' on the basis of race, colour or national or ethnic origin in private. Nor is there any prohibition on holding opinions on these grounds.³⁴ The right to hold opinions is therefore not engaged or limited by Part IIA of the RDA.

Defences

1.249 As set out above, section 18D of the RDA contains a number of defences or 'exemptions' to conduct that would otherwise be captured by section 18C of the RDA. These exemptions cover acts done 'reasonably and in good faith.' It includes artistic works, statements made for any genuine academic, artistic or scientific purpose or in the public interest. These 'exemptions' also extend to publishing a fair and accurate report of any event or matter of public interest or a fair comment on

30 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 131 [70] (French J); *Jones v Scully* (2002) 120 FCR 243 [102]; *Eatock v Bolt* (2011) 197 FCR 261 at [267]-[268] (Justice Bromberg) (*Eatock*).

31 RDA section 18C.

32 See, *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FLR 56 [15].

33 *Eatock* [243], [250].

34 RDA section 18C.

any event or matter of public interest if it is a genuine belief held by the person making the comment.³⁵

Civil-complaint based model

1.250 The model adopted at a federal level in Australia under the RDA is a civil complaint-based model rather than a criminal model. This means that proceedings are initiated by individual complainants rather than the government. If a respondent is found by the court to have engaged in unlawful conduct under Part IIA they are liable only for civil remedies, rather than subject to criminal sanctions. Further, prior to a matter proceeding to court, an individual alleging unlawful discrimination under the RDA must go through the Australian Human Rights Commission (AHRC) complaint handling process with its focus on conciliated outcomes.³⁶ This AHRC process must be terminated prior to a claim for unlawful discrimination being able to be lodged in the Federal Court or Federal Circuit Court and assessed on its merits.³⁷ Courts will not grant remedies for unlawful discrimination unless the plaintiff/complainant has first made a complaint to the AHRC and that complaint with the AHRC has been terminated.³⁸

Compatibility of Part IIA of the RDA with human rights

1.251 Assessment of the proposed measure raises the preliminary issue of whether Part IIA as enacted constitutes a permissible limit on the right to freedom of expression. Applying the committee's usual analytical framework, in order for a limitation to be permissible, limitations must be prescribed by law; pursue a legitimate objective; be rationally connected to the achievement of that objective; and be a proportionate means of achieving that objective.³⁹

1.252 In the particular context of the regulation of serious forms of racially discriminatory speech, as set out above, article 20(2) of the ICCPR and article 4(a) of the CERD constitute compulsory limits on the right to freedom of expression that are not only permissible but required of State parties. However, the form of Part IIA of the RDA does not directly reflect the wording in these articles. Nor does it reflect the criminal sanctions that are contemplated by these articles; Australia having adopted a civil rather than criminal regime at the federal level.⁴⁰

35 RDA section 18D.

36 See, *Australian Human Rights Commission Act 1986* (AHRC Act) Part IIB and section 46PO(1)

37 See, AHRC Act section 46PO(1).

38 See *Re East; Ex parte Nguyen* (1998) 196 CLR 354.

39 These general limitation criteria reflect international human rights law. For the limitation of freedom of expression specifically, see Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

40 See UNCERD, *General recommendation 35: Combating racist hate speech* (26 September 2013) 3.

1.253 Also relevant to the permissible limits on freedom of expression, and additional to the obligations on State parties to prohibit racial hate speech, are the general obligations under the CERD and ICCPR regarding equality and non-discrimination. For example, parties to the ICCPR are required, under article 26 of the ICCPR, to prohibit, and provide effective protection against, discrimination on grounds including race, colour and national origin. This may include discriminatory expression.

1.254 In these circumstances, the existing formulation of the law is likely to be compatible with Australia's international human rights obligations. It is clear that Part IIA is aimed at pursuing the legitimate objective of protecting the rights of people in respect of racial discrimination, which is contemplated in the terms of the ICCPR itself as the basis for permissible limitation. The following factors each support the conclusion that Part IIA constitutes a proportionate limit on the right to freedom of expression in pursuit of this objective:

- (a) the limited application of section 18C to conduct 'otherwise than in private';
- (b) the protection given to the freedom of expression in section 18D of the RDA;⁴¹
- (c) the interpretation of section 18C as only applying to conduct that has 'profound and serious effects' on the basis of race; and
- (d) the civil model of regulation, including conciliation, and the absence of any criminal proceedings or penalties under the regime.

1.255 For completeness, it is noted that there is nothing in Part IIA of the RDA that prevents persons from holding opinions and therefore the right to freedom of opinion is not engaged and limited.

Compatibility of proposed amendment to conduct prohibited under section 18C of the RDA with human rights

1.256 The statement of compatibility states that the bill 'promotes the right to freedom of expression' by:

...removing the words 'offend', 'insult' and 'humiliate' from section 18C, ensuring that the law does not unjustifiably prevent a person from expressing opinions and genuine beliefs, even where controversial, because they may merely offend, insult or humiliate another person or groups of people.⁴²

41 It is noted, however, that this is not a stand-alone protection for freedom of speech but operates as an exception to conduct which would otherwise be unlawful under section 18C.

42 Explanatory memorandum (EM) 13.

1.257 The statement of compatibility further states that the amendments continue to comply with Australia's obligations with respect to equality and non-discrimination:

The amendments proposed by this Bill promote the rights of equality and non-discrimination. Section 18C as amended prohibits acts that a reasonable member of the Australian community would consider harasses or intimidates a person based on their race, colour or national or ethnic origin. The Bill maintains and provides civil protections against racial discrimination to ensure that all are able to enjoy the equal realisation and exercise of their rights under the ICCPR and CERD. The amendments in the Bill are directed towards the elimination of racial discrimination as required by the ICCPR and CERD.

By redefining the conduct which is prohibited, the Bill will not reduce protections against racial vilification. Rather, the Bill will ensure that conduct which does not constitute vilification, but merely offends the feelings of particular individuals or groups, is not made unlawful. The new standard of 'harass or intimidate' will more directly target the core concept of racial vilification, protecting the rights of all persons to live free from fear of violence and racial discrimination.⁴³

1.258 The likely effect of the proposed amendments would be to reduce the scope of unlawful speech or expression under the RDA.

1.259 Part IIA of the RDA implements important aspects of Australia's obligations under the ICCPR and CERD with respect to the right to protection from serious forms of discriminatory expression. However, under international human rights law, there exists some latitude between the conduct which is required to be prohibited under article 4(a) of the CERD and article 20(2) the ICCPR and the level of protection or emphasis provided to the right to freedom of expression under article 19(2) of the ICCPR. In other words, there is scope for Australia to determine exactly how to formulate the appropriate balance between the obligation to provide protections against serious forms of discriminatory expression and the right to freedom of expression.

1.260 The committee canvassed major questions of policy including questions of priorities and balance in its final report to its inquiry, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*.⁴⁴

1.261 In relation to the current bill, the bill was amended prior to passage to remove proposed amendments to Part IIA of the RDA. Therefore the changes to the RDA did not proceed.

43 EM 14.

44 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

Committee comment

1.262 The preceding analysis sets out Australia's obligations under international human rights law to respect the right to freedom of expression, alongside obligations to protect and promote the right to equality and non-discrimination and prevent racial hate speech.

1.263 The proposed amendments to Part IIA of the RDA engage the right to equality and non-discrimination and the right to freedom of expression.

1.264 The bill was amended prior to passage to remove proposed amendments to Part IIA of the RDA.

1.265 The committee notes that its inquiry into freedom of speech in Australia canvassed a range of policy matters in relation to Part IIA of the RDA and refers to its previous report and recommendations.⁴⁵

Changes to the Australian Human Rights Commission complaint handling processes

1.266 Schedule 2 of the bill contains a number of changes to the Australian Human Rights Commission's (AHRC) complaint handling processes and the ability of a complainant alleging unlawful discrimination at a federal level to apply to the Federal Court or the Federal Circuit Court. These amendments include:

- introducing principles applicable to the AHRC's complaint handling process including a requirement that the AHRC act fairly and expeditiously;
- a requirement for the AHRC to notify respondents;
- raising the threshold for lodging a complaint by requiring that it must be reasonably arguable that the alleged conduct constitutes unlawful discrimination and by requiring a complainant to set out details as fully as practicable;
- providing the President of the AHRC greater power to terminate complaints;
- a requirement that where a complaint is terminated by the President of the AHRC (subject to exceptions), the complainant will need to seek the leave of the Federal Court or Federal Circuit Court prior to making an application to that court in relation to the complaint; and
- a requirement that a complainant be provided information about costs that the court can award against a complainant.

1.267 It is noted that several of these process changes respond to the recommendations listed in the committee's inquiry report into freedom of speech in Australia.⁴⁶

45 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

1.268 These process changes passed both Houses of Parliament on 31 March 2017 with amendments.

Compatibility of the measures with the right to an effective remedy and the right to equality and non-discrimination

1.269 Australia is required under the ICCPR to ensure that those who experience racial and other forms of discrimination have access to effective remedies (see Article 2). Article 6 of the CERD further provides that parties to the treaty:

...shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

1.270 Parties to the treaty are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law.⁴⁷ The Australian government currently meets its obligation to have effective and meaningful mechanisms for those who have experienced racial discrimination and other forms of discrimination to seek redress through the operation of the AHRC, its complaints handling mechanism, and the ability to apply to the Federal Court and the Federal Circuit Court following the AHRC processes.⁴⁸

1.271 The UN Human Rights Committee, the treaty monitoring body for the ICCPR, has explained that national human rights institutions such as the AHRC can also have an important role in ensuring the right to an effective remedy:

Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.⁴⁹

1.272 It is noted that the process reforms apply across all areas of discrimination at a federal level and not only to complaints of racial discrimination. If the reforms were likely to create barriers to bringing a complaint or limit access to court processes, this would have implications for Australia's compliance with the right to an effective

46 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

47 United Nations, International Covenant on Civil and Political Rights (ICCPR) article 2. See also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [15],[18].

48 ICCPR article 2(3); and CERD article 6.

49 See also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [15].

remedy.⁵⁰ Such measures could also have implications for the right to equality and non-discrimination more broadly to the extent that they operate to have a disproportionate negative effect on people based on particular attributes, such as sex, age or disability.

1.273 Previously the complaint handling process with the AHRC needed to be exhausted and terminated prior to a person being able to lodge a claim for unlawful discrimination under the RDA and or other federal anti-discrimination law in the Federal Court or Federal Circuit Court. However, the ground upon which the AHRC terminated the complaint did not affect whether or not a complainant could seek to apply to the Federal Court to have the merits of their claim assessed.⁵¹

1.274 The bill, at the time of first reading, proposed to introduce a requirement that leave of the court be granted to make applications alleging unlawful discrimination which were the subject of complaints terminated by the President of the AHRC. The only exception to this requirement would have been where the President of the AHRC terminated the complaint because he or she was satisfied that the subject matter of the complaint involves a significant issue of public importance that should be considered by the Federal Court or Federal Circuit Court.⁵² This went further than the committee's recommendation which was limited to a requirement for leave of the court where the complaint had been terminated on particular grounds (such as termination on the basis that the complaint was trivial, vexatious or lacking in substance).⁵³

1.275 While, in light of the above, the measure as first introduced may have had the effect of creating additional procedural barriers in relation to meritorious complaints, amendments were subsequently moved which addressed this issue in the bill as passed.⁵⁴ These amendments broadened the exemptions to the requirement for an applicant to seek the leave of the Federal Court or the Federal Circuit Court to make an application alleging unlawful discrimination. Specifically, the bill as passed provided that applicants whose complaints have been terminated on the basis that there is no reasonable prospect of the matter being settled by conciliation will not be required to seek the leave of the Federal Court or the Federal Circuit Court.⁵⁵ The Supplementary Explanatory Memorandum notes that these amendments 'reflect that termination on the basis of no reasonable prospect of

50 ICCPR article 14.

51 AHRC Act section 46PO(1).

52 EM 8.

53 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

54 See, Supplementary Explanatory Memorandum relating to sheet HZ118 (Supplementary EM) 5; Revised Explanatory Memorandum 6.

55 Supplementary EM 5; Revised Explanatory Memorandum 6; *Human Rights Legislation Amendment Act 2017* Schedule 2 item 53 (new subsection 46PO(3A)).

conciliation does not reflect the merit of the complaint. As such, these amendments will ensure that there are not additional barriers for meritorious complaints to access the Federal Court or the Federal Circuit Court'.⁵⁶

1.276 The amendments to the AHRC complaints handling processes as passed appear, in broad terms, to continue to conform with the right to an effective remedy. The legislation continues to provide a process through which complainants may seek redress in respect of claims of unlawful discrimination, and the changes on their face do not appear to place significant barriers on the access to a remedy in relation to a meritorious complaint. While it is still uncertain as to how these changes will operate in practice, the process changes appear likely to be compatible with the right to an effective remedy on the face of the legislation.

Committee comment

1.277 The committee notes that the process changes to the Australian Human Rights Commission as passed by both Houses of Parliament are likely to be compatible with the right to an effective remedy.

People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017

Purpose	Seeks to establish a Commission of Inquiry to inquire into unethical, unlawful and improper conduct in the banking, financial services and related sectors
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives, 27 March 2017
Rights	Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see Appendix 2)
Status	Advice only

Requirement to provide evidence that may incriminate an individual

1.278 The People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017 (the bill) seeks to establish a Commission of Inquiry (Commission) into the banking, financial services, and related sectors. The bill would invest the commission with the full powers of a royal commission, as set out in the *Royal Commissions Act 1902* (RC Act).¹

1.279 Section 6A of the RC Act provides that a person appearing as a witness for a commission is not excused from answering a question on the ground that the answer might tend to incriminate that person. Section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions.

Compatibility of the measure with the right not to incriminate oneself

1.280 Specific guarantees of the right to a fair trial in the determination of a criminal charge, guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.281 Article 14 and the right to a fair trial, and more particularly the right not to incriminate oneself, are directly relevant where a person is required to give information to a commission of inquiry which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. Adopting the powers of a royal commission, which include a power to require a witness to answer questions even if it may incriminate themselves, engages and limits the right not to incriminate oneself.

¹ See proposed section 11.

1.282 The right not to incriminate oneself may be subject to permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective. The statement of compatibility does not address the limitation on the right not to incriminate oneself, save for reference to Part 4 of the bill, which allows some protections for disclosure by whistleblowers.

1.283 The committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.² The statement of compatibility does not acknowledge the committee's previous concerns with the respect to the powers of royal commissions and the right not to incriminate oneself.

1.284 Additionally, while section 6A of the RC Act provides a use immunity for witnesses compelled to answer questions, and section 14 of the bill would provide use immunity for disclosure by whistleblowers, the bill does not appear to provide a derivative use immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information, (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness.³ The inclusion of both use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself.

Compatibility of the measure with the right to privacy

1.285 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

1.286 By applying the offence in the RC Act for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

1.287 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.288 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and

2 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) 14-18; and *Thirty-Eight Report of the 44th Parliament* (3 May 2016) 21-26.

3 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.

evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

Contempt of Commission

1.289 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.⁴

1.290 Section 6O of the RC Act provides that a person commits an offence if they:

- intentionally insult or disturb a royal commission;
- interrupt the proceedings of a royal commission;
- use any insulting language towards a royal commission;
- by writing or speech use words false and defamatory of a royal commission;
- or
- are in any manner guilty of any intentional contempt of a royal commission.

1.291 The penalty for the offence is two hundred dollars or imprisonment for three months.

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

1.292 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.293 As applied by the bill, the prohibition of any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not provide any analysis or justification for the limitation on the freedom of expression and the right to freedom of assembly.

1.294 It is not clear whether the restriction imposed may have the effect of criminalising legitimate expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of or objection to the Commission and its activities.

4 See proposed section 11.

Issue of arrest warrants by the Commission

1.295 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.⁵

1.296 Section 6B of the RC Act provides that if a person served with a summons to attend before a royal commission as a witness fails to attend in accordance with the summons, a President, Chair or Commissioner may issue a warrant to arrest the person. This warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of the member.

Compatibility of the measure with the right to liberty

1.297 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.298 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty. The statement of compatibility does not provide an assessment of how this measure engages and may limit human rights. In this respect it is noted that the committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.⁶ The statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures.

Committee comment

1.299 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

1.300 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.

5 See proposed section 11.

6 This committee has previously sought further information as to whether the arrest powers in the *Royal Commissions Act 1902* are compatible with the prohibition against arbitrary detention; see Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 48; and *Seventh Report of 2013* (5 June 2013) 91-92. See also the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework (ALRC Report 111)* (10 February 2010) para 11.48 and Recommendation 11-3.

Extradition (People's Republic of China) Regulations 2017 [F2017L00185]

Purpose	Sought to extend the definition of an 'extradition country' in the <i>Extradition Act 1988</i> to include the People's Republic of China, thereby giving effect to the Treaty on Extradition between Australia and the People's Republic of China. This regulation was subsequently repealed by the Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325]
Portfolio	Attorney-General
Authorising legislation	<i>Extradition Act 1988</i>
Disallowance	This regulation was repealed by the Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325] on 29 March 2017 ¹
Rights	Prohibition against torture, cruel, inhuman and degrading treatment; life; fair hearing and fair trial; liberty; equality and non-discrimination (see Appendix 2)
Status	Advice only

Background

1.301 The issues raised by this regulation have previously received sustained consideration by the committee.

- In its *First report of 2013*, the committee considered a similar regulation and asked the then Attorney-General how that regulation was compatible with a number of human rights.²
- In its *Sixth report of 2013* the committee gave detailed consideration to the issue and further requested the then Attorney-General's advice on the

1 The Extradition (People's Republic of China) Regulations 2017 [F2017L00185] was subject to 15 days disallowance and tabled in the House of Representatives on 2 March 2017 and in the Senate on 20 March 2017. The Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325] is subject to 15 days disallowance and tabled in the House of Representatives and the Senate on 29 March 2017.

2 See the committee's comments on the human rights compatibility of Extradition (Convention for Suppression of Acts of Nuclear Terrorism) Regulation 2012 [F2012L02434] in Parliamentary Joint Committee on Human Rights, *First report of 2013* (6 February 2013) 107-108. See also Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) 128 where the committee published the then Attorney-General's response but deferred its consideration to include consideration of the response together with a number of new instruments dealing with extradition.

compatibility of the *Extradition Act 1988* (the Extradition Act) with a number of specific rights.³

- In its *Tenth report of 2013*, having received the then Attorney-General's response,⁴ the committee concluded that the Extradition Act raised serious human rights concerns and considered that this was an issue that may benefit from a full review of the human rights compatibility of the legislation.
- In its *Twenty-second report of the 44th Parliament* the committee considered another similar regulation and indicated that it was not in a position to undertake a full review of the Extradition Act to assess it for compatibility with human rights. However, the committee restated its position that the Extradition Act could benefit from a comprehensive review to assess its provisions against Australia's human rights obligations.⁵ The committee concluded that until a comprehensive review is undertaken of the Extradition Act to assess its compatibility with Australia's international human rights obligations, the committee is unable to conclude that regulations that extend its operation are compatible with Australia's human rights obligations.

Extending the definition of 'extradition country' to include the People's Republic of China

1.302 The Extradition Act provides the legislative basis for extradition in Australia. The Extradition Act allows Australia to receive extradition requests from countries that are declared by regulation to be an 'extradition country' under the Extradition Act and for powers under that act to be exercised in relation to such a request.

1.303 The Extradition (People's Republic of China) Regulations 2017 [F2017L00185] (the regulation) sought to extend the definition of 'extradition country' in the Extradition Act to include the People's Republic of China, thereby giving effect to the Treaty on Extradition between Australia and the Peoples Republic of China.⁶

1.304 However, the Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325] (the repeal regulation) repealed the regulation on 29 March 2017.

3 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 149.

4 Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) 56.

5 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament* (13 May 2015) 108-110.

6 Not yet in force.

Compatibility of the measure with multiple rights

1.305 The committee previously noted that it had concerns with the compatibility of the Extradition Act with a number of human rights, including:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and
- right to equality and non-discrimination.

1.306 The regulation effectively sought to extend the operation of the Extradition Act by including a newly declared country as one to which a person may be subject to extradition. Accordingly, the regulation engages the rights set out above.

1.307 As the Extradition Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of a regulation which extends the application of powers under the Extradition Act, by listing a new 'extradition country', requires an assessment of whether the powers themselves are compatible with human rights. The committee is therefore faced with the difficult task of assessing the human rights compatibility of declaring a new country to be an 'extradition country' without the benefit of a foundational human rights assessment of the Extradition Act from the minister.

1.308 As set out above, the committee has previously considered that the Extradition Act would benefit from a comprehensive review by the minister to assess its provisions against Australia's obligations under international human rights law.⁷

1.309 However, in this case, the regulation was repealed by the repeal regulation on 29 March 2017 and is no longer in force.

Committee comment

1.310 The committee refers to its previous consideration of the *Extradition Act 1988*, and in particular, its recommendation that the *Extradition Act 1988* would benefit from a comprehensive review to assess its provisions against Australia's human rights obligations.

7 See the committee's comments on the human rights compatibility of the Extradition (Convention for the Suppression of Acts of Nuclear Terrorism) Regulation 2012 [F2012L02434]; Extradition (Cybercrime) Regulation 2013 [F2013L00214]; Extradition (Piracy against Ships in Asia) Regulation 2013 [F2013L00397]; and Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013 [F2013L00205] in Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) 58.

1.311 The committee draws the human rights implications of the *Extradition Act 1988*, and any extension of its operation by a regulation, to the attention of the minister and the Parliament.

1.312 The committee notes that the Extradition (People's Republic of China) Regulations 2017 was repealed by the Extradition (People's Republic of China) Repeal Regulations 2017 on 29 March 2017 and is no longer in force.

1.313 If a new regulation is made to extend the definition of an 'extradition country' in the *Extradition Act 1988*, the committee may request further information from the minister with respect to its compatibility with Australia's obligations under international human rights law.

Bills not raising human rights concerns

1.314 Of the bills introduced into the Parliament between 27 and 30 March 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- ASIC Supervisory Cost Recovery Levy Bill 2017;
- ASIC Supervisory Cost Recovery Levy (Collection) Bill 2017;
- ASIC Supervisory Cost Recovery Levy (Consequential Amendments) Bill 2017;
- Banking Amendment (Establishing an Effective Code of Conduct) Bill 2017;
- Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017;
- Criminal Code Amendment (Protecting Minors Online) Bill 2017;
- Fair Work Amendment (Pay Protection) Bill 2017;
- National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017;
- National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017;
- Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017;
- Parliamentary Business Resources Bill 2017;
- Parliamentary Business Resources (Consequential and Transitional Provisions) Bill 2017;
- Primary Industries Research and Development Amendment Bill 2017;
- Petroleum and Other Fuels Reporting Bill 2017;
- Petroleum and Other Fuels Reporting (Consequential Amendments and Transitional Provisions) Bill 2017;
- Renew Australia Bill 2017;
- Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017; and
- Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017.

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 3**.

Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017

Purpose	Seeks to amend the <i>Biosecurity Act 2015</i> to make changes to requirements to control exotic mosquitoes and other disease carriers at Australia's airports and seaports, including incoming aircraft and vessels
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives, 15 February 2017
Rights	Fair trial; presumption of innocence (see Appendix 2)
Previous report	3 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (the bill) in its *Report 3 of 2017*, and requested a response from the Minister for Agriculture and Water Resources by 21 April 2017.¹

2.4 The minister's response to the committee's inquiries was received on 1 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offence

2.5 Proposed section 299A of the bill would introduce a strict liability offence where the person in charge of or the operator of a vessel fails to make a required report. The penalty for contravention of this section is 120 penalty units (\$21,600).

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 26-28.

Compatibility of strict liability offences with the right to be presumed innocent

2.6 The initial analysis noted that 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. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements). Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is available to the defendant. Strict liability may apply to whole offences or to elements of offences.

2.7 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences including that:

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 1.²

2.8 The explanatory material accompanying the bill did not sufficiently address whether the strict liability offence is a permissible limit on human rights.

2.9 Accordingly, the committee sought the advice of the Minister for Agriculture and Water Resources as to:

- whether the strict liability offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the strict liability offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.10 In relation to the questions raised by the committee, the minister's response provides that:

2 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

The strict liability offence proposed by item 126 [proposed section 299A] of the Bill is essential for enforcing the report of a disposal of sediment where the disposal is:

- for the purpose of ensuring the safety of the vessel in an emergency or saving life at sea;
- accidental; or
- for the purpose of avoiding or minimising pollution from the vessel.

The strict liability offence is compatible with the right to be presumed innocent, as this information would be peculiarly within the knowledge of the defendant. The defendant (the person in charge or the operator of a vessel) will have access to the appropriate information, to detail why the disposal of sediment was necessary due to safety, accident or pollution. Further, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the circumstances of the disposal, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that the disposal related to safety, accident or pollution and that the requirement to report has been met.

Disposal of sediment within Australian territorial seas could pose a significant biosecurity risk, which may need to be managed and monitored. Without the strict liability offence, a report of disposal of sediment may not occur, making it difficult to identify any such biosecurity risk. The requirement to report a disposal of sediment relating to safety accident or pollution is necessary to manage the risk in an appropriate and timely manner.

There is a strong public interest in appropriately managing biosecurity risks and preventing serious damage to Australia's marine environment and adverse effects to related industries. The strict liability offence is necessary to achieve this legitimate policy objective because it aims to deter a failure to report a disposal of sediment relating to safety, accident or pollution.

2.11 Based on the detailed information provided, the measure appears likely to be compatible with the right to be presumed innocent and the right to a fair trial.

Committee response

2.12 The committee thanks the Minister for Agriculture and Water Resources for his response and has concluded its examination of this issue.

2.13 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the presumption of innocence and right to a fair trial. The committee notes that this information would have been useful in the statement of compatibility.

Reverse burden offence

2.14 Proposed section 270 would provide that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Proposed section 270(4) provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place. The defendant carries an evidential burden in relation to these exceptions.

Compatibility of reverse burden offences with the right to be presumed innocent

2.15 As noted above, 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.

2.16 The initial analysis explained that 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.

2.17 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

2.18 The initial analysis also drew attention to the committee's *Guidance Note 2* which sets out the committee's usual expectation in relation to reverse burden offences.³

2.19 The explanatory material accompanying the bill did not address these matters. Accordingly, the committee sought the advice of the Minister for Agriculture and Water Resources as to:

3 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

- whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.20 In relation to the questions raised by the committee, the minister's response relevantly provides that:

The exceptions set out by item 30 of the Bill are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the operator of the vessel) will have access to the appropriate information and documentation, such as the vessel's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277 of the Act), or that the discharge was part of an acceptable ballast water exchange (section 282 of the Act), and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that conditions set out by the exception have been fulfilled.

The statement of compatibility in the Explanatory Memorandum to the Biosecurity Bill 2014 discussed sections 271, 276, 277, 279, 282, and 283 of the Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

In relation to item 30 [proposed section 270(4)] of the Bill, it remains necessary that the defendant (the person in charge or the operator of the vessel) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of the evidential burden of proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply. For these reasons, the reversal of the evidentiary burden of proof is a permissible limitation on human rights.

I also draw the Committee's attention to the revised Explanatory Memorandum to the Bill that was tabled in the Senate on 29 March 2017. The revised Explanatory Memorandum included a revised statement of compatibility, which addresses the reverse burden offence in proposed

section 270 (item 30 of the Bill). The revised Explanatory Memorandum also contemplates the government amendment to the Bill, which was introduced in and passed by the House of Representatives on 28 March 2017.

2.21 Based on the information provided, the measure appears likely to be compatible with the right to be presumed innocent and the right to a fair trial.

Committee response

2.22 The committee thanks the Minister for Agriculture and Water Resources for his response and has concluded its examination of this issue.

2.23 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the presumption of innocence and right to a fair trial. The committee notes that this information would have been useful in the statement of compatibility.

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017

Purpose	Seeks amend <i>Competition and Consumer Act 2010</i> to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives, 13 February 2017
Rights	Fair trial; presumption of innocence (see Appendix 2)
Previous report	3 of 2017
Status	Concluded examination

Background

2.24 The committee first reported on the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (the bill) in its *Report 3 of 2017*, and requested further information from the proponent of the bill by 21 April 2017.¹

2.25 The Private Member's response to the committee's inquiries was received on 5 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offence

2.26 Proposed section 168A(1) would introduce a strict liability offence where a person supplies, or offers to supply, a thing that includes an 'indigenous cultural expression'. The penalty for contravention of this section is a maximum of \$25,000 for an individual (approximately 138 penalty units) and \$200,000 for a body corporate (approximately 1110 penalty units).

Compatibility of strict liability offences with the right to be presumed innocent

2.27 The initial analysis noted that 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. The initial analysis stated the concerns ordinarily raised by strict liability offences in relation to the presumption of innocence (also set out above at [2.6]).

2.28 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 5-8.

objective. The initial analysis also drew attention to the committee's *Guidance Note 2* which sets out the committee's usual expectation in relation to strict liability offences.²

2.29 The statement of compatibility did not sufficiently address whether the strict liability offence is a permissible limit on human rights. Accordingly, the committee sought the advice of the legislation proponent as to:

- whether the strict liability offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the strict liability offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Legislation proponent's response

2.30 In relation to the strict liability offence, Mr Katter's response stated:

The proposed section 168A(3) sets out that the offence in proposed section 168A(1) is a strict liability offence, subject to the offence-specific defence in proposed section 168A(2). Proposed section 168A(1) makes it an offence for a person to supply or offer to supply a thing to a consumer, which is supplied or offered to be supplied in trade and commerce, and where the thing is an Indigenous cultural expression.

This strict liability offence is not inconsistent with the presumption of innocence contained in Article 14(2) of the International Covenant on Civil and Political Rights ('ICCPR') because the offence is proportionate to and rationally connected with the pursuit of a legitimate objective. It is therefore a permissible limitation on this right.

2.31 The response addresses each of the committee's questions about whether the limitation imposed is permissible. In relation to the objective of the measure the response states:

a. Legitimate Objective for the Purposes of International Human Rights Law

This legitimate objective is set out in the explanatory memorandum to the Bill. "The purpose of the Bill is to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations and thereby depriving Aboriginal and Torres Strait Islanders of the rightful benefits of their culture."

2 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

This is a legitimate objective because it aims to address concerns regarding an influx of mass-produced Indigenous-style artwork, souvenirs and other cultural affirmations which purports to be and is sold as authentic Australian indigenous art. Throughout 2016 the Indigenous Art Code and the Arts Law Centre conducted a joint investigation into the sale of Indigenous art or products bearing Indigenous cultural expressions in Australia. From that study, the Arts Law Centre estimates that 'up to 80% of items being sold as legitimate Indigenous artworks in tourist shops around Australia are actually inauthentic.' This led to the 'Fake Art Harms Culture' campaign. The crux of the fake art issue for Indigenous persons is that their culture is being exploited for sale without their consent and arguably sold under false pretences.

In addition, the objective the Bill seeks to achieve is consistent with and in furtherance of Article 11(1) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(1) sets out that:

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

The objective of the Bill is legitimate because it seeks to promote the rights of Indigenous peoples to protect and develop past, present and future manifestations of their culture. By allowing the supply of Indigenous cultural expressions by persons other than Aboriginal and Torres Strait Islanders, the meaning and authenticity of Indigenous cultural expressions are undermined and devalued.

2.32 Accordingly, the response provides a range of information and evidence as to why the measure pursues a legitimate objective for the purpose of international human rights law.

2.33 In relation to whether the measure is rationally connected to this legitimate objective, the response provides that:

b. Rational Connection to the Objective

The strict liability offence is effective to achieve the above objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression.

This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature or artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

2.34 In relation to whether the measure is a proportionate means of achieving the legitimate objective of the measure the response states:

c. Reasonable and Proportionate Means of Achieving the Objective

The inclusion of a strict liability offence is a reasonable means of achieving the objective because requiring the prosecution to prove the existence of a fault element, such as "intention", "recklessness" etc. would not adequately protect Indigenous persons, Indigenous communities and consumers from exploitation. This is because the conduct prohibited by the Bill has the potential to cause widespread detriment to Indigenous communities both financially and culturally. It also has the potential to cause significant loss to consumers. Many consumers purchase Indigenous art or products bearing Indigenous cultural expression in Australia on the understanding that the item they are purchasing is an authorised item or does in fact bear an Indigenous cultural expression.

The strict liability approach is consistent with other provisions of the Australian Consumer Law, including those in respect of unfair practices (the section which the Bill proposes to amend). As outlined in the Explanatory Memorandum to the Australian Consumer Law:

The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention.

The absence of a fault element with respect to the offence is also reasonable in light of Article 11(2) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(2) sets out that:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

This right is set out in terms of requiring redress with respect to cultural and spiritual property taken without prior consent. This therefore suggests that creating a strict liability offence is appropriate in these circumstances because it is not difficult for suppliers to ensure they know whether or not the Indigenous cultural expression that they supply is made by or made with the consent of an Indigenous artist and Indigenous community. It simply requires the supplier to ask the producer for certification or confirmation. If the offence was not framed in terms of strict liability but instead required a fault element such as "intention" or "recklessness" this would allow defendants to escape liability in instances where prior consent was not obtained (thus undermining the rights of Indigenous persons as contained in Article 11(2)).

The strict liability offence is also a proportionate means of achieving the above objective because in addition to the defence of an honest and reasonable mistake still being available to a defendant, there is also an offence-specific defence in proposed section 168A(2). This defence provides that where a person has entered into an arrangement with each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected, this will not constitute an offence under proposed section 168(1).

Additionally, the strict liability offence is appropriate and proportionate because:

- the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;
- while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the Australian Consumer Law; and
- the offence is narrow and easily capable of avoidance. Suppliers can readily obtain information regarding the origin of products that they supply and should be encouraged to do so. The defence of reasonable mistake of fact in section 207 of the Australian Consumer Law will also help to protect suppliers which rely on information provided to them when they acquire the art for resale.

2.35 Based on the comprehensive information provided in the response, the strict liability offence appears to be rationally connected to, and a proportionate means of achieving, its legitimate objective. Accordingly, the strict liability offence is likely to be compatible with the right to be presumed innocent.

Committee comment

2.36 The committee has concluded its examination of this issue.

2.37 The committee notes that strict liability offences engage and limit the right to be presumed innocent. However, based on the information provided by the legislation proponent, the strict liability offence is likely to be compatible with this right.

Reverse burden offence

2.38 Proposed section 168A(2) provides an exception to the offence proposed in section 168A(1), so that it is a defence if a thing with an 'indigenous cultural expression' is supplied by, or in accordance with an arrangement with, each indigenous community and indigenous artist with whom the indigenous cultural expression is connected. The defendant carries an evidential burden in relation to this exception.

Compatibility of reverse burden offences with the right to be presumed innocent

2.39 As noted above, 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.

2.40 The initial analysis explained that 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.

2.41 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

2.42 The initial analysis also drew attention to the committee's *Guidance Note 2* which sets out the committee's usual expectation in relation to reverse burden offences.³

2.43 The statement of compatibility did not address whether the reverse burden offence is a permissible limit on human rights. Accordingly, the committee sought the advice of the legislation proponent as to:

- whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Legislation proponent's response

2.44 In relation to the reverse burden offence, Mr Katter provided the following information:

The offence in proposed section 168A(1)-(2) reverses the burden of proof and places the onus on the defendant to prove their innocence. The proposed offence requires the defendant to prove that the thing was supplied by, or in accordance with an arrangement with, each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected. Whilst the Committee notes that consistency with the presumption of innocence in Article 14(2) of the ICCPR generally

3 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

requires the prosecution to prove each element of the offence beyond a reasonable doubt, proposed section 168A(1)-(2) is not inconsistent with the right to be presumed innocent because it is a permissible limitation on this right.

There is substantial overlap between the analysis above regarding the strict liability offence in proposed section 168A(3) and the analysis below with respect to the reverse burden offence in proposed section 168A(1)-(2).

2.45 The response addresses each of the committee's questions about whether the limitation imposed is permissible. In relation to the objective of the measure the response states:

a. Legitimate Objective for the Purposes of International Human Rights Law

The legitimate objective is the same as outlined above with respect to the strict liability offence and is reflected in the explanatory memorandum to the Bill.

2.46 As noted above, this is likely to constitute a legitimate objective for the purposes of international human rights law.

2.47 In relation to whether the measure is rationally connected to this legitimate objective, the response provides that:

b. Rational Connection to the Objective

The reverse burden offence is effective to achieve the legitimate objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression.

This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature or artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples sets out that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions". This right is given to Indigenous peoples, not any other peoples. Consequently the requirement to seek permission from Indigenous communities and Indigenous artists ensures that they have ultimate control over their traditional cultural expressions. To permit otherwise could lead to adverse impacts on Indigenous culture through the propagation of Indigenous cultural expressions that are incorrect according to traditional knowledge. This could lead to the erosion or desecration of traditional practices and the inaccurate portrayal of cultural expressions such as Indigenous dance or art. Consequently in these circumstances there is a rational connection

between the reverse burden of proof and the objective of preventing non-Indigenous Australians from benefitting from the sale of Indigenous cultural expressions and undermining Indigenous culture. In this respect, providing Indigenous Australians with the ability to control the supply of their traditional cultural expressions respects the rights provided to them by the United Nations Declaration on the Rights of Indigenous Peoples.

2.48 In relation to whether the measure is a proportionate means of achieving the legitimate objective of the measure the response states:

c. Reasonable and Proportionate Means of Achieving the Objective

The offence-specific defence, that imposes a burden of proof on the defendant, is a reasonable and proportionate means of achieving the objective of the Bill because:

- the requirement for consent provides the best protection to Indigenous communities and artists. The fact that suppliers are commercialising Indigenous cultural expressions without obtaining any consent places Indigenous communities and artists in a position of vulnerability and exploitation. This defence focusses on the key issue - whether the relevant Indigenous community and artist has consented to the commercialisation of the indigenous cultural expression with which the community and artist is associated;
- this defence (and the legal burden associated with it) is appropriate because the consent or licensing arrangements in place for the supply of the art is peculiarly within the knowledge of the defendant. It would be a difficult and costly exercise for the prosecution to disprove consent and would necessarily require the prosecution to ensure that no Indigenous person or community had granted consent to the defendant. Such a burden would be unreasonable and make the offence difficult to establish. By contrast, it does not impose any significant burden on the defendant - if they have obtained consent to use the Indigenous cultural expression in the manner in which they have, they should be able to establish this without any real difficulty. If they have acquired the art or products bearing the Indigenous cultural expression from a wholesaler, they can make it a condition of the wholesale purchase that the wholesaler provides evidence of consent.

This approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which relevantly provides that "where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence". The Guide also relevantly provides in this respect:

"...the [Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a

particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused."

2.49 Based on the comprehensive information provided in the response, the reverse burden offence appears to be rationally connected to, and a proportionate means of achieving, its legitimate objective. Accordingly, the reverse burden offence is likely to be compatible with the right to be presumed innocent.

Committee comment

2.50 The committee notes that reverse burden offences engage and limit the right to be presumed innocent. However, based on the information provided by the legislation proponent, the reverse burden offence is likely to be compatible with this right.

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Purpose	Seeks to amend a number of Acts relating to the criminal law, law enforcement and background checking to including to ensure Australia can respond to requests from the International Criminal Court and international war crimes tribunals; amend the provisions on proceeds of crime search warrants, clarify which foreign proceeds of crime orders can be registered in Australia and clarify the roles of judicial officers in domestic proceedings to produce documents or articles for a foreign country, and others of a minor or technical nature; ensure magistrates, judges and relevant courts have sufficient powers to make orders necessary for the conduct of extradition proceedings; ensure foreign evidence can be appropriately certified and extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay Territory; amend the vulnerable witness protections in the <i>Crimes Act 1914</i> ; clarify the operation of the human trafficking, slavery and slavery-like offences in the <i>Criminal Code Act 1995</i> ; amend the reporting arrangements under the <i>War Crimes Act 1945</i>
Portfolio	Justice
Introduced	House of Representatives, 23 November 2016
Rights	Privacy; fair trial and fair hearing (see Appendix 2) (see Appendix 2)
Previous report	2 of 2017
Status	Concluded examination

Background

2.51 The committee first reported on the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (the bill) in its *Report 2 of 2017*, and requested a response from the Minister for Justice by 13 April 2017.¹

2.52 The minister's response to the committee's inquiries was received on 27 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 3-9.

Proceeds of crime

2.53 Part 8 of Schedule 1 of the bill seeks to amend the *International Criminal Court Act 2002* and the *International War Crimes Tribunals Act 1995* in relation to existing proceeds of crime provisions. This includes amendments to the authorisation process for proceeds of crime tools and the availability of a range of investigative and restraint tools in respect of an investigation or prosecution at the International Criminal Court (ICC), an International War Crimes Tribunal (IWCT) and to apply in the foreign context. It also seeks to enhance the process for seeking restraining orders and giving effect to forfeiture orders. The proceeds of crime provisions referred to in these Acts make use of the proceeds of crime framework established by the *Proceeds of Crime Act 2002* (POC Act).

2.54 Schedule 2 of the bill seeks to ensure that the provisions of the proceeds of crime investigative tools in the *Mutual Assistance in Criminal Matters Act 1987* (MA Act) align, and are consistent, with the POC Act or are modified appropriately for the foreign context. It seeks to clarify the types of foreign proceeds of crime orders to which the MA Act applies. It also provides that the MA Act applies to interim foreign proceeds of crime orders issued by non-judicial government bodies. The explanatory memorandum states that proposed item 33 of the bill will confirm the existing provision that the definition of 'foreign restraining order' is not limited to orders made by a court, which 'reflects the fact that in some countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.²

Compatibility of the measure with fair trial and fair hearing rights

2.55 The initial human rights analysis noted that the statement of compatibility states that the amendments in Schedule 2 engage the right to a presumption of innocence, as the MA Act permits the Attorney-General to authorise a proceeds of crime authority to apply to register foreign restraining orders, which could allow a person's property to be restrained, frozen, seized or taken into official custody before a finding of guilt has been made. However, the statement of compatibility states that the proposed amendments will not limit a person's right to a presumption of innocence.³ The statement of compatibility does not examine the compatibility of the measures in Schedule 1 with the right to a fair trial and fair hearing.

2.56 The statement of compatibility explains that the amendments are intended to ensure 'Australia can provide the fullest assistance to the ICC and IWCT in investigating and prosecuting the most serious of crimes and taking proceeds of

2 Explanatory memorandum (EM) 160.

3 EM, statement of compatibility (SOC) 21. Note the SOC also identifies that the right to privacy is engaged and justifiably limited. No comment is made in respect of this right as, based on the information provided in the SOC and the safeguards in the relevant legislation, no concerns are raised in respect of this right.

crime action'.⁴ This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to achieving that objective.

2.57 The statement of compatibility states that, in relation to the proposed amendment to the MA Act in Schedule 2, the Attorney-General's decision to assist a foreign country with registering a foreign restraining order 'will be subject to the safeguards in the MA Act, including all of the mandatory and discretionary grounds for refusal in section 8 of the MA Act' and 'the courts will retain the discretion to refuse to register the order if it is satisfied that it would be contrary to the interests of justice to do so'.⁵

2.58 The initial human rights analysis noted that the committee has previously stated that the MA Act raises serious human rights concerns and that it would benefit from a full review of the human rights compatibility of the legislation.⁶ The committee has also raised concerns regarding the POC Act. In particular, the initial analysis noted that the committee has previously raised concerns about the right to a fair hearing and noted that asset confiscation may be considered criminal for the purposes of international human rights law, and in particular the right to a fair trial. As the committee's previous analysis noted:

...the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies [with] important and necessary tools in the fight against crime in Australia. Assessing the forfeiture orders under the POC Act as involving the determination of a criminal charge does not suggest that such measures cannot be taken – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the [*International Covenant on Civil and Political Rights*].⁷

2.59 The committee previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. In his recent response to the committee in respect of the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, the minister stated he did not consider it necessary to conduct an assessment of the POC Act to determine its compatibility with the

4 EM, SOC 5.

5 EM, SOC 21-22.

6 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 56-61 at 61.

7 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 37-44 at 43-44.

right to a fair trial and fair hearing as legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the POC Act as it is amended.⁸

2.60 Despite this, the existing human rights concerns with the POC Act and the MA Act mean that any extension of the provisions in those Acts by this bill raise similar concerns as those previously identified. The initial analysis stated that it would therefore be of considerable assistance if these Acts were subject to a foundational human rights assessment.

2.61 In addition, the amendments in item 33 of Schedule 2 provide that an order made under the law of a foreign country—whether made by a court or not—restraining, freezing or directing the seizure or control of property is enforceable in Australia. This is so regardless of whether the person whose property is to be restrained, frozen or seized has been accorded a fair hearing before the order was made. The explanatory memorandum states that this amendment confirms the existing position that the registration of a foreign restraining order is not limited to orders made by a court, which reflects 'the fact that in some countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.⁹ The explanatory memorandum states that the Attorney-General has a discretion whether to authorise the registration of orders and may consider 'the nature of the body issuing the order' in exercising that discretion.¹⁰

2.62 The initial analysis noted that the registration and enforcement of foreign restraining orders and foreign forfeiture orders under Australian law, without any oversight of the process by which such orders were made, raises questions about the compatibility of the measures with the right to a fair hearing and fair trial. This is particularly acute in relation to the registration of foreign restraining orders made by non-judicial bodies. While the Attorney-General retains a broad discretion to refuse to grant assistance under the MA Act, the existence of a ministerial discretion is not in itself a human rights safeguard. As the committee has previously noted, while the government may have an obligation to ensure that the law is applied in a manner

8 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 43.

9 EM 160 in relation to item 33 of Schedule 2 of the bill.

10 EM 160. This is based on section 8(2)(g) of the MA Act which provides that the Attorney-General may refuse a request by a foreign country for assistance if in the opinion of the Attorney-General it is appropriate in all the circumstances of the case that the assistance should not be granted.

that respects human rights, the law itself must also be consistent with human rights.¹¹ As the UN Human Rights Committee has explained:

[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.¹²

2.63 The initial analysis stated that while this bill does not substantially amend the provisions of the POC Act or the MA Act or the application process, human rights concerns remain in relation to these existing Acts. In addition, specifically providing in the bill that a foreign restraining order does not need to be made by a court raises serious concerns about the right to a fair hearing before a person's private property is frozen, seized or subject to restraint.

2.64 The committee reiterated its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial. The committee reiterated its previous view that both the MA Act and the POC Act would benefit from a full review of the human rights compatibility of the legislation and drew these matters to the attention of the Parliament.

Minister's response

2.65 The minister provided the following information in response to the committee's comments:

The Government continually reviews the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* and will continue to undertake human rights compatibility assessments where Bills amend those Acts.

The Government reiterates that proceeds of crime orders are classified as civil under section 315 of the *Proceeds of Crime Act* and do not involve the determination of a criminal charge or the imposition of a criminal penalty.

As the Acts were enacted before the *Human Rights (Parliamentary Scrutiny) Act 2011*, they were not required to be subject to a human rights compatibility assessment.

2.66 It is understood that the MA Act and the POC Act were legislated prior to the establishment of the committee, and for that reason, were never required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, in

11 See Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (27 June 2013) 56-61 at 59.

12 Human Rights Committee, *General Comment 27, Freedom of movement* (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 13.

light of the existing human rights concerns with the POC Act and the MA Act, any extension of the provisions in those Acts requires an assessment of how such measures interact with existing provisions. It would therefore be of considerable assistance if these Acts were subject to a foundational human rights assessment.

Committee response

2.67 The committee thanks the Minister for Justice for his response and has concluded its examination of this issue.

2.68 The preceding analysis indicates that extensions to the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* could raise concerns regarding the right to a fair hearing and the right to a fair trial.

2.69 The committee reiterates its previous view that both the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation.

2.70 The committee draws these matters to the attention of the Parliament.

Person awaiting surrender under extradition warrant must be committed to prison

2.71 Schedule 3 of the bill seeks to amend the *Extradition Act 1988* (Extradition Act) to provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

Compatibility of the measure with the right to liberty

2.72 The initial human rights analysis noted that the right to liberty is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. An obligation on courts to order that a person be committed to prison to await surrender under an extradition warrant engages and limits the right to liberty.

2.73 The statement of compatibility acknowledges that the right to liberty is engaged by this measure but states that the limitation on the right is reasonable and necessary 'given the serious flight risk posed in extradition matters and Australia's obligations to secure the return of alleged offenders to face justice'.¹³ It also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'.¹⁴

13 EM, SOC 24.

14 EM, SOC 24.

2.74 The initial analysis noted that measures to ensure a person does not evade extradition are likely to be a legitimate objective for the purposes of international human rights law, and the measures appear to be rationally connected to that objective. However, in relation to whether the limitation on the right to liberty is proportionate to the objective sought to be achieved, the question arises as to why the power of the court to commit a person to prison is phrased as an *obligation* to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

2.75 The statement of compatibility states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration'.¹⁵ It states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days.'¹⁶ It also goes on to provide that the Extradition Act makes bail available in special circumstances which ensures that 'where circumstances justifying bail exist, the person will not be kept in prison during the extradition process'.¹⁷ However, it is unclear how these existing bail provisions fit with the proposed amendments which *require* the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

2.76 The committee therefore sought the advice of the Minister for Justice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the Extradition Act fits with the amendments proposed by this bill.

Minister's response

2.77 In relation to why the measure places an obligation (rather than discretion) on the court to commit a person to prison, the following information is provided by the minister:

The amendments to sections 26 and 35 of the Extradition Act address the logistics for the execution of a surrender warrant when a person is on bail and a surrender warrant has been issued to surrender the person to an extradition country. The surrender warrant is the instrument that empowers the police to bring an eligible person into custody to await transportation out of Australia.

15 EM, SOC 24.

16 EM, SOC 24.

17 EM, SOC 24.

The amendments to sections 26 and 35 do not affect the existing framework for bail under the Extradition Act. In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release. The presumption against bail is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The requirement to demonstrate 'special circumstances' justifying release provides suitable flexibility to accommodate exceptional circumstances that may necessitate granting a person bail (such as where the person is in extremely poor health).

The Extradition Act does not provide for a person to apply to have their bail extended following the issuing of a surrender warrant and while the person awaits surrender to the requesting country. The amendment clarifies that, following a discharge of bail recognisances, a magistrate, eligible Federal Circuit Court Judges or relevant court is to remand the person to prison to await surrender. The amendment is framed as an obligation on [sic] to reflect the unavailability of bail pending logistical arrangements for surrender to the requesting country. If a person seeks to challenge the surrender determination by way of judicial review, the person is able to make a new bail application under section 49C of the Extradition Act to the relevant review or appellate Court. Under section 49C(2) of the Extradition Act a grant of bail by a review or appellate Court terminates each time such a Court has upheld the surrender determination.

2.78 The minister's response clarifies that the proposed measure, which obliges a person to be committed to prison, relates to circumstances where a surrender warrant has been issued and where the person awaits surrender or transfer to the requesting country. As outlined in the response, some safeguards exist in relation to the measure and there is some capacity for an individual to apply for bail should they seek judicial review in relation to the issue of the surrender warrant.

2.79 However, even in circumstances where a person awaits surrender, it is unclear that an obligation for that person to be committed to prison represents the least rights restrictive approach. While there may be some circumstances where an individual poses an unacceptable flight risk such that imprisonment is necessary, it is unclear that each individual awaiting transfer would represent such a risk. Nor is it clear why particular conditions of bail are not adequate to address such risks in relation to individuals. Noting that an extradition country has two months from the issue of the surrender warrant to effect surrender, a person may be deprived of their liberty in prison for an extended period of time. As set out in the minister's response, it appears that there is no general ability for a person to apply to have their bail extended following the issue of the surrender warrant regardless of their individual circumstances. It follows that there is a risk that the measure is not a proportionate limit on the right to liberty. This is because in order for a deprivation of liberty to be

permissible it must be reasonable, necessary and proportionate in the individual case.

2.80 The minister's response also explains that under the Extradition Act there is currently a presumption against bail unless a 'special circumstance' exists. This also raises concerns in relation to the right to liberty under the Extradition Act more broadly as the deprivation of liberty may not be reasonable, necessary and proportionate in the individual case. In this respect it is noted that the Extradition Act was legislated prior to the establishment of the committee, and for that reason, has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. In light of the issues raised in the minister's response and by the amendments, the Extradition Act may benefit from a full review of its human rights compatibility.

Committee response

2.81 The committee thanks the Minister for Justice for his response and has concluded its examination of this issue.

2.82 The preceding analysis indicates that the measure may not be the least rights restrictive in each individual case noting that the measure obliges a court to commit a person awaiting transfer to prison regardless of their individual circumstances. This means that there is a risk that the measure is not a proportionate limit on the right to liberty.

2.83 The committee considers that the *Extradition Act 1988* would benefit from a full review of the human rights compatibility of the legislation.

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	Seeks to amend the <i>Migration Act 1958</i> to: harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; clarify the requirements relating to notification of oral review decisions; and make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 30 November 2016
Rights	Non-refoulement; fair hearing; effective remedy (see Appendix 2)
Previous report	2 of 2016
Status	Concluded examination

Background

2.84 The committee first reported on Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the bill) in its *Report 2 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 13 April 2017.¹

2.85 No response was received to the committee's request by that date. Accordingly, the committee's concluding remarks on the bill are based on the information available at the time of finalising this report.²

2.86 The bill relates to the schedules of the *Tribunals Amalgamation Act 2015*,³ which commenced on 1 July 2015. That Act merged key commonwealth merits review tribunals, including the former Migration Review Tribunal and Refugee Review Tribunal (RRT), into the Administrative Appeals Tribunal (AAT).

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 10-17.

2 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

3 The committee considered the Tribunals Amalgamation Bill 2014 in its *Eighteenth Report of the 44th Parliament* (10 February 2015), and found that the bill did not raise human rights concerns.

2.87 The bill consolidates Parts 5 and 7 of the *Migration Act 1958* (Migration Act) into an updated Part 5 of the Migration Act in respect of reviewable decisions by the Migration and Refugee Division (MRD) of the AAT.

2.88 Certain parts of the bill therefore reintroduce existing measures, some of which have previously been considered by the committee.⁴

Limited review of decisions in respect of grant or cancellation of protection visas

2.89 Proposed section 338A, which defines a 'reviewable refugee decision', is proposed to be inserted into the Migration Act by Schedule 4, Part 1, item 34 of the bill. This new section largely mirrors the provisions contained in existing section 411 of the Act.

2.90 Proposed subsection 338A(2) defines what is a 'reviewable refugee decision', which includes a decision to refuse to grant or to cancel a protection visa. However, a decision to refuse to grant or to cancel a protection visa is not classified as a reviewable decision if it was made on a number of specified grounds, relating to criminal convictions or security risk assessments.⁵ As such, decisions made on such grounds are not reviewable by the MRD. In addition, subsection 338A(1) provides that a number of reviewable refugee decisions are excluded from review on specified grounds, including:

4 See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44; *Twelfth report of the 44th Parliament* (24 September 2014) 24-45; *Twentieth report of the 44th Parliament* (18 March 2015) 80-87; *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

5 Schedule 1, Part 1, item 34, new paragraph 338A(2)(c) applies in relation to a decision to refuse to grant a protection visa. The relevant grounds for exclusion are decisions made relying on: subsection 5H(2), which corresponds to the exclusion grounds for refugee status under article 1F of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention); subsection 36(1B), which sets out that a person cannot receive a protection visa if determined by the Australian Security Intelligence Organisation (ASIO) to be a risk to security; subsection 36(1C), which sets out that the person is excluded from the grant of a protection visa if the minister considers the person is a danger or threat to Australia's security, or is a danger to the Australian community having been convicted by final judgement of a particularly serious crime; paragraph 36(2C)(a), which excludes people from complementary protection on the basis of the exclusion grounds for refugee status under article 1F of the Refugee Convention; or paragraph 36(2C)(b) which also excludes people from complementary protection if the minister considers the person to be a danger or threat to Australia's security, or a danger to the Australian community, having been convicted by final judgment of a particularly serious crime. New paragraph 338A(2)(d) applies in relation to a decision to cancel a protection visa. The relevant grounds for exclusion are the same as those under paragraph 338(2)(c), with the addition of a further ground: that a person has been assessed by ASIO as a risk to security.

- that the minister has issued a conclusive certificate in relation to the decision, on the basis that the minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the minister personally; and
- that the decision is a 'fast track decision' (A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,⁶ for which a very limited form of review is available under Part 7AA of the Act.)⁷

2.91 As such, there is a range of decisions relating to the grant or cancellation of protection visas that are either not subject to any merits review (in relation to ministerial decisions to refuse to grant or to cancel protection visas on certain grounds) or which are subject to very limited review (in the case of fast track decisions).

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

2.92 The obligation of non-refoulement requires that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment (see Appendix 2).⁸ Non-refoulement obligations are absolute and may not be subject to any limitations.

6 These include unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but before 1 January 2014 and who have not been taken to a regional processing country.

7 See the committee's comments on the human rights compatibility of the fast-track review process in Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

8 Australia's obligations arise under the article 33 of the Refugee Convention in respect of refugees, and also under articles 6(1) and 7 of International Covenant on Civil and Political Rights (ICCPR), article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. The non-refoulement obligations under the ICCPR and CAT are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

2.93 Effective, independent and impartial review by a court or tribunal of decisions to deport or remove a person (in the Australian context including merits review), is integral to giving effect to non-refoulement obligations.⁹

2.94 As noted in the initial analysis the measure engages the right to non-refoulement and the right to an effective remedy as it fails to ensure sufficient procedural and substantive safeguards apply to ensure a person is not removed in contravention of the obligation of non-refoulement.¹⁰ The right to non-refoulement is an absolute right: it cannot be subject to any permissible limitations.

2.95 The statement of compatibility identifies that the right to non-refoulement:

[is] arguably engaged as the amendments go to the review of decisions made under the Migration Act, including review of decisions in relation to protection visa applicants or former protection visa holders, and may impact on whether such applicants or former visa holders, depending on the outcome of the review, may become liable for removal from Australia.¹¹

2.96 The initial analysis noted that the statement of compatibility provides that the amendments proposed by the bill 'preserve the existing merits review framework without removing or otherwise diminishing a visa applicant or former visa holder's access to merits review of a refusal or cancellation decision in relation to them.'¹² However, the committee's role is to examine all bills introduced into Parliament for compatibility with human rights,¹³ an assessment which must take place regardless of whether the bill reflects the existing law (which may or may not have been subject to a human rights compatibility assessment when introduced).

2.97 In respect of the right to an effective remedy, the statement of compatibility states that as there is no general right or entitlement to hold a visa to enter or remain in Australia, a decision to refuse or cancel a visa is not a violation of a person's rights or freedoms. However, the statement of compatibility goes on to note that if it is considered to be a violation of rights or freedoms, judicial review is

9 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

10 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 179-180, 182-183. Treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT.

11 Explanatory memorandum (EM), statement of compatibility (SOC) 45.

12 EM, SOC 45.

13 See section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

available to an aggrieved person, and as such, the measure is compatible with this right.¹⁴

2.98 This reasoning fails to sufficiently acknowledge the scope of Australia's obligations with respect to prohibition on non-refoulement and the right to an effective remedy.

2.99 As set out in the initial analysis, the committee has previously expressed its view that judicial review (the scope of which is discussed in detail below) is not sufficient to fulfil the international standard required of 'effective review' in the context of non-refoulement decisions and, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met when effective merits review of the decision to grant or cancel a protection visa is not available.¹⁵

2.100 While there is no express requirement for merits review in the articles of the relevant conventions relating to obligations of non-refoulement, the position that merits review of such decisions is required to comply with the obligation under international law is based on a consistent analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context.

2.101 In formulating this view, the usual approach of drawing on the jurisprudence of bodies recognised as authoritative in specialised fields of international human rights law that can inform the human rights treaties that fall directly under the committee's mandate has been adopted.

2.102 In this regard, treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. For example, the UN Committee against Torture in *Agiza v. Sweden* found:

The nature of refoulement is such...that an allegation of breach of...[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy... requires, in this context, **an opportunity for effective, independent and impartial review of the decision to expel or remove**...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.¹⁶

14 EM, SOC 46.

15 For the reasoning in support of this view, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 184.

16 *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7] (emphasis added).

2.103 Similarly, the UN Committee Against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.¹⁷

2.104 In relation to the ICCPR, in *Alzery v. Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

As to...the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the...[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, **effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.** The absence of any opportunity for effective, independent review of the decision to expel in...[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].¹⁸

2.105 These statements are accepted internationally to be persuasive interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).¹⁹

2.106 The jurisprudence quoted above therefore establishes the proposition that, while merits review is not expressly referred to in the ICCPR or CAT, there is strict requirement for 'effective review' of non-refoulement decisions.

2.107 Applied to the Australian context, the committee has previously considered numerous cases, like the present case, where legislation allows only for judicial (rather than merits) review of non-refoulement decisions. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the

17 *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000.

18 *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) [11.8] (emphasis added).

19 Australia is a party to this the VCLT and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

common law. It represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker) and other related grounds. The court cannot undertake a full review of the facts (that is, the merits) of a particular case, for instance, an assessment as to *refoulement* to torture or persecution, to determine whether the case was correctly decided.

2.108 Accordingly, in the Australian context, judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not address whether that decision was the correct or preferable decision. The ineffectiveness of judicial review is particularly apparent when considered against the purpose of effective review of non-*refoulement* decisions under international law, which is to 'avoid irreparable harm to the individual'.

2.109 In contrast, merits review allows a person or entity other than the primary decision maker to reconsider the facts, law and policy aspects of the original decision and to determine what is the correct or preferable decision. In light of the above, in the Australian context, the requirement for independent, effective and impartial review of non-*refoulement* decisions is not met by the availability of judicial review, but may be fulfilled by merits review.

2.110 A question is sometimes posed about the difference between the obligations of nation states such as Australia under the ICCPR, CAT and the Refugee Convention and the standards and procedures applied by the Office of the United Nations High Commissioner for Refugees (UNHCR). While the UNHCR may assist nation states with refugee status determination (RSD), non-*refoulement* obligations ultimately rest with nation states who are parties to the relevant conventions. Given the nature of its role, the UNHCR, in assisting nation states with RSD, does not have all of the same procedural safeguards that are expected of nation states. Nor does the UNHCR possess the apparatus of nation states such as courts and tribunals. As the UNHCR is not a nation state it is accordingly not a party to the ICCPR, CAT and Refugee Convention. It does not therefore have legal obligations under these treaties *per se* as these rest with nation states. Further, and significantly, the UNHCR unlike Australia and other nation states does not possess coercive powers to deport or expel an individual. These powers rest with nation states and accordingly it is nation states, including Australia, that have particular responsibilities in relation to the obligation of non-*refoulement* in accordance with their treaty obligations.

2.111 The committee previously sought further information from the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-*refoulement*. As set out above no response was received from the minister by the requested date.

2.112 As the measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, it is likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent,

effective and impartial review, including merits review, of non-refoulement decisions.

Committee comment

2.113 The obligation of non-refoulement is absolute and may not be subject to any limitations.

2.114 Noting in particular that a response was not received from the Minister for Immigration and Border Protection regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the obligation of non-refoulement.²⁰

2.115 The measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, and therefore is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

Unfavourable inferences to be drawn by the Tribunal

2.116 Schedule 1, Part 1, item 53 of the bill proposes to insert into the Migration Act new section 358A, which sets out how the MRD of the AAT is to deal with new claims or evidence in respect of refugee review decisions in relation to a protection visa. This section mirrors current section 423A of the Migration Act.

2.117 Pursuant to this proposed amendment, the MRD must draw an inference unfavourable to the credibility of the claim or evidence if the MRD is satisfied that the applicant does not have a reasonable explanation for why the claim was not raised, or evidence presented, before the reviewable refugee decision was made.

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

2.118 The obligation of non-refoulement and the right to an effective remedy have been described in detail above (see also **Appendix 2**).

2.119 As with the measures discussed above, the initial analysis noted that the right to non-refoulement and the right to an effective remedy are engaged by this measure as it fails to introduce sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement. The right to non-refoulement is an absolute right: it cannot be subject to any permissible limitations.

20 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

2.120 The discussion of the right to non-refoulement in the statement of compatibility includes reference to the requirements of the MRD to conduct a review of the refusal or cancellation decision in accordance with the procedures in amended Part 5 of the Migration Act.²¹

2.121 The committee previously considered the requirement on the then RRT to draw an inference unfavourable to the credibility of the claim or evidence, which mirrors proposed section 358A.²² In its consideration of then proposed section 423A, the committee found that the section was incompatible with Australia's non-refoulement obligations. The committee expressed its concern that:

...there are insufficient procedural and substantive safeguards to ensure that this proposed provision does not result in a person being removed in contravention of non-refoulement obligations. For example, people who are fleeing persecution or have experienced physical or psychological trauma may not recount their full story initially (often due to recognised medical conditions such as post-traumatic stress disorder), or else may simply fail to understand what information might be important for their claim.²³

2.122 The committee was also concerned that:

...the proposed provision appears to be inconsistent with the fundamental nature of independent merits review and, to that end, would seem to depart from the typical character of merits review tribunals in Australia. In particular, the committee notes that the function of the RRT as a merits review tribunal is to make the 'correct and preferable' decision in a supporting context where applicants are entitled to introduce new evidence to support their applications. However, proposed section 423A would limit the RRT to facts and claims provided in the original application, and require (rather than permit) the drawing of an adverse inference as to credibility in the absence of a 'reasonable explanation' for not including those facts or claims in the original application.²⁴

21 EM, SOC 45.

22 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44. The committee also considered the 'quality of law test' in respect of the requirement on applicants to provide a 'reasonable explanation', and on the basis of information provided by the minister, subsequently found this measure to be compatible with the quality of law test for human rights purposes: Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 30-32.

23 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43.

24 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44.

2.123 The measure would require the tribunal to draw an inference unfavourable to the credibility of the new claims or evidence raised in the absence of a 'reasonable explanation'. Such an adverse inference may be required to be drawn even where the MRD considers that the evidence is relevant, reliable or credible. This inability of the MRD to be able to freely assess the credibility of evidence may in turn result in denial of protection visas in circumstances where Australia has non-refoulement obligations. As set out above, the provision of independent, effective and impartial review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT. The requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.²⁵

2.124 The committee sought further information from the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-refoulement. As set out above, no response was received from the minister by the requested date.

2.125 As the measure limits the ability of the tribunal to provide effective merits review of decisions relating to the grant of protection visas, it is likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

Committee comment

2.126 The obligation of non-refoulement is absolute and may not be subject to any limitations.

2.127 Noting in particular that a response was not received from the Minister for Immigration and Border Protection regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the obligation of non-refoulement.²⁶

2.128 The measure limits the ability of the Administrative Appeals Tribunal to provide effective merits review of decisions relating to the grant of protection visas, and therefore is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against

25 See, Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 30.

26 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.**New procedures for the Immigration Assessment Authority**

2.129 Schedule 2, Part 3 proposes to amend the Migration Act such that the minister may refer fast track reviewable decisions in relation to members of the same family unit to the Immigration Assessment Authority (IAA) for review together.²⁷ The amendments also enable the IAA to review two or more fast track reviewable decisions together, whether or not they were referred together.²⁸ Further, where fast track reviewable decisions have been referred and reviewed together, documents given by the IAA to any of the applicants will be taken to be given to each applicant.²⁹

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

2.130 The initial analysis noted that the obligation of non-refoulement is engaged by the measure, as allowing for two or more fast-track decisions to be considered together may not provide effective review for the individual applicants. This concern is particularly relevant in the context of fast track review decisions by the IAA, as the committee has previously raised concerns about procedural fairness in relation to this process. In that context, these measures may fail to provide sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement.

2.131 The statement of compatibility sets out that the stated objective of the measure is to 'promote administrative efficiency'.³⁰ However, the right to non-refoulement, including the obligation to ensure independent, effective and impartial review, is absolute, and cannot even be justifiably limited.

2.132 In this regard, in the previous assessment of the introduction of the IAA in a previous committee report, it was noted that the (then proposed) system – an internal departmental review system – lacks the requisite degree of independence to ensure 'independent, effective and impartial' review under international human rights law.³¹ It was identified that this concern is most pronounced in respect of the fact that any such internal reviews by the department would be performed by the

27 Schedule 2, Part 3, item 27 inserts new subsection 473CA(2).

28 Schedule 2, Part 3, item 28 inserts new section 473DG.

29 Schedule 2, Part 3, item 33 inserts new section 473HE.

30 EM, SOC 45.

31 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

department itself, which, being the executive arm of government, would amount to executive review of executive decision making.³²

2.133 This was subsequently reiterated in the final assessment of the introduction of the IAA.³³ It was also noted that, while judicial review is still available, it is limited to review of decisions as to whether the decision was lawful and does not consider the merits of a decision.³⁴ This report also discussed how the right to a fair hearing was engaged and limited by the introduction of the IAA.³⁵

2.134 These concerns with the IAA process are relevant to the consideration of the proposed amendments, as the possibility that the individual merits of an applicant's claim will not be treated or considered separately further increases the existing risk of refoulement and further limits the existing limitations on the right to an effective remedy.

2.135 As noted in the initial analysis the right to an effective remedy, including the right to independent, effective and impartial review, is further limited by the proposed amendments to the IAA process, which provide that individual applications need not be treated separately.

2.136 The committee sought the advice of the Minister for Immigration and Border Protection as to whether hearing family applications together (without the consent of the applicants) will ensure the review process under the IAA provides for effective review of such claims so as to comply with Australia's non-refoulement obligations. As set out above, no response was received from the minister by the requested date.

2.137 In the absence of this further information, it is not possible to conclude that the measure is compatible with the obligation of non-refoulement and the right to an effective remedy including the requirement of independent, effective and impartial review of non-refoulement decisions.

32 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

33 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. It was noted that the fact that the reviewers are employees under the *Public Service Act 1999* affects the independence of such a review and therefore the impartiality of such a review.

34 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178.

35 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. Specifically, it was noted that: '... nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.'

Committee comment

2.138 The obligation of non-refoulement is absolute and may not be subject to any limitations.

2.139 The right to an effective remedy and the obligation of non-refoulement, which includes the right to independent, effective and impartial review of non-refoulement decisions, is further limited by the proposed amendments to the Immigration Assessment Authority process, which provide that individual applications need not be treated separately.

2.140 Noting in particular that a response was not received from the Minister for Immigration and Border Protection regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the obligation of non-refoulement and the right to an effective remedy.³⁶

36 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Purpose	Seeks to amend the <i>Native Title Act 1993</i> to respond to the Federal Court's decision in <i>McGlade v Native Title Registrar</i> [2017] FCAFC 10 by: confirming the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); enable the registration of agreements which have been made but have not yet been registered; and ensure that area Indigenous Land Use Agreements can be registered without requiring every member of the RNTC to be a party to the agreement
Portfolio	Attorney-General
Introduced	House of Representatives, 15 February 2017
Rights	Culture; self-determination (see Appendix 2)
Previous report[s]	2 of 2017
Status	Concluded examination

Background

2.141 The committee first reported on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the bill) in its *Report 2 of 2017*, and requested a response from the Attorney-General by 13 April 2017.¹

2.142 The Attorney-General's response to the committee's inquiries was received on 28 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Area Indigenous Land Use Agreements and the Native Title Act

2.143 The *Native Title Act 1993* (NTA) provides a legislative process by which native title groups can negotiate with other parties to form voluntary agreements in relation to the use of land and waters called Indigenous Land Use Agreements (ILUAs). Under the NTA ILUAs may be:

- over areas or land where native title has, or has not yet, been determined;
- entered into regardless of whether there is a native title claim over the area or not; or

¹ Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 18-25.

-
- part of a native title determination or settled separately from a native title claim.²

2.144 There are a number of matters which ILUAs may cover including:

- how native title rights coexist with the rights of other people;
- who may have access to an area;
- native title holders agreeing to a future development or future acts;
- extinguishment of native title;
- compensation for any past or future act;
- employment and economic opportunities for native title groups;
- issues of cultural heritage; and
- mining.³

2.145 When registered, ILUAs bind all parties and all native title holders to the terms of the agreement including people that have not been born at the time an ILUA was registered.⁴

2.146 Under the NTA there are three types of ILUAs:

- body corporate ILUAs are made in relation to land or waters where a registered native title body corporate exists;
- 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists; and
- alternative procedure ILUAs.⁵

2.147 The NTA specifies requirements which must be met in order for an agreement to be an 'Area ILUA'. Section 24CD of the NTA provides that all persons in the 'native title group', as defined in the section, must be parties to an Area ILUA. Under section 24CD the native title group consists of all 'registered native title claimants' (RNTC) in relation to land or waters in the area. Section 253 of the NTA defines RNTC as 'a person or persons whose name or names appear in an entry to the Register of Native Title Claims'. The RNTC is often a subset of the larger group native title claim group that may hold native title over the area.⁶ Section 251A of the NTA provides for a process for authorising the making of ILUAs by the native title claim group.

2 See *Native Title Act 1993* (NTA) section 34CD.

3 See NTA section 24CB.

4 See NTA section 24AA(3).

5 Explanatory memorandum (EM) 2.

6 EM 2.

2.148 The recent Full Federal Court decision in *McGlade v Native Title Registrar & Ors (McGlade)*,⁷ dealt with three main issues relating to the process of Area ILUAs:

- whether each individual member of the RNTC must be party to an area ILUA;
- whether a deceased individual member of the RNTC must be party to an Area ILUA; and
- whether an individual member of the RNTC must sign an area ILUA prior to the application for registration being made.

2.149 The court in *McGlade* held in relation to any proposed Area ILUA, if one of the persons who, jointly with others, has been authorised by the native title claim group to be the applicant, refuses, fails or neglects, or is unable to sign a negotiated, proposed written indigenous land use agreement, for whatever reason, then the document will lack the quality of being an agreement recognised for the purposes of the NTA and will be unable to be registered.⁸ Following this decision all individuals comprising the RNTC must sign the agreement otherwise it cannot be registered as an Area ILUA.

Amendments to process for Area ILUAs and validation of existing ILUAs

2.150 The bill seeks to amend the NTA to overturn aspects of the decision in *McGlade* regarding Area ILUAs. The bill seeks to amend the process for authorising ILUAs as follows:

- (a) a native title claim group authorising an ILUA under section 251A of the NTA will be able to:
 - (i) nominate one or more of the members of the RNTC for the group to be party to the ILUA; or
 - (ii) specify a process for determining which of the members of the RNTC for the group is, or are, to be party to the ILUA.⁹
- (b) under section 251A a native title claim group will be able to choose to utilise a traditional decision-making process for authorising such matters or agree and adopt an alternative decision-making process;¹⁰

7 [2017] FCAFC 10 (*McGlade*).

8 The decision of the full bench of the Federal Court in *McGlade* reversed the decision of Reeves J in *QGC Pty Ltd v Bygrave* (No 2) (2010) 189 FCR 412 (*Bygrave*) which held the authorisation of the ILUA by the claimant group was of paramount importance, not the signature of all of the persons comprising the applicant. Once authorised, the claimant group could decide who they wanted to sign the Area ILUA. Prior to *Bygrave* an Area ILUA would not be registered unless it was signed by all of the RNTCs.

9 See proposed section 251A(2).

10 See proposed section 251A(2).

- (c) in place of the current requirement for all members of the RNTC to be party to the agreement under section 24CD of the NTA, the mandatory parties to an ILUA would include:
- (i) the member or members of the RNTC who is or are nominated by the native title claim group, or determined using a process specified by the native title claim group, to be party to the ILUA; or
 - (ii) if no such members are nominated or determined to be party to the ILUA, a majority of the members of the RNTC.¹¹

2.151 The bill also seeks to amend the NTA to:

- (a) provide that existing Area ILUAs which have been registered on or before 2 February 2017, but do not comply with *McGlade* as they were not signed by all members of the RNTC, are valid; and
- (b) enable the registration of agreements which have been made and lodged for registration on or before 2 February 2017 but do not comply with *McGlade* as they have not been signed by all members of the RNTCs.¹²

Compatibility of the measures with the right to culture

2.152 The right to culture is contained in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the International Covenant on Civil and Political Rights (ICCPR).

2.153 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. This right is separate from the right to self-determination as it is conferred on individuals (whereas the right to self-determination belongs to groups). This right has been identified as particularly applying to Indigenous communities, and includes the right for Indigenous people to use land resources, including traditional activities such as hunting and fishing and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.¹³

2.154 The initial human rights analysis noted that the proposed amendments to the process for authorising the making of Area ILUAs engage the right to culture. This is because the types of matters which may be the subject of an Area ILUA are

11 See proposed section 24CD(2)(a).

12 EM 6.

13 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994); UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, A/55/40 (2000) and Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009).

significant and include such matters as authorisation of any future act and the extinguishment of native title rights and interests. Given that such agreements continue to operate into the future, the process by which ILUAs are authorised by native title claim groups is of great significance for the right to culture.

2.155 Under proposed section 24CD(2)(a)(ii) where no members of the RNTC are nominated or determined to be party to the ILUA, the default position is that agreement from a majority of the members of the RNTC will be sufficient for an Area ILUA to be valid. Noting that the right to culture is an individual rather than collective right, this may have the effect of limiting the right to culture of individuals who do not agree with the ILUA. Similarly, the validation of Area ILUAs that have previously been registered or are lodged for registration which have not been signed by all RNTC members could potentially limit the right to culture for individuals that do not agree to an Area ILUA.

2.156 A limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and a proportionate means of achieving this objective.

2.157 The statement of compatibility identifies that the measures engage the right to culture and states that the NTA 'as a whole' promotes the right to enjoy and benefit from culture by establishing processes through which native title can be recognised and protected. It contends that the bill supports this function of the NTA by providing certainty to native title claimants and holders.¹⁴

2.158 The initial human rights analysis noted that statement of compatibility does not provide an assessment of the potential limitation on individuals' right to culture. Nevertheless, the statement of compatibility explains that the amendments are needed to ensure the views of the broader native title claim group are not frustrated noting that the position following *McGlade* means that if a single member of the RNTC withholds consent to be a party to the Area ILUA the ILUA cannot be registered. The statement of compatibility notes in particular that disputes between RNTC members and the broader claim group can lead to 'delays and burdensome costs.'¹⁵

2.159 The explanatory memorandum to the bill further notes that while a native title claim group may make an application under section 66B of the NTA removing a member or members of the RNTC who refuse to sign or are unable to sign, 'this process can impose high costs on claim groups.'¹⁶

14 EM 7.

15 EM 7.

16 EM 4.

2.160 The factors above indicate that, to the extent that the measures limit the right to culture, the measure pursues a legitimate objective for the purposes of international human rights law.

2.161 However, while acknowledging difficulties with the current authorisation process for ILUAs, the initial human rights analysis noted some questions about the proportionality of the measures, particularly in light of the serious matters that ILUAs may cover (including future projects and extinguishment of native title) and the ongoing binding nature of such ILUAs into the future. The proposed amendments would allow an ILUA to be registered even where a significant minority of RNTC members disagree or refuse to sign and may have strong reasons for doing so.

2.162 The statement of compatibility does not address whether reasonable scope could be given to minority views, which is relevant to whether the measure is the least rights-restrictive means of achieving its objective.

2.163 Accordingly, the committee sought the advice of the Attorney-General as to whether the measure is a reasonable and proportionate measure for the achievement of its apparent objective and in particular:

- whether less rights restrictive measures would be workable;
- whether reasonable scope could be given for minority views; and
- any procedural or other safeguards to protect the right to culture for individuals.

Compatibility of the measure with the right to self-determination

2.164 The right to self-determination is protected by article 1 of the ICCPR and article 1 of the ICESCR. The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development. It is generally understood that the right to self-determination accrues to 'peoples', rather than to individuals.

2.165 The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.¹⁷

2.166 The initial human rights analysis noted that, as acknowledged in the statement of compatibility, the principles contained in the UN Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the amendments in this bill. The Declaration provides context as to how human rights standards under

17 See UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21, The right to self-determination* (1996).

international law apply to the particular situation of Indigenous peoples.¹⁸ The Declaration affirms the right of Indigenous peoples to self-determination.¹⁹

2.167 The initial human rights analysis stated that the proposed amendments to the authorisation process of Area ILUAs engage and appear likely to promote the collective right to self-determination, noting that a minority of members of the RNTC would be unable to prevent the making of an ILUA which has been authorised by the native title claim group. The statement of compatibility states that the measures engage and promote the rights contained in the Declaration and the right to self-determination by:

...emphasis[ing] the fundamental importance of authorisation to the integrity of the native title system. Authorisation processes recognise the communal character of Indigenous traditional law and custom, and ensure that decisions regarding the rights and interest of Indigenous Australians are made with traditional owners.²⁰

2.168 While acknowledging that the measures, in general, appear to promote the collective right to self-determination, the initial human rights analysis noted that there are some remaining questions about whether the measures will promote the right to self-determination in all circumstances. The initial human rights analysis stated that, as indicated above at [2.160], it may be considered to be important to give some scope to the reasonable expression of minority views as part of ensuring genuine agreement is reached. In this respect, it is noted that adequately consulting those most likely to be affected by such changes in accordance with the Declaration is of particular importance.

2.169 In relation to the compatibility of the measure with the right to self-determination, the committee therefore sought the advice of the Attorney-General:

- about the extent to which the measures promote the right to self-determination in a range of circumstances;
- as to whether reasonable scope could be given for minority views; and
- as to whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes.

18 EM 8.

19 UN Declaration on the Rights of Indigenous Peoples, article 3.

20 EM 8.

Attorney-General's response

Right to culture

2.170 In relation to the right to culture, the Attorney-General's response acknowledges that there may be some tension between the protection of communal rights and the individual right to culture:

One of the main purposes of the Act is to preserve and protect native title rights. Native title rights are generally communal in nature and there may be some [sic] tension between the protection and preservation of communal rights and the individual right to enjoy and benefit culture.

The practice of culture and the recognition of native title rights are not necessarily dependent; it is possible for native title holders to engage in a range of cultural practice without a native title claim or determination. Indigenous Land Use Agreements (ILUAs) will often facilitate access for such practices regardless of the nature and extent of native title rights likely to be recognised by a court.

2.171 The Attorney-General's response provides useful information addressing the committee's questions about whether the measures are a reasonable and proportionate limitation on the right to culture.

2.172 In relation to whether less rights restrictive measures would be workable, the Attorney-General's response states:

ILUAs are a mechanism allowing native title holders and claimants and third parties to agree about the doing of things on land subject to native title. While the exact subject matter of the affected ILUAs is commercial-in-confidence to the parties of those ILUAs, ILUAs can cover a range of matters including agreement about the doing of acts that may affect native title, how native title and other rights in the area will be exercised including how parties will be notified and consulted, and agreement on compensation and other benefits. The effect of the decision has been to bring into doubt the agreements that have been reached on these and other issues, and to raise doubts about the validity of acts done in reliance on the agreement and of benefits transferred or to be transferred in the future. This leaves the ILUAs open to legal challenge.

Allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether agreements struck can continue to be relied upon by both native title holders and third parties. It also raises the prospect of significantly increased costs for the sector both in the form of litigation about the status of affected agreements, which may divert resources away from progressing claims for native title, and potentially the need to re-negotiate ILUAs which may have already taken several years and significant resources to negotiate. Given these consequences I am satisfied that less restrictive measures are not available.

2.173 It can be accepted that the burden to re-negotiate ILUAs which have already been negotiated may take significant time and resources, and uncertainty regarding the status of agreements already registered or lodged for registration may pose significant problems for native title holders and third parties. In these circumstances, legislating to save existing agreements (that have already been registered, or have been lodged for registration) from legal challenge may be the least rights-restrictive feasible method of addressing these problems, less so than, for instance, imposing some interim arrangement that has not been authorised by native title holders, or simply leaving the ILUA open to legal challenge.

2.174 However, it is noted in this respect that ILUAs may cover a range of serious matters, including the extinguishment of native title rights and interests, and accordingly, where the terms of the ILUA are a matter of dispute within the claim group, the measures validating those ILUA's may profoundly affect the interests of certain individuals in relation to the right to culture. This underscores the importance of consultation with affected groups, addressed below.

2.175 In relation to whether reasonable scope could be given in the ILUA authorisation process to minority views, the Attorney-General's response states:

Minority views within the claim group are given voice through the authorisation process for an ILUA. The authorisation process involves everyone who holds, or who may hold, native title within the area of an ILUA, and requires those parties to use a traditional decision-making process (where one exists), or a process agreed upon by the group, to decide whether or not to authorise the ILUA. Where a claim group does not authorise an ILUA, the agreement cannot be registered. It is only after the authorisation has occurred that the Registered Native Title Claimant (RNTC) - a smaller group of authorised representatives who manage the claim on behalf of the wider group - must become parties to the agreement, before it can be registered.

The measures in the Bill allow an ILUA to be registered where not every member of the RNTC has become party to the agreement; however, the ILUA must still be authorised before this can occur. Where a claim group authorises an ILUA, notwithstanding minority views, the Act allows for that ILUA to be registered. Requiring unanimity on the part of the claim group before ILUAs can be authorised would slow, or possibly entirely stop, agreement-making under the Act, which would dramatically reduce the financial and other benefits which can flow to native title holders as a result of ILUAs.

2.176 This response assists to further explain the authorisation process for an ILUA and indicates that scope is afforded to minority views in these processes but that requiring unanimity on the part of the claim group before ILUAs are authorised may undermine the process of agreement-making under the NTA. The response also clarifies that even if not every member of the RNTC signs the ILUA the ILUA must still

be properly authorised. These factors collectively may assist to support the view that the measures are a proportionate limit on the individual right to culture.

2.177 In relation to whether there are any procedural or other safeguards to protect the right to culture for individuals, the Attorney-General's response states:

Part of the statutory functions of Native Title Representative Bodies and Service Providers is to provide dispute resolution services. This mechanism provides support to claim groups unable to agree about the conduct of consultations, mediations, negotiations or proceedings about ILUAs.

The measures in the Bill impose a higher standard on decision-making in relation to ILUAs than existed prior to *McGlade*. Before that decision it was sufficient for a single member of the RNTC to be a party to an ILUA. The Bill strikes a balance between the unanimity requirement in *McGlade* and the previously accepted position that a single RNTC member being party to an ILUA was sufficient.

The *McGlade* decision emphasised the role of the s 66B applicant replacement process as a mechanism for removing members of the RNTC who refuse to sign an ILUA, notwithstanding the fact that the wider group has authorised it. The court noted that it is open to a claim group to remove a person from the RNTC for failing to comply with the claim group's will in that regard. However, the process of obtaining a court order under s 66B is costly, and will often delay the making of agreements for groups, which is already a lengthy and expensive process. Requiring a change in the composition of the RNTC under s 66B in order to ensure that an ILUA can be registered imposes significant transaction costs on native title groups.

2.178 These points support the view that the measures may constitute a proportionate limit on human rights. In relation to the section 66B mechanism, it is accepted that this process is costly and may create considerable delay. On balance, on the available information, it appears that the measures are likely to be a reasonable and proportionate limit on the individual right to culture and accordingly compatible with this right.

Right to self-determination

2.179 In relation to the compatibility of the measure with the right to self-determination and whether reasonable scope could be given to minority views, the Attorney-General's response states:

Through ILUAs the Act provides a framework for native title holders to use their native title rights in particular ways and to make agreements about how activities on land subject to native title may occur. The measures provide greater control to claim groups as a whole, rather than the individual members of the RNTC, over the making of area ILUAs. If allowed to stand, the *McGlade* decision would have required unanimity among the RNTC, even in circumstances where the broader claim group supports the relevant ILUA and have authorised it. Negotiation and authorisation of an

ILUA are the appropriate forums for a native title group to consider minority viewpoints.

2.180 This response, in key respects, reflects the nature of the right to self-determination as ultimately a collective one. The Attorney-General's response usefully outlines the scope provided to minority views through the authorisation process. The authorisation process, rather than the registration process, appears to be the appropriate mechanism to assist to ensure that genuine agreement is reached and the collective right to self-determination is promoted.

2.181 In relation to whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes the Attorney-General's response states:

The consultation process for the Bill was necessarily targeted, given the narrow scope of the measures and their urgency. My department consulted with the peak body representing all Native Title Representative Bodies and Service Providers across the country, the National Native Title Council (NNTC), along with state and territory officials, and peak representative bodies for the mining and agricultural sectors. The NNTC were supportive of the measures and made a submission to the Senate Inquiry into the provisions of the Bill - endorsed by many of the Native Title Representative Bodies and Service Providers - indicating its support. The NNTC and Cape York Land Council also expressed concern that, absent the Bill being passed, the *McGlade* decision will allow individuals to frustrate the will of the group.

2.182 The obligation to consult with Indigenous peoples in relation to actions which may affect them is accepted as part of customary international law.²¹ The information provided by the Attorney-General that a number of Native Title Representative Bodies were able to make submissions into the Senate Legal and Constitutional Affairs Inquiry into the bill and that some targeted consultations were undertaken is welcome.

2.183 However, it is noted that the judgment in *McGlade* was handed down on 2 February 2017, and the bill was introduced into parliament within two weeks' time. This is very short period of time given the obligation to consult and the importance and complexity of the issues raised and the need for affected people to develop and communicate their views to representative and other bodies.

2.184 A related human rights issue that some affected parties have raised in relation to the bill is the requirement of 'free, prior and informed consent' contained within the Declaration. While the Declaration is not included in the definition of

21 Customary international law is the practice of states accepted by states internationally as law. It has two elements (1) widespread and representative state practice and (2) *opinio juris* (belief by states that such conduct is required because a rule of law renders it compulsory). Customary international law is binding on all states.

'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law apply to the particular situation of Indigenous peoples.²² Aspects of the Declaration may also be considered to represent customary international law, which is binding on Australia. The statement of compatibility recognises the relevance of the Declaration in relation to the committee's mandate of assessing legislation for human rights compatibility.²³

2.185 There is, however, uncertainty about the requirement of 'free prior and informed consent' as a matter of international human rights law. A number of governments (including Australia) have previously not accepted that aspects of the provisions of the Declaration which require 'free prior and informed consent' (rather than 'consultation') have yet attained the status of customary international law which is binding on Australia.²⁴ This analysis does not comprehensively address whether the measure complies with this principle and the extent to which it relates to the right to self-determination. However, it is noted that while not in itself legally binding, the Declaration is an important instrument that articulates a range of principles, standards and guidance to governments for the treatment of Indigenous peoples.²⁵ The principle of 'free prior and informed consent' may be viewed as an important one in the context of developing and amending native title legislation. The standards articulated in the Declaration may also signify future developments in international law which may become legally binding.

2.186 Overall, noting the information provided in the Attorney-General's response, the measures appear to promote the right to self-determination.

Committee response

2.187 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

22 EM 8.

23 EM 8.

24 See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34 (2009) [38]; See, also Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) 16.

25 See, for example, Trevor Buck, *International Child Law* (Routledge, 2014) 437 – 438; Brenda L Gunn, 'Self-Determination as the Basis for Recognition: Implementing the UN Declaration on the Rights of Indigenous Peoples' 7(30) (May/June 2012) *Indigenous Law Bulletin* 22; Kanchana Kariyawasam, 'The significance of the UN Declaration on the rights of Indigenous Peoples: The Australian Perspectives' 11(2) (2010) *Asia-Pacific Journal on Human Rights and the Law* 1-17; Elvira Pulitano (ed) *Indigenous Rights In the Age of the UN Declaration* (Cambridge University Press, 2012).

2.188 While noting that the measures may profoundly affect certain individuals' enjoyment of their right to culture, the committee notes that the measures are likely to be a reasonable and proportionate limit on the individual right to culture and accordingly may be compatible with the right to culture.

2.189 The committee notes that the measures are likely to promote the right to self-determination.

2.190 The committee also notes the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the UN Declaration on the rights of Indigenous peoples.

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017

Purpose	Seeks to amend the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i> to implement amendments of the <i>International Convention for the Prevention of Pollution from Ships 1973</i> , to ensure that there are strict discharge restrictions for oil, noxious liquid substances, sewage and garbage for certain ships operating in polar waters
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives, 16 February 2017
Rights	Fair trial; presumption of innocence (see Appendix 2)
Previous report	3 of 2017
Status	Concluded examination

Background

2.191 The committee first reported on the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (the bill) in its *Report 3 of 2017*, and requested a response from the Minister for Infrastructure and Transport by 21 April 2017.¹

2.192 The minister's response to the committee's inquiries was received on 31 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Compatibility of strict liability and reverse burden offences with the right to be presumed innocent

2.193 In its initial analysis, the committee described the relevant requirements of article 14(2) of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to be presumed innocent until proven guilty according to law in relation to strict liability and reverse burden offences.

2.194 The committee noted that, in relation to both strict liability offences and reverse burden offences, such measures will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The initial analysis also drew attention to the committee's *Guidance Note 2*

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 26-28.

which sets out the committee's usual expectation in relation to strict liability offences and reverse burden offences.²

2.195 The statement of compatibility did not sufficiently address these matters. Accordingly, the committee sought the advice of the Minister for Infrastructure and Transport as to:

- whether the strict liability and reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the strict liability and reverse burden offences are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.196 In relation to the questions raised by the committee, the minister's response provides that:

Strict liability offences

26BCC(3) creates an offence for the master and owner of an Annex IV Australian ship where sewage is discharged in the Antarctic Area outside Australia's exclusive economic zone. The purpose of this offence to [sic] manage the risk of Australian ships discharging sewage into the pristine waters of the Antarctic. This type of discharge could have a significant adverse impact on the environment, human health, safety and other users of the sea, particularly when a reoccurring activity.

26BCC(4) creates a similar offence, being an offence for the master and owner of an Annex IV Australian ship which discharges sewage in Arctic waters. While Australia does not have the additional burdens of responsibilities for the Arctic area as is the case for the Antarctic under the Antarctic treaty system, the same concerns outlined above in relation to the Antarctic apply to this offence in the Arctic.

Reverse Burden Provisions

26BCC(5)-(9) provide defences to the strict liability offences proposed at 26BCC(3) and (4). These provisions describe exceptions to the strict liability offences and require the defendant to raise evidence about the matters outlined in each provision.

Section 26BCC(5) creates two exceptions. The first is an exception to the strict liability offences where safety of life at sea is endangered. The

2 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

second exception requires evidence to be presented about the precautions taken throughout a voyage to minimise damage and the decision about the need to discharge sewage.

Section 26BCC(6) creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the speed of the ship when the discharge occurs.

Section 26BCC(7) also creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the physical nature of the discharge when the discharge occurs.

Section 26BCC(8) creates an exception requiring evidence to be presented about the nature of the sewage discharged.

Section 26BCC(9) creates an exception requiring evidence to be presented about the location of the discharge.

Legitimate objective

The Polar Code is an international agreement negotiated under the auspices of the International Maritime Organization (IMO) that includes mandatory provisions covering pollution prevention measures. These measures are important because as sea ice continues to decline, the polar waters are becoming more accessible to vessel traffic. Shipping activities are therefore projected to increase as a result of natural resource exploration and exploitation, tourism, and faster transportation routes. The increase in shipping presents substantial environmental risks for these fragile marine ecosystems. Therefore, I consider that both the strict liability offences and reverse burden provisions are directed toward a legitimate objective.

Rational connection

In aiming to protect the environment the Polar Code places strict limitations on discharge of sewage and garbage from ships travelling in polar waters. The strict liability provisions in the Bill implement the parts of the Polar Code that reflect these limitations. Prevention of the discharge of untreated sewage from passing ships is a necessary step in protecting these waters and will become more important as traffic increases.

The burden of proof is placed on the defendant in the above provisions of the Bill because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are best placed to give evidence as to their decision making at the time when a discharge occurs. This is a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. The Senate Standing Committee for the Scrutiny of Bills has previously indicated that the burden of proof may be imposed on a defendant under these circumstances. In my view, this approach is also consistent with

4.3.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Regarding 26BCC(5), only those present during a particular incident are able to make an assessment as to what is necessary to ensure the safety of life at sea, and the master of the ship is charged with the responsibility for making this judgement. Regarding 26BCC(6), the circumstances surrounding a particular incident, the precautions needed to address that situation, and the assessment undertaken in making a decision, can only be known by those present (specifically the master of the ship). Similarly, regarding 26BCC(7)-(9), the matters described in each of these exceptions is knowable only by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner.

Proportionality

Shipping companies are engaging in a high-investment, high-return commercial activities. Stringent regulatory regimes designed to better manage safety and environment issues throughout the world's oceans are agreed internationally through the IMO, a longstanding international body involving 172 Member States. Those ships travelling through Antarctic and Arctic waters are subject to additional internationally agreed regulatory regimes designed to protect these sensitive waters. Australia has a particular responsibility for parts of the Antarctic waters through the Antarctic Treaty system.

Given the significant consequences of non-compliance for the Antarctic, it is important that the penalty for non-compliance is high enough to be a real incentive to industry. In order to ensure compliance with environmental regimes, high initial outlays by the shipping industry are sometimes required. In these circumstances, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the strict liability offences and reverse burden provisions contained in the Bill are reasonable and proportionate. Further, these strict liability offences and reverse burden provisions are consistent with other measures in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

There are no less intrusive measures that could be implemented that would achieve the same environmental outcome. I acknowledge the burden placed on shipowners and masters through these provisions, however I note the benefits that also accrue to industry in protecting the environment in which they operate. I also note the support provided by the maritime industry during the international negotiations relating to the Polar Code conducted under the auspices of the IMO.

Given the above, I consider that the strict liability offences and reverse burden provisions contained in the Bill are aimed at achieving a legitimate objective for the purposes of international human rights law, that the offences and provisions are rationally connected to that objective, and

that the limitation is in each case a reasonable and proportionate measure.

2.197 Based on the detailed information provided, the measures appear likely to be compatible with the right to be presumed innocent and the right to a fair trial.

Committee response

2.198 The committee thanks the Minister for Infrastructure and Transport for his detailed response and has concluded its examination of this issue.

2.199 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the presumption of innocence and the right to a fair trial. The committee notes that this information would have been useful in the statement of compatibility.

Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

Purpose	Proposes to make a number of amendments to the <i>Therapeutic Goods Act 1989</i> , including to: enable the making of regulations to establish new priority pathways for faster approval of certain products, designate bodies to appraise the suitability of the manufacturing process for medical devices manufactured in Australia, and to consider whether such medical devices meet relevant minimum standards for safety and performance; allow certain unapproved therapeutic goods that are currently accessed by healthcare practitioners through applying to the Secretary of the Department of Health for approval to be more easily obtained; provide review and appeal rights for persons who apply to add new ingredients for use in listed complementary medicines; and make a number of other measures to ensure consistency across the regulation of different goods under the Act
Portfolio	Health and Aged Care
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see Appendix 2)
Previous report	2 of 2017
Status	Concluded examination

Background

2.200 The committee first reported on the Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016 (the bill) in its *Report 2 of 2017*, and requested a response from the Minister for Health by 13 April 2017.¹

2.201 The minister's response to the committee's inquiries was received on 19 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.202 Proposed section 41AF of the bill seeks to introduce a new civil penalty provision that applies if a licence holder carrying out one or more steps in the manufacture of therapeutic goods provides false or misleading information or documents to the Secretary of the Department of Health (the secretary).

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 26-28.

2.203 A maximum of 5 000 civil penalty units will apply to an individual who is found to contravene proposed section 41AF. Based on the rate for penalty units as it currently stands this equates to a monetary penalty of up to \$900 000.² With changes to the rate of penalty units scheduled to increase from July 2017, the maximum penalty will be over \$1 million.³

2.204 The initial analysis identified that the measure raised questions as to the compatibility of the measure with the right to a fair trial, insofar as the civil penalty provisions may be regarded as 'criminal' for the purposes of international human rights law and thereby engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). This was not addressed in the statement of compatibility.

2.205 The committee therefore sought further information from the Minister for Health as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.

Minister's response

2.206 In relation to the questions raised by the committee, the minister's response provides that:

This measure (proposed new section 41AF) is clearly identified in the Bill as being a civil penalty, and is plainly distinguishable as such from the corresponding criminal offences in the Bill relating to the same conduct - proposed new sections 41 AD and 41 AE.

Although the maximum levels of these penalties may appear high, this is designed to reflect the size and nature of the therapeutic goods industry, and the significant health dangers that major problems with medicines and medical devices can cause to patients.

It is very important from a public health perspective that the Act discourage the provision of false or misleading information to the Therapeutic Goods Administration (TGA) in the context of the carrying out of its regulatory functions - including in respect of therapeutic goods manufacturers. If the TGA were to rely on false or misleading information to, for example, elect not to suspend or revoke a manufacturing licence, this could potentially have quite serious consequences for public health and safety.

2 The current penalty unit rate is \$180 per unit, see section 4AA of the *Crimes Act 1914*.

3 See *Mid-Year Economic and Fiscal Outlook 2016-17*, December 2016, Appendix A. See also Crimes Amendment (Penalty Unit) Bill 2017, which seeks to increase the amount of the Commonwealth penalty unit from \$180 to \$210, with effect from 1 July 2017. This bill was introduced into the House of Representatives on 16 February 2017.

The new information-gathering power in proposed new section 41AB is needed to support the effective regulation of therapeutic goods manufacturing in Australia so as to safeguard public health, particularly as it relates to informing the TGA about significant matters such as the quality assurance and control measures used by a manufacturer, and whether a manufacturer has been observing the manufacturing principles (as minimum requirements for ensuring quality and safety of therapeutic goods).

The maximum penalty levels for proposed new section 41AF are also consistent with the regime throughout the Act of having civil penalties as an alternative to criminal offences for a range of behaviour that breaches important regulatory requirements. For example, section 9H of the Act (which the Committee considered in its Second Report of the 44th Parliament) sets out a civil penalty for making false statements in, or in connection with a request to vary an entry for a therapeutic good in the Australian Register of Therapeutic Goods, with identical maximum penalty levels to proposed new section 41AF.

It is also important to note that the civil penalty in proposed new section 41AF would not apply to the public in general, but would only arise in the specific regulatory context of manufacturers of therapeutic goods who are licensed under Part 3-3 of the Act.

In addition, proposed new section 41AF does not carry any sanction of imprisonment for non-payment. Section 42YD of the Act makes it clear that if the Federal Court orders a person to pay a civil penalty, the Commonwealth may enforce the order as if it were a judgment of the Court, that is as a debt owed to the Commonwealth.

With these points in mind, this civil penalty provision would not seem likely to be 'criminal' for the purposes of international human rights law and, accordingly, the Committee's question in relation to whether the measure is consistent with the right to a fair trial would not appear to arise.

The Act also protects a person from being required to pay a civil penalty if they have already been convicted of an offence relating to the same conduct, and prohibits criminal proceedings from being started if an order has been made against the person in civil penalty proceedings for the same conduct. Any civil penalty proceedings will be stayed if criminal proceedings relating to the same conduct are, or already have been, started.

In addition, the Act makes it clear that any evidence given by a person in civil penalty proceedings (whether or not any order was made by the Court in those proceedings) will not be admissible in criminal proceedings involving the same conduct.

2.207 Based on the detailed information provided and the particular regulatory context, the measures appear unlikely to be criminal for the purposes of

international human rights law. Accordingly, the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply. It is noted in this respect that there are also relevant safeguards that would prevent persons being found liable for both a criminal and civil penalty in relation to the same conduct.

Committee response

2.208 The committee thanks the Minister for Health for his response and has concluded its examination of this issue.

2.209 In light of the additional information provided the committee notes that the measure appears unlikely to be 'criminal' for the purpose of international human rights law. The committee notes that this information would have been useful in the statement of compatibility.

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

Purpose	Seeks to enable the Secretary of the Department of Veterans' Affairs to authorise the use of computer programmes to: make decisions and determinations; exercise powers or comply with obligations; and do anything else related to making decisions and determinations or exercising powers or complying with obligations. The bill also empowers the secretary to disclose information about a particular case or class of persons to whomever the secretary determines, if it is in the public interest
Portfolio	Veterans' Affairs
Introduced	House of Representatives, 24 November 2016
Right	Privacy (see Appendix 2)
Status	Concluded examination

Background

2.210 The committee reported on the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the bill) in its *Report 3 of 2017*, and requested further information from the minister in relation to the human rights issues identified in that report.¹

2.211 In order to conclude its assessment of the bill while it is still before the Parliament, the committee requested that the minister's response be provided by 21 April 2017. However, a response was not received by this date.

2.212 Accordingly, the committee's concluding remarks on the bill are based on the information available at the time of finalising this report.²

Broad public interest disclosure powers

2.213 Schedule 2 of the bill inserts a provision into each of the *Military, Rehabilitation and Compensation Act 2004* (MRCA), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and *Veterans' Entitlements Act 1986* to enable the Secretary of the Department of Veterans' Affairs (DVA) to disclose information obtained by any person in the performance of their duties under those Acts, in a particular case or class of case, to such persons and for such

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 5-8.

2 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

purposes as the secretary determines, if the secretary certifies it is necessary in the public interest to do so.³

2.214 If the information to be disclosed is personal information, the secretary is required to notify the affected person in writing of the intention to disclose this personal information, and give the person a reasonable opportunity to provide a response and consider that response.⁴ The secretary will commit an offence if information is disclosed without engaging with the affected person.⁵

Compatibility of the measure with the right to privacy

2.215 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information.

2.216 The initial human rights analysis noted that Schedule 2 of the bill engages and limits the right to privacy by bestowing upon the secretary of the DVA a broad discretionary power to 'disclose any information obtained by any person in the performance in that persons duties' under the relevant act⁶ 'to such persons and for such purposes as the secretary determines'.⁷

2.217 The statement of compatibility for the bill acknowledges that the right to privacy is engaged and limited by this measure, but states that to the extent that it may limit rights those limitations are reasonable, necessary and proportionate.

2.218 The explanatory memorandum sets out the objective for the proposed amendment:

[t]he information sharing provisions, and related consequential amendments, are necessary because, with the creation of a stand-alone version of the [*Safety, Rehabilitation and Compensation Act 1988*] with application to Defence Force members, the ability of the [Military

3 Proposed section 409A of the *Military, Rehabilitation and Compensation Act 2004*, proposed section 151B of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed section 131A of the *Veterans' Entitlements Act 1986*.

4 At proposed subsection 409A(6) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(6) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed subsection 131A(6) of the *Veterans' Entitlements Act 1986*.

5 At proposed subsection 409A(7) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(7) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed subsection 131A(7) of the *Veterans' Entitlements Act 1986*.

6 Namely, the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* or the *Veterans' Entitlements Act 1986*.

7 Lawful interferences with privacy must be sufficiently circumscribed in order to accord with article 17 of the International Covenant on Civil and Political Rights: UN Human Rights Committee, *General Comment 16: Article 17 (Right to Privacy)* (1988) paragraph [8].

Rehabilitation and Compensation Commission] to share claims information about current serving members with either the Secretary of the Department of Defence or the Chief of the Defence Force is more limited than it is under the MRCA. These amendments will align information sharing under the DRCA with arrangements under the MRCA.⁸

2.219 The statement of compatibility also sets out the following examples of when it may be appropriate for the secretary to disclose personal information:

...where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices.⁹

2.220 The initial analysis stated that the objective of ensuring claims information about current serving members can be shared with either the Secretary of the Department of Defence or the Chief of the Defence Force would appear to seek to achieve a legitimate objective for the purposes of international human rights law.

2.221 The initial analysis stated that in allowing for disclosure in this way, the measure also appears to be rationally connected to this objective.

2.222 The statement of compatibility sets out that several statutory safeguards will ensure that the secretary's powers will be exercised appropriately, including that:

- the secretary must act in accordance with rules that the minister makes about how the power is to be exercised;
- the minister cannot delegate his or her power to make rules about how the power is to be exercised to anyone;
- the secretary cannot delegate the public interest disclosure power to anyone;
- before disclosing personal information about a person, the secretary must notify the person in writing about his or her intention to disclose the information, give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person; and
- unless the secretary complies with the above requirements before disclosing personal information, he or she will commit an offence, punishable by a fine of 60 penalty units.¹⁰

2.223 However, as noted in the initial analysis these safeguards are not sufficient to demonstrate that the limitation on the right to privacy is proportionate to the

8 Explanatory memorandum (EM) 11.

9 EM, statement of compatibility (SOC) 3.

10 EM, SOC 4.

objective sought to be achieved. For example, although the secretary must act in accordance with rules made by the minister, there is no requirement on the minister to make such rules. Under the legislation as drafted, the secretary is empowered to disclose any personal information to any person with the sole criteria for the exercise of this power being that the secretary considers it to be in 'the public interest' to do so.

2.224 The initial analysis noted that the absence in the primary legislation of any substantive detail as to the circumstances in which personal information can be disclosed, and to whom, and the absence of any obligation to make rules confining this power, together created a broad discretionary power to disclose information which raises concerns as to whether the limitation on the right to privacy is proportionate to the objective being sought to be achieved.

2.225 The committee therefore sought the advice of the Minister for Veterans' Affairs as to whether:

- there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved; and
- there are less restrictive ways to achieve the objective of the measure (including whether the primary legislation could set limits on the breadth of the secretary's discretionary power or, at a minimum, it could require the making of rules that set out how the power is to be exercised).

2.226 As noted above, no response was received by the date requested. In the absence of this information, it is not possible to conclude that the measure is compatible with the right to privacy.

Committee comment

2.227 The measure gives the Secretary of the Department of Veterans' Affairs the power to disclose personal information to any person on any basis so long as the secretary considers that disclosure to be in the 'public interest'. The statement of compatibility refers to rules that will govern the exercise of the secretary's broad discretionary power to disclose information. However, there is no obligation to make such rules, and their proposed content is not available to the committee. This broad discretionary power to disclose personal information raises potential concerns in relation to the right to privacy.

2.228 Noting in particular that a response was not received from the minister regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the right to privacy.¹¹

11 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934]

Purpose	Specifies the amounts to be paid to the states and territories to support service delivery in the areas of schools, skills and workforce development, disability and housing
Portfolio	Treasury
Authorising legislation	<i>Federal Financial Relations Act 2009</i>
Last day to disallow	Exempt
Rights	Equality and non-discrimination; health; social security; adequate standard of living; children; education; work (see Appendix 2)
Previous reports	3 of 2017
Status	Concluded examination

Background

2.229 The committee first reported on the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934] in its *Report 3 of 2017*, and requested a response from the Treasurer by 21 April 2017.¹

2.230 The Assistant Minister to the Treasurer's response to the committee's inquiries was received on 19 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.231 The committee has previously examined a number of related Federal Financial Relations (National Specific Purpose Payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.²

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 2-4.

2 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102; and *Thirty-fourth report of the 44th Parliament* (23 February 2016) 115-119.

2.232 Based on this additional information provided by the Treasurer, the committee was previously able to conclude that these determinations were compatible with human rights.³

Payments to the states and territories for the provision of health, education, employment, housing and disability services

2.233 The Intergovernmental Agreement on Federal Financial Relations (the IGA) is an agreement providing for a range of payments from the Commonwealth government to the states and territories. These include National Specific Purpose Payments (NSPPs), which are financial contributions to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

2.234 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NSPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories.

2.235 Payments under the determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the determinations engage a number of human rights.

Compatibility of the measure with multiple rights

2.236 As noted above, the committee has considered similar NSPP determinations in a number of previous reports.

2.237 As noted in the initial analysis, under international human rights law, Australia has obligations to respect, protect and fulfil human rights. This includes specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

2.238 As such, the initial human rights analysis stated that where the Commonwealth seeks to reduce the amount of funding pursuant to NSPPs, such reductions in expenditure may amount to retrogression or limitations on rights. Any backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

2.239 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 (the determination) simply states that the determination 'is compatible with relevant human rights'.⁴ This mirrors

3 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) 119.

4 Explanatory statement, statement of compatibility 2.

information provided in the statements of compatibility for NSPP determinations previously considered by the committee.

2.240 In the committee's previous assessment of similar NSPP determinations, in response to the committee's request, the Treasurer provided additional information which included a comparison of funding amounts for the various NSPPs over recent years. This additional information allowed the committee to conclude on previous occasions that there had been no reduction in funding allocation to the NSPPs in these determinations, and as such, that these payments would not have a retrogressive impact on human rights.

2.241 It is relevant to the committee's consideration of the determination whether there has been any reduction in funding allocation to the NSPPs since the committee's last assessment at the beginning of 2016. This information is not provided in the statement of compatibility.

2.242 Accordingly, the committee sought the advice of the Treasurer as to:

- whether there has been any reduction in the allocation of funding towards NSPPs since its last assessment of related determinations;
- whether the determination does or does not support the progressive realisation of economic, social and cultural rights (such as the rights to health and education); and
- if there has been a reduction in the allocation of funding towards NSPPs, whether this is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights.

Minister's response

2.243 The response of the Assistant Minister to the Treasurer provides a range of relevant information to address these questions.

2.244 In relation to whether there has been a reduction in the allocation of funding towards NSPPs since the last assessment of related determinations, the response provides the following table outlining increases in expenditure:

Sector	2014-15 (\$)	2015-16 (\$)	Increase
Disability services	1,393,331,000	1,438,826,000	45,495,000
Affordable housing	1,305,771,000	1,324,052,000	18,281,000
Skills and workforce	1,435,176,000	1,455,484,000	20,308,000

2.245 The response further states that even though there was no decrease in funding on this occasion, a year-on-year decrease in the total payment amount does not necessarily indicate a retrogressive measure. The response explains that this is

because a change in the parameters underlying indexation formulas could result in a reduced total payment and other policies and programs may also have an effect on NSPPs. As an example, the response notes that the transition to the National Disability Insurance Scheme is likely to result in reduced funding under the NSPPs but that the total commonwealth government expenditure will be increasing in the area of disability services.

2.246 In relation to whether the determination supports the progressive realisation of economic, social and cultural rights, the response notes that:

- The NSPP for skills and workforce development promotes a range of rights including the right to education and the right to work;
- The NSPP for affordable housing promotes the right to an adequate standard of living specifically in relation to housing;
- The NSPP for disability services promotes a range of human rights for persons with disabilities.

2.247 The information provided demonstrates that the allocation of funding towards NSPPs does not constitute a retrogressive measure under international human rights law. This allocation is likely to be compatible with Australia's obligations under international human rights law to progressively realise economic, social and cultural rights. Moreover, the allocation of funding appears to promote a range of economic and social rights.

Committee response

2.248 The committee thanks the Assistant Minister to the Treasurer for his response and has concluded its examination of this issue. The committee notes that it would have been useful to include the additional information in the statement of compatibility and recommends that such information be included in the future.

2.249 Based on the information provided, the allocation of funding towards National Specific Purpose Payments is likely to be compatible with Australia's obligations under international human rights law to progressively realise economic, social and cultural rights. The National Specific Purpose Payments appear to promote a range of these rights.

Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696]

Purpose	Amends the Migration Regulations 1994 to make various changes to the immigration citizenship policy, including changing the definition of 'member of the family unit' for most visas (except protection, refugee and humanitarian visas)
Portfolio	Immigration and Border Protection
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	13 February 2017
Right	Protection of the family (see Appendix 2)
Previous reports	1 of 2017, 3 of 2017
Status	Concluded examination

Background

2.250 The committee first reported on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696] (the regulation) in its *Report 1 of 2017*, and requested a response from the Minister Immigration and Border Protection by 3 March 2017.¹ The minister's response to the committee's initial inquiries was received on 10 March 2017.

2.251 The committee reported again on the regulation in its *Report 3 of 2017*, and requested a further response from the minister by 21 April 2017.²

2.252 The minister's response to the committee's further inquiries was received on 27 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Narrowing the definition of the member of a family unit

2.253 Schedule 4 of the regulation changes the general definition of 'member of the family unit' such that extended family members are no longer included in this definition. A member of a family unit will therefore only include the spouse or de facto partner of a primary applicant, and the dependent children (under the age of 23 or who are over this age but incapacitated) of the primary applicant or their partner (previously there was no age limit for the children of an applicant).³ A child

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 2-4.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 9-12.

3 Schedule 4, subregulation 1.12(2).

over 23 who is not incapacitated will therefore be considered an extended family member, and would not fall within the definition of a 'member of the family unit' (and therefore not entitled to family reunion).

2.254 In respect of protection, refugee and humanitarian visas,⁴ a person will continue to be a member of the family unit of another person (the family head) if the person meets the criteria for the general definition of a member of a family unit, as well as if the person is a dependent child of any age or a single dependent relative of any age who is usually resident in the household of the family head.⁵

2.255 The initial human rights analysis noted that the right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. The definition of what constitutes 'family' under international human rights law is broad; it refers not only to spouses, parents and children, but also to unmarried and same-sex couples and extended family members.⁶

2.256 The initial human rights analysis noted that the measure engages and limits the right to protection of the family for visa holders, other than holders of protection, refugee and humanitarian visas,⁷ as it could operate to separate parents and their adult children and extended members of the same family by excluding those family members from being considered a 'member of the family unit'. This would apply regardless of the circumstances of an individual family.

2.257 The statement of compatibility identifies that the right to protection of the family unit is engaged by the measure, however, it also states that:

...protection of the family unit under articles 17 and 23 [of the ICCPR] does not amount to a right to enter and remain in Australia where there is no other right to do so. Nor do they give rise to an obligation on a State to take positive steps to facilitate family reunification.⁸

2.258 Although Australia's obligations under international human rights law do not extend to non-citizens over whom Australia has no jurisdiction, where a person is under Australia's jurisdiction for the purposes of international human rights law,

4 As defined at Schedule 4, subregulation 1.12(3).

5 Schedule 4, subregulation 1.12(4).

6 See, for example, UN Human Rights Committee, *General Comment 16: Article 17 (Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, 1988 at [5] which stated that the term 'family' should 'be given a broad interpretation to include all those comprising the family as understood in the society of the State Party concerned'. See also UN Human Rights Committee, *General Comment 19: Article 23 (The Family)*, 1990 at [2].

7 The previous definition of member of the same family unit will continue to apply to these visa classes – see: explanatory statement (ES), statement of compatibility (SOC) 11.

8 ES, SOC 12.

human rights obligations will apply. As such, Australia is required not to arbitrarily or unlawfully (for the purposes of international human rights law) interfere in the family life of visa holders. For example, if a visa holder is residing in Australia, the government must respect, protect and fulfil this person's right to protection of their family. This includes ensuring family members are not involuntarily separated from one another.

2.259 The initial human rights analysis noted that the statement of compatibility does not explicitly identify the legitimate objective of the measure; however, it does note that the new provisions are intended to better align 'migration pathways for relatives of new migrants with those for Australian citizens and existing permanent residents'.⁹ This analysis noted that it was unclear whether this constituted a legitimate objective for the purposes of international human rights law.

2.260 The initial analysis further stated that it was unclear whether the measure was rationally connected to, and a proportionate means of achieving, a legitimate objective. The committee therefore sought the advice of the Minister for Immigration and Border Protection as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected) to that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's initial response

2.261 The minister's initial response noted that the adult children of a primary applicant or of the primary applicant's spouse (or de facto partner) continue to be eligible to be included where they are aged under 23 years and are financially dependent. Adult children of any age also continue to be eligible where they are financially dependent due to incapacity to work.

2.262 The minister's initial response further noted that Australia has a right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. While it is well-established under international law that nation states generally have the right to control such immigration matters, this is subject to particular human rights obligations such as the right to protection of the family.

2.263 The minister's initial response stated that the right to protection of the family unit under articles 17(1) and 23(1) of the International Covenant on Civil and Political Rights (ICCPR) does not amount to a right to enter and reside in Australia

9 ES, SOC 12.

where there is no other right to do so. The minister further stated that while the ICCPR requires the protection of the family, there is no positive obligation to take steps to facilitate family reunification.

2.264 While there is no positive obligation on Australia to facilitate family reunion, Australia does have international obligations in relation to actions that interfere with the family life of those within its jurisdiction.

2.265 A measure which limits the ability of certain family members to join others in a country, or prevents certain family members from staying in a country, is a limitation on the right to protection of the family, and therefore must be proportionate to the pursuit of a legitimate objective in order to be compatible with human rights.¹⁰

2.266 The committee considered that further information was necessary to evaluate whether the measure pursues a legitimate objective, is effective to achieve that objective, and is proportionate to it. Accordingly, the committee sought the further advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected) to that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response to the committee's further requests

2.267 In relation to whether the measure pursues a legitimate objective for the purpose of international human rights law, the minister's response states:

The Minister notes the concerns raised by the committee in its request for further information and provides the following response to the committee, which is in addition to information previously provided...

Why the limitation is permissible under international human rights law

The objective of the amendment is to contribute to the effective management of Australia's Migration Programme. Australia has well managed and targeted migration programmes that are designed to meet social and economic needs. It is imperative to ensure that the limited places available in targeted programmes, such as the Skilled Migration Programme and the Family Stream, are directed to those who are most

10 See, for example, *Sen v the Netherlands* (Application no. 31465/96) (2001) ECHR; *Tuquabo-Tekle And Others v The Netherlands* (Application no. 60665/00) (2006) ECHR [41]; *Maslov v Austria* (Application no. 1638/03) (2008) ECHR [61]-[67].

likely to support and deliver on the intentions of the programmes. Extended family members excluded by the new definition of MoFU [Member of the Family Unit] are able to apply for other visa classes where they meet the eligibility criteria in their own right. In doing so, the extended family member will be demonstrating their ability to make a positive contribution to Australia.

In addition, the amended definition of MoFU ensures consistency with the current framework for the relatives of Australian citizens and existing permanent residents.

2.268 The minister's response outlines the objective of the measure as meeting Australia's social and economic needs in the context of targeted migration programs. Noting the information provided and the broad scope afforded to states under international law with respect to migration, this appears to be a legitimate objective for the purpose of international human rights law.

2.269 In relation to how the measure is effective to achieve (that is, rationally connected to) that objective, the minister's response states:

The former definition allowed for more generous migration pathways for relatives of new entrants into Australia, who often benefit from differential visa pricing and processing timeframes attributable to the primary applicant. The amendment is thus effective in achieving the legitimate objectives stated, as it promotes the intentions of the Migration Programme and contributes to its effective management.

2.270 The minister's response also provides a range of information as to the proportionality of the limitation:

The new definition predominately applies to non-citizens outside Australia applying for visas to enter Australia. In regard to non-citizens within Australia's jurisdiction, this limitation is a reasonable and proportionate measure to achieve the stated objectives as it:

- includes grandfathering provisions, so that lawful non-citizens in Australia are not disadvantaged by this change...
- does not prevent extended family members who do not meet the new MoFU definition to apply for other visa classes in their own right (see first response to the committee...)
- is consistent with the arrangements for relatives of Australian citizens and existing permanent residents (see first response to the committee...)
- is more generous than that of similar nations, who are also signatories to the ICCPR (see first response to the committee)
- will not apply to refugee, humanitarian and protection visas (see first response to the committee).

2.271 In relation to the effect on current visa holders which also goes to issues of proportionality, the minister's response additionally provides the following:

In response to the committee comments provided at **Item 1.39** [2.253 above], the Minister advises that these changes are not retrospective. They predominantly apply to persons who:

- are **outside** Australia; and
- do not hold a valid visa that allows for entry into Australia; and
- are seeking to make a new application for a visa to enter Australia.

In relation to the practical application of MoFU, specific grandfathering provisions have been introduced as part of this amendment. These provide that lawful non-citizens living in Australia are not disadvantaged by this change (refer sub-regulation 1.12(5)).

2.272 It is noted that the measure has the potential to separate parents and their adult children and other family members and that in particular individual circumstances this may have a severe effect on an Australian resident's right to family life. However, on balance, noting the detailed information provided as to the proportionality of the limit placed on the right to a family life, it appears that the measure may be a proportionate limit on the right to the protection of family.

Committee comment

2.273 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this issue.

2.274 The committee notes that the measure may be compatible with the right to the protection of the family.

Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858]

Purpose	Determines classes of visas for qualifying residence exemptions pursuant to the <i>Social Security Act 1991</i> , such that a waiting period does not apply to a person who holds or was the former holder of a visa in a determined class in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card
Portfolio	Social Services
Authorising legislation	<i>Social Security Act 1991</i>
Last day to disallow	9 May 2016
Rights	Social security; adequate standard of living (see Appendix 2)
Previous reports	2 of 2017
Status	Concluded examination

Background

2.275 The committee first reported on the Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858] (the 2016 Determination) in its *Report 2 of 2017*, and requested a response from the Minister for Social Services by 13 April 2017.¹

2.276 The minister's response to the committee's inquiries was received on 24 April 2017. The response is discussed below and is reproduced in full at **Appendix 3.**

2.277 The committee first reported on the enabling legislation (the Budget Savings (Omnibus) Bill 2016 (the bill))² in its *Report 7 of 2016*,³ and, following a response from the Treasurer in respect of the bill, concluded its consideration of the bill in its *Report 8 of 2016*.⁴

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- 1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 41-43.
 - 2 The bill passed both Houses of Parliament with amendments on 15 September 2016, and received Royal Assent on 16 September 2016.
 - 3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 2-11.
 - 4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 57-61.

2.278 Schedule 10 of the bill removed the exemption from the 104-week waiting period for certain welfare payments⁵ for new migrants who are family members of Australian citizens or long-term residents with the exception of permanent humanitarian entrants. The committee found that this measure could not be assessed as a proportionate limitation on the rights to social security and an adequate standard of living.⁶ The 2016 Determination has been introduced to give effect to the changes introduced by the bill.

Newly arrived residents' waiting period

2.279 Section 4 of the 2016 Determination revokes the Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2015 (2015 Determination), which currently determines visas for the purposes of paragraph 7(6AA)(f) of the *Social Security Act 1991* (the Act). Together with the 2015 Determination, that paragraph exempts from the waiting period certain visa holders⁷ in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

2.280 The 2016 Determination puts into effect the amendments in the bill and provides that from 1 January 2017,⁸ only Referred Stay (Permanent)⁹ visas will be exempted from the waiting period, as prescribed in paragraph 7(6AA)(f) of the Act.

Compatibility of the measure with the right to social security and right to an adequate standard of living

2.281 As noted in the initial human rights analysis for the instrument, the right to social security 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. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.

5 Namely, a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

6 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 59.

7 See section 4 of the Social Security (Class of Visas — Qualifying Residence Exemption) Determination 2015 [F2015L01815]: Subclass 100 (Partner); Subclass 110 (Interdependency); Subclass 801 (Partner); Subclass 814 (Interdependency); and Subclass 852 (Referred Stay (Permanent)).

8 At subsection 2(1).

9 At section 5.

2.282 As noted in the previous legal analysis in respect of the bill,¹⁰ the right to social security and the right to an adequate standard of living are engaged and limited by this measure.

2.283 The statement of compatibility provides that the measure 'engages or gives effect' to the right to social security and the right to an adequate standard of living, and that:

[a]ccess to Special Benefit will still be available for a newly arrived permanent resident who has suffered a substantial change in their circumstances, beyond their control, and are in financial hardship, after arrival. There remains no waiting period for family assistance payments for families with children, such as Family Tax Benefit.¹¹

2.284 The committee's previous findings in respect of the enabling legislation noted in particular that information had not been provided as to how the family members will be able to meet basic living expenses during the 104-week waiting period and what specific arrangements, if any, are open to them in situations of crisis.

2.285 The statement of compatibility in relation to the 2016 Determination states that access to Special Benefit is available for a newly arrived permanent resident where there has been a substantial change in their circumstances.

2.286 The initial human rights analysis in relation to the instrument noted that, in light of the information provided in the statement of compatibility, it appears that newly arrived permanent residents would have available to them a type of payment (Special Benefit), which may serve as a safeguard to meet the cost of basic necessities. The initial analysis stated that this may support an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of living. However, the statement of compatibility does not detail whether such safeguards are in place for other newly arrived residents who are not permanent residents. It is also not clear what level of support Special Benefit provides or how long it would apply for.

2.287 Accordingly, the committee sought the advice from the Minister for Social Services as to the extent to which the Special Benefit is available to newly arrived residents who are not permanent residents and are in financial hardship and what is the level of support provided for by Special Benefit and how long they could be eligible for the Special Benefit.

10 Parliamentary Joint Committee on Human Rights, Report 8 of 2016 (9 November 2016) 57-61.

11 Explanatory statement, statement of compatibility 3.

Minister's response

2.288 In relation to the questions raised by the committee, the minister's response provides that:

In your letter you seek my clarification as to the extent to which Special Benefit is available to people who are in Australia on a temporary visa and the potential level of support available to them through this payment. I appreciate the time you have taken to bring this matter to my attention.

By way of background, Australia's social security system is different from the contributory systems that operate in other countries. It is a taxpayer funded, non-contributory system based on the concepts of residence and need. Access to social security payments is generally restricted to people who are Australian permanent residents or citizens residing in Australia.

Temporary visa holders, such as 457 visas, student and tourist visas, are not Australian residents for social security purposes and are ineligible for social security payments. A person on a temporary visa must first formalise their immigration status as a permanent resident if they wish to stay in Australia and have access to social security payments.

There are some exceptions to the general residency rules for certain determined temporary visa subclasses contained in the Social Security (Class of Visas - Qualification for Special Benefit) Determination 2015 (No. 2). This determination lists a number of visa subclasses that may be eligible to receive Special Benefit. These types of visas include temporary protection visa holders, temporary (provisional) partner visa holders and people granted a visa for the purposes assisting Australian authorities in criminal matters related to human trafficking, or slavery.

Illegal Maritime Arrivals (IMAs) who are assessed as engaging Australia's protection obligations and meet other requirements such as health, security and character checks can be granted a temporary humanitarian or protection visa. Holders of a temporary humanitarian or protection visa remain ineligible for mainstream social security payments because of their temporary visa status. Their access to social security payments is limited to Special Benefit and related ancillary payments, such as Rent Assistance, Health Care Card, and family assistance payments.

People in Australia on a temporary (provisional) partner visa are generally subject to a 104-week newly arrived residence waiting period (NARWP) before being eligible for Special Benefit. However, the 104-week Special Benefit NARWP can be waived in circumstances where the temporary partner visa holder is in financial hardship due a substantial change of circumstances beyond their control after they have first entered Australia (e.g. victim of domestic violence).

Special Benefit is a discretionary income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for

themselves and their dependants. To receive Special Benefit, it must be established that the person is not eligible for any other pension or allowance.

The rate of Special Benefit a person receives is discretionary and depends on their individual circumstances, provided it does not exceed the rate of Newstart Allowance or Youth Allowance that would otherwise be payable to the person. In practice, the Newstart Allowance rate (including supplements) is generally paid to those aged 22 years and over while the Youth Allowance rate is paid to those under 22 years.

To establish whether a person is in financial hardship or unable to earn a sufficient livelihood, an available funds test is applied. A person who requires Special Benefit long-term (more than three months) cannot receive a payment until their available funds are \$5,000 or less.

For a person who requires the payment on a short-term basis (less than three months), their available funds must be less than their fortnightly rate of payment. Where a person is a member of a couple, the partner's available funds are also included in assessing the person's available funds. In recognition that Special Benefit is a payment of last resort, the value of any in-kind support (such as free boarding and lodging) and income (both earned and unearned) is directly deducted from their maximum rate of payment.

People who receive Special Benefit can be paid for up to 13 weeks from the date of decision. Payment of Special Benefit must then be reviewed before the delegate determines whether payment can continue. If payment of Special Benefit continues, it must be reviewed every 13 weeks, though there is no limit to the length of time a person can receive the payment.

2.289 The response from the minister provides useful information about circumstances in which a Special Benefit will be available. In relation to visa classes in respect of which the 104-week waiting period applies, the minister's response details that the waiting period may be waived in respect of newly-arrived migrants on a temporary (provisional) partner visa in circumstances where there is financial hardship due a substantial change of circumstances beyond their control. As set out in the response, in these circumstances, the individual may be able to access the discretionary Special Benefit payment.

2.290 The Special Benefit appears to provide a safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This supports an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of living. In this respect, it is also noted that the waiting period for social security does not apply to certain visa holders. Accordingly, the measure appears likely to be compatible with the right to social security and the right to an adequate standard of living.

Committee response

2.291 The committee thanks the Minister for Social Services for his response and has concluded its examination of this issue. The committee notes that the additional information provided would have been useful in the statement of compatibility.

2.292 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the right to social security.

Mr Goodenough MP
Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Electoral and Other Legislation Amendment Bill 2017;
- Competition and Consumer Amendment (Competition Policy Review) Bill 2017;
- Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017) [F2017L00198];
- Law Enforcement Integrity Commissioner Regulations 2017 [F2017L00304];
- Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210];
- Telecommunications Integrated Public Number Database Scheme 2017 [F2017L00298]; and
- Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2017 - 2018 [F2017L00276].

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

- Code for the Tendering and Performance of Building Work 2016 [F2016L01859];¹ and
- Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132].²

1 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 53.

2 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 21.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.¹

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).²

Right to life

Article 6 of the International Covenant on Civil and Political Rights (ICCPR); and article 1 of the Second Optional Protocol to the ICCPR

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [3.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

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

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [3.9] to [3.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [3.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

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

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

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

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [3.6] to [3.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note 2* provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [3.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [3.6] to [3.8]));
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

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- respect for family life (prohibiting interference with personal family relationships);
 - respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
 - the right to reputation.

Right to protection of the family

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

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (CRPD)

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates 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. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); CRPD; and article 2 of the Convention on the Rights of the Child (CRC)

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).³ 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.⁴

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 The prohibited grounds of discrimination 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. The prohibited grounds of discrimination are often described as 'personal attributes'.

4 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [3.29]).

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

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security 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, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and 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).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States 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, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

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

Appendix 3

Correspondence



The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC17-002587

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

28 APR 2017

Dear Mr Goodenough *Ian,*

Thank you for your letter of 28 March 2017 regarding the comments of the Parliamentary Joint Committee on Human Rights on the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (*Report 3 of 2017*). I note the Committee requested further information on provisions that reverse the evidentiary burden of proof (item 30) and compatibility of strict liability offences with the right to be presumed innocent (item 126).

Please find below my response to the Committee's comments. In addition, I have enclosed my response to the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) included in *Scrutiny Digest 4 of 2017*, which addressed similar matters.

Right to the presumption of innocence (reverse burden provisions)

The Committee was concerned that the statement of compatibility did not adequately explain why the reverse burden provision in item 30 of the Bill is a permissible limitation on the right to be presumed innocent, as protected by article 14(2) of the *International Convention on Civil and Political Rights* (ICCPR).

Section 270 of the *Biosecurity Act 2015*, as amended by item 27 of the Bill, provides that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Item 30 of the Bill provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place.

The exceptions set out by item 30 of the Bill are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the operator of the vessel) will have access to the appropriate information and documentation, such as the vessel's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277 of the Act), or that the discharge was part of an acceptable ballast water exchange (section 282 of the Act), and

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that conditions set out by the exception have been fulfilled.

The statement of compatibility in the Explanatory Memorandum to the Biosecurity Bill 2014 discussed sections 271, 276, 277, 279, 282, and 283 of the Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

In relation to item 30 of the Bill, it remains necessary that the defendant (the person in charge or the operator of the vessel) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of the evidential burden of proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply. For these reasons, the reversal of the evidentiary burden of proof is a permissible limitation on human rights.

I also draw the Committee's attention to the revised Explanatory Memorandum to the Bill that was tabled in the Senate on 29 March 2017. The revised Explanatory Memorandum included a revised statement of compatibility, which addresses the reverse burden offence in proposed section 270 (item 30 of the Bill). The revised Explanatory Memorandum also contemplates the government amendment to the Bill, which was introduced in and passed by the House of Representatives on 28 March 2017.

Compatibility of strict liability offences with the right to be presumed innocent

The Committee commented that the statement of compatibility for the Bill has not sufficiently addressed whether the strict liability offence in proposed section 299A (item 126 of the Bill) is a permissible limitation on human rights (see Article 14(2) of the ICCPR). The Committee has therefore requested the following further information:

- whether the strict liability offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the strict liability offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

The statement of compatibility in the Explanatory Memorandum to the Bill currently states:
Item 126 introduces a reporting requirement when a vessel disposes of sediment in Australian territorial seas to ensure safety of the vessel in an emergency or a saving life at sea situation, or because disposal has been accidental or is needed to avoid or minimise pollution from the vessel. The person in charge of the vessel, or the operator of the vessel, commits a strict liability offence if a report of the incident is not made to the Director of Biosecurity.

The strict liability offence proposed by item 126 of the Bill is essential for enforcing the report of a disposal of sediment where the disposal is:

- for the purpose of ensuring the safety of the vessel in an emergency or saving life at sea;
- accidental; or
- for the purpose of avoiding or minimising pollution from the vessel.

The strict liability offence is compatible with the right to be presumed innocent, as this information would be peculiarly within the knowledge of the defendant. The defendant (the person in charge or the operator of a vessel) will have access to the appropriate information, to detail why the disposal of sediment was necessary due to safety, accident or pollution. Further, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the circumstances of the disposal, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that the disposal related to safety, accident or pollution and that the requirement to report has been met.

Disposal of sediment within Australian territorial seas could pose a significant biosecurity risk, which may need to be managed and monitored. Without the strict liability offence, a report of disposal of sediment may not occur, making it difficult to identify any such biosecurity risk. The requirement to report a disposal of sediment relating to safety accident or pollution is necessary to manage the risk in an appropriate and timely manner.

There is a strong public interest in appropriately managing biosecurity risks and preventing serious damage to Australia's marine environment and adverse effects to related industries. The strict liability offence is necessary to achieve this legitimate policy objective because it aims to deter a failure to report a disposal of sediment relating to safety, accident or pollution.

Thank you for drawing this matter to my attention. I trust this information confirms the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Yours sincerely

Barnaby Joyce MP

Enc.



The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref:

27 MAR 2017

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Helen,

The Senate Scrutiny of Bills Committee has requested further information about measures in the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (the Bill) (Scrutiny Digest 3/17 at paragraphs 1.12 to 1.20). I have provided the relevant information below.

Request at paragraph 1.15 – Reversal of evidentiary burden of proof

On this issue, the Committee has requested my advice, as follows:

“As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee requests the Minister’s advice as to why it is proposed to use an offence-specific defence (which reverse the evidential burden of proof) in this instance. The committee’s consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.”

Right to the presumption of innocence (reverse burden provisions) – Background

Laws which shift the burden of proof to a defendant, commonly known as ‘reverse burden provisions’, can be considered a limitation of the presumption of innocence. This is because a defendant’s failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.

Reversal of evidential burden of proof under Section 270

Section 270 of the *Biosecurity Act 2015* (the Act), as amended by item 27, provides that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Item 30 provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place.

The Human Rights Compatibility Statement within the Explanatory Memorandum to the Act discussed sections 271, 276, 277, 279, 282 and 283 of that Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.

The exceptions set out by item 30 are:

- peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the ship's operator) will have access to the appropriate information and documentation, such as the ship's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277), or that the discharge was part of an acceptable ballast water exchange (section 282), and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the ship's operator) will have the easiest access to appropriate records to show that conditions set out by the exception has been fulfilled.

It remains necessary that the defendant (the person in charge or the ship's operator) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of evidential proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply.

Request at paragraph 1.20 – Strict liability

On this issue, the Committee has requested my advice, as follows:

“The committee requests the Minister's advice as to why the proposed penalty for the strict liability offence in item 30 is double that which is considered appropriate in the Guide to Framing Commonwealth Offences.”

Even though the Committee has asked for my advice in relation to item 30, that item does not seek to insert a strict liability offence subject to a proposed penalty of 120 penalty units. However, item 126 of the Bill, which proposes to insert new section 299A into the Act, does seek to insert a strict liability offence subject to a proposed penalty of 120 penalty units. As the Committee referred to item 126 of the Bill at paragraph 1.16 of its consideration of the Bill in Scrutiny Digest 3/17, I have answered the question from the Committee as if it referred to item 126 of the Bill.

Strict liability offences - Background

When ‘strict liability’ applies to an offence, the prosecution is only required to prove the physical elements of an offence (that is, they are not required to prove fault elements), in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 9.2 of the *Criminal Code Act 1995*).

The Guide provides, relevantly, that although the penalty applied to a strict liability offence should not exceed 60 penalty units for an individual, a higher penalty is available where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.

Penalty units for strict liability offence under new section 229A (item 126)

New section 299A as inserted by item 126 provides that a person in charge or the operator of a vessel must make a report to the Director of Biosecurity if a disposal of sediment has been made to ensure the safety of the vessel or to save a life, or accidentally, or to minimise or avoid pollution. A person in charge or operator of a vessel commits a strict liability offence if a report is not made in accordance with this section.

This offence is similar to the existing strict liability offence provided by section 284, as amended by items 73 to 75 of the Bill. That section provides for an offence where a person in charge or the operator of a vessel fails to report a discharge of ballast water in similar circumstances as set out by section 299A. Current subsection 284(4) of the Act provides for a strict liability offence with a penalty of 500 units. As provided by the Human Rights Compatibility Statement to the Biosecurity Bill 2014, this penalty is in line with a similar offence provided by section 22 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (duty to report certain incidents, such as certain discharges of a liquid substance carried by the ship).

The penalty provided by current subsection 284(4) of the Act is proposed to be amended by item 75 from 500 penalty units to 120 penalty units. This approach seeks to better align with matters of similar seriousness, as the original penalty is considered too onerous for such a failure, and is inconsistent with the approach to penalties elsewhere in the same chapter in Chapter 5 of the Act.

As the new offence provided by section 299A is similar to the offence provided by section 284, it is appropriate that the two offences of similar severity be prescribed the same amount of penalty units.

Further, reporting promptly to the Director of Biosecurity enhances Australia’s ability to assess any adverse consequences from the incident, and to take steps to minimise any cascade effects if necessary. Contravention of the offence provided by new section 299A, similar to the offence under section 284, could result in severe consequences to Australia’s marine environment. A court will still be able to consider the circumstances and significance of the offence to determine whether a lesser penalty than the maximum should be applied.

I trust that this information confirms that the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Yours sincerely

Barnaby Joyce MP



PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

HON BOB KATTER MP

Federal Member for Kennedy



5 May 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
R1.123
Parliament House
Canberra ACT 2600

Dear Chair,

Response to Committee's Report

We write in response to the Parliamentary Joint Committee on Human Rights' ('the Committee') letter dated 28 March requesting a response in relation to the human rights compatibility of the *Consumer Amendment Exploitation of Indigenous Culture) Bill 2017* ('the Bill'), as set out in the Committee's report.

1. Strict liability offence in proposed section 168A(3) (item 4)

The proposed section 168A(3) sets out that the offence in proposed section 168A(1) is a strict liability offence, subject to the offence-specific defence in proposed section 168A(2). Proposed section 168A(1) makes it an offence for a person to supply or offer to supply a thing to a consumer, which is supplied or offered to be supplied in trade and commerce, and where the thing is an Indigenous cultural expression.

This strict liability offence is not inconsistent with the presumption of innocence contained in Article 14(2) of the International Covenant on Civil and Political Rights ('ICCPR') because the offence is proportionate to and rationally connected with the pursuit of a legitimate objective. It is therefore a permissible limitation on this right.

a. Legitimate Objective for the Purposes of International Human Rights Law

This legitimate objective is set out in the explanatory memorandum to the Bill. "The purpose of the Bill is to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations and thereby depriving Aboriginal and Torres Strait Islanders of the rightful benefits of their culture."

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REPRESENTING

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This is a legitimate objective because it aims to address concerns regarding an influx of mass-produced Indigenous-style artwork, souvenirs and other cultural affirmations which purports to be and is sold as authentic Australian indigenous art. Throughout 2016 the Indigenous Art Code and the Arts Law Centre conducted a joint investigation into the sale of Indigenous art or products bearing Indigenous cultural expressions in Australia. From that study, the Arts Law Centre estimates that 'up to 80% of items being sold as legitimate Indigenous artworks in tourist shops around Australia are actually inauthentic.' This led to the 'Fake Art Harms Culture' campaign. The crux of the fake art issue for Indigenous persons is that their culture is being exploited for sale without their consent and arguably sold under false pretences.

In addition, the objective the Bill seeks to achieve is consistent with and in furtherance of Article 11(1) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(1) sets out that:

"Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."

The objective of the Bill is legitimate because it seeks to promote the rights of Indigenous peoples to protect and develop past, present and future manifestations of their culture. By allowing the supply of Indigenous cultural expressions by persons other than Aboriginal and Torres Strait Islanders, the meaning and authenticity of Indigenous cultural expressions are undermined and devalued.

b. Rational Connection to the Objective

The strict liability offence is effective to achieve the above objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression. This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature or artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

c. Reasonable and Proportionate Means of Achieving the Objective

The inclusion of a strict liability offence is a reasonable means of achieving the objective because requiring the prosecution to prove the existence of a fault element, such as "intention", "recklessness" etc. would not adequately protect Indigenous persons, Indigenous communities and consumers from exploitation. This is because the conduct prohibited by the Bill has the potential to cause widespread detriment to Indigenous communities both financially and culturally. It also has the potential to cause significant loss to consumers. Many consumers purchase Indigenous art or products bearing Indigenous cultural expression in Australia on the understanding that the item they are purchasing is an authorised item or does in fact bear an Indigenous cultural expression.

The strict liability approach is consistent with other provisions of the Australian Consumer Law, including those in respect of unfair practices (the section which the Bill proposes to amend). As outlined in the Explanatory Memorandum to the Australian Consumer Law:

"The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention."

The absence of a fault element with respect to the offence is also reasonable in light of Article 11(2) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(2) sets out that:

"States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

This right is set out in terms of requiring redress with respect to cultural and spiritual property taken without *prior* consent. This therefore suggests that creating a strict liability offence is appropriate in these circumstances because it is not difficult for suppliers to ensure they know whether or not the Indigenous cultural expression that they supply is made by or made with the consent of an Indigenous artist and Indigenous community. It simply requires the supplier to ask the producer for certification or confirmation. If the offence was not framed in terms of strict liability but instead required a fault element such as "intention" or "recklessness" this would allow defendants to escape liability in instances where prior consent was not obtained (thus undermining the rights of Indigenous persons as contained in Article 11(2)).

The strict liability offence is also a proportionate means of achieving the above objective because in addition to the defence of an honest and reasonable mistake still being available to a defendant, there is also an offence-specific defence in proposed section 168A(2). This defence provides that where a person has entered into an arrangement with each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected, this will not constitute an offence under proposed section 168(1).

Additionally, the strict liability offence is appropriate and proportionate because:

- the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;
- while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the Australian Consumer Law; and
- the offence is narrow and easily capable of avoidance. Suppliers can readily obtain information regarding the origin of products that they supply and should be encouraged to

do so. The defence of reasonable mistake of fact in section 207 of the Australian Consumer Law will also help to protect suppliers which rely on information provided to them when they acquire the art for resale.

2. Reverse burden offence in proposed section 168A(1)-(2)

The offence in proposed section 168A(1)-(2) reverses the burden of proof and places the onus on the defendant to prove their innocence. The proposed offence requires the defendant to prove that the thing was supplied by, or in accordance with an arrangement with, each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected. Whilst the Committee notes that consistency with the presumption of innocence in Article 14(2) of the ICCPR generally requires the prosecution to prove each element of the offence beyond a reasonable doubt, proposed section 168A(1)-(2) is not inconsistent with the right to be presumed innocent because it is a permissible limitation on this right.

There is substantial overlap between the analysis above regarding the strict liability offence in proposed section 168A(3) and the analysis below with respect to the reverse burden offence in proposed section 168A(1)-(2).

a. Legitimate Objective for the Purposes of International Human Rights Law

The legitimate objective is the same as outlined above with respect to the strict liability offence and is reflected in the explanatory memorandum to the Bill.

b. Rational Connection to the Objective

The reverse burden offence is effective to achieve the legitimate objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression. This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature or artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples sets out that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”. This right is given to Indigenous peoples, not any other peoples. Consequently the requirement to seek permission from Indigenous communities and Indigenous artists ensures that they have ultimate control over their traditional cultural expressions. To permit otherwise could lead to adverse impacts on Indigenous culture through the propagation of Indigenous cultural expressions that are incorrect according to traditional knowledge. This could lead to the erosion or desecration of traditional practices and the inaccurate portrayal of cultural expressions such as Indigenous dance or art. Consequently in these circumstances there is a rational connection between the reverse burden of proof and the objective

of preventing non-Indigenous Australians from benefitting from the sale of Indigenous cultural expressions and undermining Indigenous culture. In this respect, providing Indigenous Australians with the ability to control the supply of their traditional cultural expressions respects the rights provided to them by the United Nations Declaration on the Rights of Indigenous Peoples.

c. Reasonable and Proportionate Means of Achieving the Objective

The offence-specific defence, that imposes a burden of proof on the defendant, is a reasonable and proportionate means of achieving the objective of the Bill because:

- the requirement for consent provides the best protection to Indigenous communities and artists. The fact that suppliers are commercialising Indigenous cultural expressions without obtaining any consent places Indigenous communities and artists in a position of vulnerability and exploitation. This defence focusses on the key issue – whether the relevant Indigenous community and artist has consented to the commercialisation of the indigenous cultural expression with which the community and artist is associated;
- this defence (and the legal burden associated with it) is appropriate because the consent or licensing arrangements in place for the supply of the art is peculiarly within the knowledge of the defendant. It would be a difficult and costly exercise for the prosecution to disprove consent and would necessarily require the prosecution to ensure that no Indigenous person or community had granted consent to the defendant. Such a burden would be unreasonable and make the offence difficult to establish. By contrast, it does not impose any significant burden on the defendant – if they have obtained consent to use the Indigenous cultural expression in the manner in which they have, they should be able to establish this without any real difficulty. If they have acquired the art or products bearing the Indigenous cultural expression from a wholesaler, they can make it a condition of the wholesale purchase that the wholesaler provides evidence of consent.

This approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which relevantly provides that “where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence”. The Guide also relevantly provides in this respect:

“...the [Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.”

We hope this response assists the Committee in reaching a conclusion regarding the human rights compatibility of the Bill.

Yours Sincerely,

Bob Katter MP

Federal Member for Kennedy



THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-001012

18 APR 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair *Ian*

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Thank you for your letter of 28 March 2017 regarding the Parliamentary Joint Committee on Human Rights' consideration of the above Bill in its *Report 2 of 2017*.

I enclose my response to this request, which I trust will assist the Committee in its consideration of the Bill.

Should your office require any further information, the responsible adviser for this matter in my office is Adrian Barrett, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Response to request for further information from the Parliamentary Joint Committee on Human Rights - Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Proceeds of Crime

Compatibility of the measure with fair trial and fair hearing rights

While this bill does not substantially amend the provisions of the POC Act or the MA Act or the application process, human rights concerns remain in relation to these existing Acts. In addition, specifically providing in the bill that a foreign restraining order does not need to be made by a court raises serious concerns about the right to a fair hearing before a person's private property is frozen, seized or subject to restraint.

The bill seeks to amend or expand the operation of a number of Acts in relation to the proceeds of crime. The committee reiterates its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial. The committee reiterates its previous view that both the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation. The committee draws these matters to the attention of the Parliament.

Minister for Justice's response:

The Government continually reviews the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* and will continue to undertake human rights compatibility assessments where Bills amend those Acts.

The Government reiterates that proceeds of crime orders are classified as civil under section 315 of the Proceeds of Crime Act and do not involve the determination of a criminal charge or the imposition of a criminal penalty.

As the Acts were enacted before the *Human Rights (Parliamentary Scrutiny) Act 2011*, they were not required to be subject to a human rights compatibility assessment.

Person awaiting surrender under extradition warrant must be committed to prison

Compatibility of the measure with the right to liberty

The committee notes that a requirement on a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant engages and limits the right to liberty.

The preceding analysis raises the question of whether the obligation to commit to prison, without providing the court with any discretion not to order commitment to prison in individual cases, is proportionate to the objective of preventing suspects from absconding.

The committee therefore seeks the Minister for Justice's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the Extradition Act 1988 fits with the amendments proposed by this bill.

Minister for Justice's response:

The amendments to sections 26 and 35 of the Extradition Act address the logistics for the execution of a surrender warrant when a person is on bail and a surrender warrant has been issued to surrender the person to an extradition country. The surrender warrant is the instrument that empowers the police to bring an eligible person into custody to await transportation out of Australia.

The amendments to sections 26 and 35 do not affect the existing framework for bail under the Extradition Act. In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release. The presumption against bail is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The requirement to demonstrate 'special circumstances' justifying release provides suitable flexibility to accommodate exceptional circumstances that may necessitate granting a person bail (such as where the person is in extremely poor health).

The Extradition Act does not provide for a person to apply to have their bail extended following the issuing of a surrender warrant and while the person awaits surrender to the requesting country. The amendment clarifies that, following a discharge of bail recognisances, a magistrate, eligible Federal Circuit Court Judges or relevant court is to remand the person to prison to await surrender. The amendment is framed as an obligation on to reflect the unavailability of bail pending logistical arrangements for surrender to the requesting country. If a person seeks to challenge the surrender determination by way of judicial review, the person is able to make a new bail application under section 49C of the Extradition Act to the relevant review or appellate Court. Under section 49C(2) of the Extradition Act a grant of bail by a review or appellate Court terminates each time such a Court has upheld the surrender determination.



ATTORNEY-GENERAL

CANBERRA

27 MAR 2017

MS17-000908

The Hon Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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Dear Chair

I refer to the Parliamentary Joint Committee on Human Rights' *Report 2 of 2017* tabled on 21 March 2017, which includes a report on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the Bill).

In its report, the Committee has requested further advice as to the compatibility of the measures with rights to enjoy and benefit from culture. Specifically, the Committee has sought comment on whether the measures limit rights to enjoy and benefit from culture for individuals or minorities within claim groups who do not agree with the broader claim group's support for an area Indigenous Land Use Agreement (ILUA) under the *Native Title Act 1993* (the Act). The Committee has requested advice on whether the measure is a reasonable and proportionate measure for the achievement of its apparent objective and in particular:

- whether less rights restrictive measures would be workable;
- whether reasonable scope could be given for minority views; and
- any procedural or other safeguards to protect the right to culture for individuals.

The Committee has also requested further advice as to the compatibility of the measures with the right to self-determination. It notes that the measures appear to promote the right to collective self-determination, but has questions about whether the Bill promotes the right to self-determination in all circumstances and has requested advice on:

- the extent to which the measures promote the right to self-determination in a range of circumstances;
- whether reasonable scope could be given for minority views; and
- whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes.

The Native Title Act 1993 and cultural rights

One of the main purposes of the Act is to preserve and protect native title rights. Native title rights are generally communal in nature and there may be some tension between the protection and preservation of communal rights and the individual right to enjoy and benefit from culture.

The practice of culture and the recognition of native title rights are not necessarily dependent; it is possible for native title holders to engage in a range of cultural practice without a native title claim or determination. Indigenous Land Use Agreements (ILUAs) will often facilitate access for such practices regardless of the nature and extent of native title rights likely to be recognised by a court.

Whether less restrictive measures would be workable

I have been asked a similar question of the Senate Scrutiny of Bills Committee and provide my response to that Committee here.

ILUAs are a mechanism allowing native title holders and claimants and third parties to agree about the doing of things on land subject to native title. While the exact subject matter of the affected ILUAs is commercial-in-confidence to the parties of those ILUAs, ILUAs can cover a range of matters including agreement about the doing of acts that may affect native title, how native title and other rights in the area will be exercised including how parties will be notified and consulted, and agreement on compensation and other benefits. The effect of the decision has been to bring into doubt the agreements that have been reached on these and other issues, and to raise doubts about the validity of acts done in reliance on the agreement and of benefits transferred or to be transferred in the future. This leaves the ILUAs open to legal challenge.

Allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether agreements struck can continue to be relied upon by both native title holders and third parties. It also raises the prospect of significantly increased costs for the sector both in the form of litigation about the status of affected agreements, which may divert resources away from progressing claims for native title, and potentially the need to re-negotiate ILUAs which may have already taken several years and significant resources to negotiate. Given these consequences I am satisfied that less restrictive measures are not available.

Minority views

Minority views within the claim group are given voice through the authorisation process for an ILUA. The authorisation process involves everyone who holds, or who may hold, native title within the area of an ILUA, and requires those parties to use a traditional decision-making process (where one exists), or a process agreed upon by the group, to decide whether or not to authorise the ILUA. Where a claim group does not authorise an ILUA, the agreement cannot be registered. It is only after the authorisation has occurred that the Registered Native Title Claimant (RNTC) – a smaller group of authorised representatives who manage the claim on behalf of the wider group – must become parties to the agreement, before it can be registered.

The measures in the Bill allow an ILUA to be registered where not every member of the RNTC has become party to the agreement; however, the ILUA must still be authorised before this can occur. Where a claim group authorises an ILUA, notwithstanding minority views, the Act allows for that ILUA to be registered. Requiring unanimity on the part of the claim group before ILUAs can be authorised would slow, or possibly entirely stop, agreement-making under the Act, which would dramatically reduce the financial and other benefits which can flow to native title holders as a result of ILUAs.

Procedural and other safeguards

Part of the statutory functions of Native Title Representative Bodies and Service Providers is to provide dispute resolution services. This mechanism provides support to claim groups unable to agree about the conduct of consultations, mediations, negotiations or proceedings about ILUAs.

The measures in the Bill impose a higher standard on decision-making in relation to ILUAs than existed prior to *McGlade*. Before that decision it was sufficient for a single member of the RNTC to be a party to an ILUA. The Bill strikes a balance between the unanimity requirement in *McGlade* and the previously accepted position that a single RNTC member being party to an ILUA was sufficient.

The *McGlade* decision emphasised the role of the s 66B applicant replacement process as a mechanism for removing members of the RNTC who refuse to sign an ILUA, notwithstanding the fact that the wider group has authorised it. The court noted that it is open to a claim group to remove a person from the RNTC for failing to comply with the claim group's will in that regard. However, the process of obtaining a court order under s 66B is costly, and will often delay the making of agreements for groups, which is already a lengthy and expensive process. Requiring a change in the composition of the RNTC under s 66B in order to ensure that an ILUA can be registered imposes significant transaction costs on native title groups.

The Native Title Act 1993 and self-determination

Through ILUAs the Act provides a framework for native title holders to use their native title rights in particular ways and to make agreements about how activities on land subject to native title may occur. The measures provide greater control to claim groups as a whole, rather than the individual members of the RNTC, over the making of area ILUAs. If allowed to stand, the *McGlade* decision would have required unanimity among the RNTC, even in circumstances where the broader claim group support the relevant ILUA and have authorised it. Negotiation and authorisation of an ILUA are the appropriate forums for a native title group to consider minority viewpoints.

Consultation process for the Bill

The consultation process for the Bill was necessarily targeted, given the narrow scope of the measures and their urgency. My department consulted with the peak body representing all Native Title Representative Bodies and Service Providers across the country, the National Native Title Council (NNTC), along with state and territory officials, and peak representative bodies for the mining and agricultural sectors. The NNTC were supportive of the measures and made a submission to the Senate Inquiry into the provisions of the Bill – endorsed by many of the Native Title Representative Bodies and Service Providers – indicating its support. The NNTC and Cape York Land Council also expressed concern that, absent the Bill being passed, the *McGlade* decision will allow individuals to frustrate the will of the group.

I trust this additional information is of assistance.



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

PDR ID: MC17-001391

31 MAR 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
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Dear Mr Goodenough

Thank you for your letter of 28 March 2017 regarding the Parliamentary Joint Committee on Human Rights' assessment of the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (the Bill).

The Committee has requested further information regarding the strict liability offences contained in Sections 26BCC(3) and(4) of the Bill and the reverse burden provisions in Sections 26BCC(5)-(9) of the Bill.

Strict Liability Offences

26BCC(3) creates an offence for the master and owner of an Annex IV Australian ship where sewage is discharged in the Antarctic Area outside Australia's exclusive economic zone. The purpose of this offence to manage the risk of Australian ships discharging sewage into the pristine waters of the Antarctic. This type of discharge could have a significant adverse impact on the environment, human health, safety and other users of the sea, particularly when a reoccurring activity.

26BCC(4) creates a similar offence, being an offence for the master and owner of an Annex IV Australian ship which discharges sewage in Arctic waters. While Australia does not have the additional burdens of responsibilities for the Arctic area as is the case for the Antarctic under the Antarctic treaty system, the same concerns outlined above in relation to the Antarctic apply to this offence in the Arctic.

Reverse Burden Provisions

26BCC(5)-(9) provide defences to the strict liability offences proposed at 26BCC(3) and (4). These provisions describe exceptions to the strict liability offences and require the defendant to raise evidence about the matters outlined in each provision.

Section 26BCC(5) creates two exceptions. The first is an exception to the strict liability offences where safety of life at sea is endangered. The second exception requires evidence to be presented about the precautions taken throughout a voyage to minimise damage and the decision about the need to discharge sewage.

Section 26BCC(6) creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the speed of the ship when the discharge occurs.

Section 26BCC(7) also creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the physical nature of the discharge when the discharge occurs.

Section 26BCC(8) creates an exception requiring evidence to be presented about the nature of the sewage discharged.

Section 26BCC(9) creates an exception requiring evidence to be presented about the location of the discharge.

Legitimate objective

The Polar Code is an international agreement negotiated under the auspices of the International Maritime Organization (IMO) that includes mandatory provisions covering pollution prevention measures. These measures are important because as sea ice continues to decline, the polar waters are becoming more accessible to vessel traffic. Shipping activities are therefore projected to increase as a result of natural resource exploration and exploitation, tourism, and faster transportation routes. The increase in shipping presents substantial environmental risks for these fragile marine ecosystems. Therefore, I consider that both the strict liability offences and reverse burden provisions are directed toward a legitimate objective.

Rational connection

In aiming to protect the environment the Polar Code places strict limitations on discharge of sewage and garbage from ships travelling in polar waters. The strict liability provisions in the Bill implement the parts of the Polar Code that reflect these limitations. Prevention of the discharge of untreated sewage from passing ships is a necessary step in protecting these waters and will become more important as traffic increases.

The burden of proof is placed on the defendant in the above provisions of the Bill because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are best placed to give evidence as to their decision making at the time when a discharge occurs. This is a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. The Senate Standing Committee for the Scrutiny of Bills has previously indicated that the burden of proof may be imposed on a defendant under these circumstances. In my view, this approach is also consistent with 4.3.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Regarding 26BCC(5), only those present during a particular incident are able to make an assessment as to what is necessary to ensure the safety of life at sea, and the master of the ship is charged with the responsibility for making this judgement. Regarding 26BCC(6), the circumstances surrounding a particular incident, the precautions needed to address that situation, and the assessment undertaken in making a decision, can only be known by those present (specifically the master of the ship). Similarly, regarding 26BCC(7)-(9), the matters described in each of these exceptions is knowable only by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner.

Proportionality

Shipping companies are engaging in a high-investment, high-return commercial activities. Stringent regulatory regimes designed to better manage safety and environment issues throughout the world's oceans are agreed internationally through the IMO, a long-standing international body involving 172 Member States. Those ships travelling through Antarctic and Arctic waters are subject to additional internationally agreed regulatory regimes designed to protect these sensitive waters. Australia has a particular responsibility for parts of the Antarctic waters through the Antarctic Treaty system.

Given the significant consequences of non-compliance for the Antarctic, it is important that the penalty for non-compliance is high enough to be a real incentive to industry. In order to ensure compliance with environmental regimes, high initial outlays by the shipping industry are sometimes required. In these circumstances, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the strict liability offences and reverse burden provisions contained in the Bill are reasonable and proportionate. Further, these strict liability offences and reverse burden provisions are consistent with other measures in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

There are no less intrusive measures that could be implemented that would achieve the same environmental outcome. I acknowledge the burden placed on shipowners and masters through these provisions, however I note the benefits that also accrue to industry in protecting the environment in which they operate. I also note the support provided by the maritime industry during the international negotiations relating to the Polar Code conducted under the auspices of the IMO.

Given the above, I consider that the strict liability offences and reverse burden provisions contained in the Bill are aimed at achieving a legitimate objective for the purposes of international human rights law, that the offences and provisions are rationally connected to that objective, and that the limitation is in each case a reasonable and proportionate measure.

I trust this information will be of assistance to the Committee.

DARREN CHESTER



The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-006147

Mr Ian Goodenough MP
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Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

10 APR 2017

Dear Mr Goodenough

I refer to the request by the Parliamentary Joint Committee on Human Rights (the Committee) of 28 March 2017 for further information about an aspect of the Therapeutic Goods Amendment (2016 Measures No.1) Bill 2016 (the Bill), which amends the *Therapeutic Goods Act 1989* (the Act) to implement a number of reforms arising from the Expert Panel Review of Medicines and Medical Devices Regulation.

In its *Report 2* of 2017, the Committee sought further information on whether the civil penalty provision in Schedule 12 of the Bill for therapeutic goods manufacturers who provide false or misleading information in response to a request from the Secretary for information or documents about the goods they are manufacturing may be 'criminal' for the purposes of international human rights law (having regard to the Committee's Guidance Note 2) and, if so, whether that provision accords with the right to a fair trial.

This measure (proposed new section 41AF) is clearly identified in the Bill as being a civil penalty, and is plainly distinguishable as such from the corresponding criminal offences in the Bill relating to the same conduct – proposed new sections 41AD and 41AE.

Although the maximum levels of these penalties may appear high, this is designed to reflect the size and nature of the therapeutic goods industry, and the significant health dangers that major problems with medicines and medical devices can cause to patients.

It is very important from a public health perspective that the Act discourage the provision of false or misleading information to the Therapeutic Goods Administration (TGA) in the context of the carrying out of its regulatory functions – including in respect of therapeutic goods manufacturers. If the TGA were to rely on false or misleading information to, for example, elect not to suspend or revoke a manufacturing licence, this could potentially have quite serious consequences for public health and safety.

The new information-gathering power in proposed new section 41AB is needed to support the effective regulation of therapeutic goods manufacturing in Australia so as to safeguard public health, particularly as it relates to informing the TGA about significant matters such as the quality assurance and control measures used by a manufacturer, and whether a manufacturer has been observing the manufacturing principles (as minimum requirements for ensuring quality and safety of therapeutic goods).

The maximum penalty levels for proposed new section 41AF are also consistent with the regime throughout the Act of having civil penalties as an alternative to criminal offences for a range of behaviour that breaches important regulatory requirements. For example, section 9H of the Act (which the Committee considered in its Second Report of the 44th Parliament) sets out a civil penalty for making false statements in, or in connection with a request to vary an entry for a therapeutic good in the Australian Register of Therapeutic Goods, with identical maximum penalty levels to proposed new section 41AF.

It is also important to note that the civil penalty in proposed new section 41AF would not apply to the public in general, but would only arise in the specific regulatory context of manufacturers of therapeutic goods who are licensed under Part 3-3 of the Act.

In addition, proposed new section 41AF does not carry any sanction of imprisonment for non-payment. Section 42YD of the Act makes it clear that if the Federal Court orders a person to pay a civil penalty, the Commonwealth may enforce the order as if it were a judgment of the Court, that is as a debt owed to the Commonwealth.

With these points in mind, this civil penalty provision would not seem likely to be 'criminal' for the purposes of international human rights law and, accordingly, the Committee's question in relation to whether the measure is consistent with the right to a fair trial would not appear to arise.

The Act also protects a person from being required to pay a civil penalty if they have already been convicted of an offence relating to the same conduct, and prohibits criminal proceedings from being started if an order has been made against the person in civil penalty proceedings for the same conduct. Any civil penalty proceedings will be stayed if criminal proceedings relating to the same conduct are, or already have been, started.

In addition, the Act makes it clear that any evidence given by a person in civil penalty proceedings (whether or not any order was made by the Court in those proceedings) will not be admissible in criminal proceedings involving the same conduct.

Thank you for writing on this matter.

Yours sincerely



ASSISTANT MINISTER TO THE TREASURER

Ref: MC17-002896

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 28 March 2017, seeking the Treasurer's advice as to the human rights compatibility of the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 (the determination). The Treasurer has asked me to respond on his behalf.

National Specific Purpose Payments (NSPPs) are made by the Commonwealth to states and territories in three specific sectors: disability services, skills and workforce development, and affordable housing. The *Federal Financial Relations Act 2009* requires the Treasurer to make an annual determination of the total payment amount for each NSPP by applying an indexation factor to the total payment amount from the previous financial year. The relevant indexation factors are calculated according to formulas set out in Schedule D to the Intergovernmental Agreement on Federal Financial Relations.

The Committee asked whether there had been any reduction in the funding allocation to the NSPPs since the previous determination (relating to the 2014-15 financial year), which the Committee assessed in early 2016. The total payment amount for each NSPP has increased since 2014-15 (see following table).

Sector	2014-15 (\$)	2015-16 (\$)	Increase (\$)
Disability services	1,393,331,000	1,438,826,000	45,495,000
Affordable housing	1,305,771,000	1,324,052,000	18,281,000
Skills and workforce	1,435,176,000	1,455,484,000	20,308,000

Had there been a reduction in any of these amounts, the Committee sought advice as to whether that reduction was compatible with Australia's obligation to avoid unjustifiable retrogressive measures in the realisation of economic, social and cultural rights. While no such reduction occurred in 2015-16, a year-on-year decrease in the total payment amount does not necessarily indicate a retrogressive measure in the realisation of human rights. A change in the parameters underlying the indexation formulas could result in a reduced total payment. Other policies and programmes may also have an effect on NSPPs. For example, the NSPP for disability services is likely to decrease in future financial years as states and territories transition to the National Disability Insurance Scheme, even though the total resources that the Commonwealth devotes to disability services will be increasing.

Finally, the Committee sought advice as to whether the determination supports the progressive realisation of economic, social and cultural rights. The determination assists in the realisation of a number of human rights:

- The NSPP for skills and workforce development promotes the right to education (art 13, International Covenant on Economic Social and Cultural Rights (ICESCR); art 28, Convention of the Rights of the Child (CRC) and art 24, Convention on the Rights of Persons with Disabilities (CRPD)), and the full realisation of the right to work through vocational training (art 6, ICESCR and art 27, CRPD).
- The NSPP for affordable housing promotes the right to an adequate standard of living, specifically in relation to housing (art 11, ICESCR; art 27, CRC and art 28, CRPD).
- The NSPP for disability services promotes:
 - the right of children with disabilities to education, training and health care (art 23, CRC and art 7, CRPD);
 - rights concerning the ability of persons with disabilities to live independently and be included in the community (art 19, CRPD);
 - rights concerning the personal mobility of persons with disabilities (art 20, CRPD);
 - rights concerning the habilitation and rehabilitation of persons with disabilities (art 26, CRPD); and
 - the right to take part in cultural life (art 30, CRPD).

I trust this information will be of assistance to you.

The Hon Michael Sukkar MP

19 / 4 / 2017



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MS17-001344

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Ian,

Dear ~~Mr~~ Goodenough

Thank you for your correspondence of 28 March 2017 in which a further response was requested on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016.

My response to your request is attached.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON

21/04/17

**Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016
[F2016L01696]**

Committee response

1.53 The preceding analysis indicates that narrowing the definition of ‘member of the family unit’ engages and limits the right to protection of the family. The minister’s response does not sufficiently address whether this limitation is permissible as a matter of international human rights law.

1.54 Accordingly, the committee requests the further advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected) to that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

The Minister notes the concerns raised by the committee in its request for further information and provides the following response to the committee, which is in addition to information previously provided.

As previously noted in the first response, the new definition of Member of the Family Unit (MoFU) is permissible as a matter of international law.

Limiting jurisdictional application of MoFU

In response to the committee comments provided at **Item 1.39**, the Minister advises that these changes are not retrospective. They predominantly apply to persons who:

- are **outside** Australia; and
- do not hold a valid visa that allows for entry into Australia; and
- are seeking to make a new application for a visa to enter Australia.

In relation to the practical application of MoFU, specific grandfathering provisions have been introduced as part of this amendment. These provide that lawful non-citizens living in Australia are not disadvantaged by this change (refer sub-regulation 1.12(5)).

Why the limitation is permissible under international human rights law

The objective of the amendment is to contribute to the effective management of Australia’s Migration Programme. Australia has well managed and targeted migration programmes that are designed to meet social and economic needs. It is imperative to ensure that the limited places available in targeted programmes, such as the Skilled Migration Programme and the Family Stream, are directed to those who are most likely to support and deliver on the intentions of the programmes. Extended family members excluded by the new definition of MoFU are able to apply for other visa classes where they meet the eligibility criteria in their

own right. In doing so, the extended family member will be demonstrating their ability to make a positive contribution to Australia.

In addition, the amended definition of MoFU ensures consistency with the current framework for the relatives of Australian citizens and existing permanent residents. The former definition allowed for more generous migration pathways for relatives of new entrants into Australia, who often benefit from differential visa pricing and processing timeframes attributable to the primary applicant. The amendment is thus effective in achieving the legitimate objectives stated, as it promotes the intentions of the Migration Programme and contributes to its effective management.

The new definition predominately applies to non-citizens outside Australia applying for visas to enter Australia. In regard to non-citizens within Australia's jurisdiction, this limitation is a reasonable and proportionate measure to achieve the stated objectives as it:

- includes grandfathering provisions, so that lawful non-citizens in Australia are not disadvantaged by this change (see above)
- does not prevent extended family members who do not meet the new MoFU definition to apply for other visa classes in their own right (see first response to the committee and above)
- is consistent with the arrangements for relatives of Australian citizens and existing permanent residents (see first response to the committee and above)
- is more generous than that of similar nations, who are also signatories to the ICCPR (see first response to the committee)
- will not apply to refugee, humanitarian and protection visas (see first response to the committee).



The Hon Christian Porter MP
Minister for Social Services

MC17-006013

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

21 APR 2017

Dear Mr Goodenough

Thank you for your letter of 28 March 2017 regarding the Joint Committee's Report 2 of 2017 - Class of Visas - Qualifying Residence Exemption. In your letter you seek my clarification as to the extent to which Special Benefit is available to people who are in Australia on a temporary visa and the potential level of support available to them through this payment. I appreciate the time you have taken to bring this matter to my attention.

By way of background, Australia's social security system is different from the contributory systems that operate in other countries. It is a taxpayer-funded, non-contributory system based on the concepts of residence and need. Access to social security payments is generally restricted to people who are Australian permanent residents or citizens residing in Australia.

Temporary visa holders, such as 457 visas, student and tourist visas, are not Australian residents for social security purposes and are ineligible for social security payments. A person on a temporary visa must first formalise their immigration status as a permanent resident if they wish to stay in Australia and have access to social security payments.

There are some exceptions to the general residency rules for certain determined temporary visa subclasses contained in the *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)*. This determination lists a number of visa subclasses that may be eligible to receive Special Benefit. These types of visas include temporary protection visa holders, temporary (provisional) partner visa holders and people granted a visa for the purposes assisting Australian authorities in criminal matters related to human trafficking, or slavery.

Illegal Maritime Arrivals (IMAs) who are assessed as engaging Australia's protection obligations and meet other requirements such as health, security and character checks can be granted a temporary humanitarian or protection visa. Holders of a temporary humanitarian or protection visa remain ineligible for mainstream social security payments because of their temporary visa status. Their access to social security payments is limited to Special Benefit and related ancillary payments, such as Rent Assistance, Health Care Card, and family assistance payments.

People in Australia on a temporary (provisional) partner visa are generally subject to a 104-week newly arrived residence waiting period (NARWP) before being eligible for Special Benefit. However, the 104-week Special Benefit NARWP can be waived in circumstances where the temporary partner visa holder is in financial hardship due a substantial change of circumstances beyond their control after they have first entered Australia (e.g. victim of domestic violence).

Special Benefit is a discretionary income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for themselves and their dependants. To receive Special Benefit, it must be established that the person is not eligible for any other pension or allowance.

The rate of Special Benefit a person receives is discretionary and depends on their individual circumstances, provided it does not exceed the rate of Newstart Allowance or Youth Allowance that would otherwise be payable to the person. In practice, the Newstart Allowance rate (including supplements) is generally paid to those aged 22 years and over while the Youth Allowance rate is paid to those under 22 years.

To establish whether a person is in financial hardship or unable to earn a sufficient livelihood, an available funds test is applied. A person who requires Special Benefit long-term (more than three months) cannot receive a payment until their available funds are \$5,000 or less. For a person who requires the payment on a short-term basis (less than three months), their available funds must be less than their fortnightly rate of payment. Where a person is a member of a couple, the partner's available funds are also included in assessing the person's available funds. In recognition that Special Benefit is a payment of last resort, the value of any in-kind support (such as free boarding and lodging) and income (both earned and unearned) is directly deducted from their maximum rate of payment.

People who receive Special Benefit can be paid for up to 13 weeks from the date of decision. Payment of Special Benefit must then be reviewed before the delegate determines whether payment can continue. If payment of Special Benefit continues, it must be reviewed every 13 weeks, though there is no limit to the length of time a person can receive the payment.

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Appendix 4

Guidance Note 1 and Guidance Note 2

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;

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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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.

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.

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 civil penalties may be 'criminal' for the purposes 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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