Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 22 – 25 September 2014

Legislative Instruments received 6 – 12 September 2014

Thirteenth Report of the 44th Parliament

October 2014

ISBN 978-1-76010-097-1

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights/

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

Membership of the committee

Members

Senator Dean Smith, Chair	Western Australia, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Senator Matthew Canavan	Queensland, NAT
Dr David Gillespie MP	Lyne, New South Wales, NAT
Mr Andrew Laming MP	Bowman, Queensland, LP
Senator Claire Moore	Queensland, ALP
Ms Michelle Rowland MP	Greenway, New South Wales, ALP
Senator Penny Wright	South Australia, AG
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

Functions of the committee

The Committee has the following functions:

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

Secretariat

Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Ms Zoe Hutchinson, Principal Research Officer
Dr Patrick Hodder, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EM	Explanatory Memorandum
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
PJCHR	Parliamentary Joint Committee on Human Rights

Table of contents

Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 22 to 25 September 2014 and legislative instruments received during the period 6 to 12 September 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 22 to 25 September 2014

The committee considered 11 bills, all of which were introduced with a statement of compatibility. Of these 11 bills, ten do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to defer its consideration of five bills.

The committee has identified one bill that it considers requires further examination and for which it will seek further information.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 30 September 2014 include:

- Automotive Transformation Scheme Amendment Bill 2014
- Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014
- Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014
- Australian Education Amendment Bill 2014
- Rural Research and Development Legislation Amendment Bill 2014
- Aged Care and Other Legislation Amendment Bill 2014
- Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014
- Private Health Insurance Amendment Bill (No. 1) 2014

Legislative instruments received between 6 and 12 September 2014

The committee considered 23 legislative instruments received between 6 and 12 September 2014. All instruments tabled in this period are listed in the Journals of the Senate.[1]

1 Journals of the Senate, available at: http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate

Of these 23 instruments, none appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate.

Responses

The committee has considered two responses relating to matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to one bill and one instrument.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 30 September 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of 10 bills introduced between 22 and 25 September 2014, in addition to one bill which has been previously deferred.

Aged Care and Other Legislation Amendment Bill 2014

Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 25 September 2014

Purpose

1.1 The Aged Care and Other Legislation Amendment Bill 2014 (the bill) seeks to:

- amend the *Aged Care Act 1997* to increase basic subsidies to residential care, home care and flexible care providers of aged care services, as implemented from 1 July 2014 through two legislative instruments addressing the subsidy arrangements (the *Aged Care (Subsidy, Fees and Payments) Determination 2014* and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*); and
- amend the *Healthcare Identifiers Act 2010* to support the implementation from 1 January 2015 of stage 2 of the Aged Care Gateway.

1.2 The bill and the Health and Other Services (Compensation) Care Charges (Amendment) Bill 2014 (the bills) together seek to amend the *Health and Other Services (Compensation) Act 1995* and the *Health and Other Services (Compensation) Care Charges Act 1995* to apply existing legislative capacities for residential care to those in home care, in relation to the recovery of past care costs that are provided to a care recipient who receives a compensation payment.

Committee view on compatibility

1.3 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Australian Education Amendment Bill 2014

Portfolio: Education
Introduced: House of Representatives, 25 September 2014

Purpose

1.4 The Australian Education Amendment Bill 2014 (the bill) seeks to amend the *Australian Education Act 2013* to:

- allow payment of additional funding in 2014 to schools with large numbers of Indigenous boarding students from remote areas;
- prevent funding cuts to students with disabilities and to other students in some independent special schools and special assistance schools that would otherwise occur from 1 January 2015; and
- correct errors and omissions in the existing legislation and provide funding and regulatory certainty to schools.

Committee view on compatibility

1.5 **The committee considers that the bill promotes the right to education and has therefore concluded its examination of the bill.**

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014

Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014

Portfolio: Justice
Introduced: House of Representatives, 24 September 2014

Purpose

1.6 The Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014 and the Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014 seek to amend the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Act 2011* and the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Act 2011* to replace the existing Supervisory Cost Recovery Levy, which funds the regulatory activities of the Australian Transaction Reports and Analysis Centre (AUSTRAC), with a new industry contribution which will fund both the regulatory and financial intelligence unit (FIU) functions of AUSTRAC.

Committee view on compatibility

1.7 **The committee considers that the bills are compatible with human rights and has concluded its examination of the bills.**

Automotive Transformation Scheme Amendment Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 24 September 2014

Purpose

1.8 The Automotive Transformation Scheme Amendment Bill 2014 (the bill) seeks to amend the *Automotive Transformation Scheme Act 2009* to:

- implement funding cuts of $500 million to the Automotive Transformation Scheme (ATS) capped assistance over the financial years 2014-15 to 2017-18; and
- terminate the ATS on 1 January 2018.

Committee view on compatibility

1.9 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Migration Amendment (Humanitarian Visa Intake) Bill 2014

Sponsor: Senator Sarah Hanson-Young
Introduced: Senate, 25 September 2014

Purpose

1.10 The Migration Amendment (Humanitarian Visa Intake) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* to prevent the preclusion of processing or granting a visa at any time in a financial year when fewer than 20 000 humanitarian visas have been granted.

1.11 The bill would also require the Minister for Immigration and Border Protection to make quarterly statements to Parliament setting out how many humanitarian visas of each class have been granted.

Committee view on compatibility

1.12 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

National Security Legislation Amendment Bill (No. 1) 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 16 July 2014

Purpose

1.13 The National Security Legislation Amendment Bill (No. 1) 2014 (the bill) seeks to amend the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) and the *Intelligence Services Act 2001* (the IS Act) to implement the government's response to recommendations of the Parliamentary Joint Committee on Intelligence and Security's *Report of Inquiry into Potential Reforms of Australia's National Security Legislation* (June 2013).

1.14 The bill would expand ASIO's intelligence-collection powers by:

- enabling it to obtain intelligence from a number of computers (including a computer network) under a single computer access warrant, including computers at a specified location or associated with a specified person;
- allowing ASIO to use third-party computers and communications in transit to gain access to a target computer under a computer access warrant;
- establishing an identified person warrant for ASIO to utilise multiple warrant powers against an identified person of security concern;
- allowing the search warrant, computer access, surveillance devices and identified person warrant provisions to authorise access to third-party premises to execute a warrant; and
- allowing the use of force at any time during the execution of a warrant, not just on entry.

1.15 In addition, the bill would:

- introduce an evidentiary certificate regime in relation to special intelligence operations and specific classes of warrants issued under the ASIO Act;
- provide protection from criminal and civil liability for ASIO employees and affiliates, in relation to authorised special intelligence operations, subject to appropriate safeguards and accountability arrangements;
- provide ASIO with the ability to co-operate with the private sector;
- enable breaches of section 92 of the ASIO Act (publishing the identity of an ASIO employee or affiliate) to be referred to law enforcement for investigation;
- enable the minister responsible for ASIS to authorise the production of intelligence on an Australian person who is, or is likely to be, involved in activities that pose a risk to, or are likely to pose a risk to, the operational security of ASIS;

- expand the power of ASIS to co-operate with ASIO, without ministerial authorisation, when undertaking less intrusive activities to collect intelligence relevant to ASIO's functions on an Australian person or persons overseas in accordance with ASIO's requirements;
- expand the ability of ASIS to train staff members of a limited number of approved agencies that are authorised to carry weapons in the use of weapons and self-defence;
- provide that ASIS, in limited circumstances, is not restricted from using a weapon or self-defence technique in a controlled environment (such as a gun club or rifle range or martial arts club);
- extend the immunity available to a person who does an act preparatory to, in support of, or otherwise directly connected with, an overseas activity of an IS Act agency to an act done outside Australia;
- increase the penalties for existing unauthorised communication of information offences in the ASIO Act and the IS Act from two to ten years;
- extend the existing unauthorised communication offences in the IS Act to the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA);
- create a new offence in the ASIO Act and the IS Act, punishable by a maximum of three years imprisonment, for intentionally dealing with a record in an unauthorised way; and
- create a new offence in the ASIO Act and the IS Act, punishable by a maximum of three years' imprisonment, for intentionally making a new record of information or matter without authorisation.

Committee view on compatibility

Multiple rights

1.16 The committee notes that the measures in Schedules 2 to 6 of the bill engage a number of human rights including:

- the right to security of the person and the right to be free from arbitrary detention;[1]
- the right to an effective remedy;[2]
- the right to freedom of expression;[3]
- the right to freedom of movement;[4]

1 Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 2 of the ICCPR.

3 Article 19 of the ICCPR.

- the right to a fair trial;[5] and
- the right to privacy.[6]

Inadequate statement of compatibility

1.17 The replacement statement of compatibility for the bill provides the following statement regarding its purpose and approach:

> This is a long and highly technical Bill which has a wide range of human rights implications. The purpose of a Statement of Compatibility is to assess generally the measures in the Bill against human rights obligations, and when a right is limited, to analyse how that right is permissibly limited. The approach adopted in this Statement of Compatibility is to set out the key amendments and to address related provisions in each Schedule together against the key rights engaged as related provisions engage the same rights in a very similar way as well as draw attention to safeguards. This approach has been adopted to ensure that the Statement does not become unwieldy and practically illustrates how the provisions operate together.[7]

1.18 Consistent with this approach, the statement of compatibility provides a description of the measures in the bill and generally identifies the human rights engaged by the measures. The committee notes that many of the measures may represent serious limitations. However, such general descriptions as are provided in the statement of compatibility are insufficient for the committee to assess their human rights compatibility.

1.19 In this respect, the committee's expectations regarding statements of compatibility are set out in the committee's Practice Note 1,[8] which states:

> The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights….The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.

1.20 Similar guidance on the preparation of statements of compatibility is provided by the Attorney-General's Department, which advises:

---

4 Article 12 of the ICCPR.

5 Article 14 of the ICCPR.

6 Article 17 of the ICCPR.

7 Replacement Explanatory Memorandum (REM) 6.

8 See Appendix 2.

> Where rights are limited, explain why it is thought that there is no incompatibility with the right engaged:
>
> a) Legitimate objective: Identify clearly the reasons which are relied upon to justify the limitation on the right. Where possible, provide empirical data that demonstrates that the objectives being sought are important.
>
> b) Reasonable, necessary and proportionate: Explain why it is considered that the limitation on the right is (i) necessary and (ii) within the range of reasonable means to achieve the objectives of the Bill/Legislative Instrument.
>
> Cite the evidence that has been taken into account in making this assessment.[9]

1.21 It flows from these requirements that a separate and detailed analysis of each measure that may limit human rights is required to assess its compatibility with Australia's human rights obligations. In the committee's view, by providing a selective and generalised assessment, the statement of compatibility for the bill fundamentally misapprehends the purpose for which such statements are required.

1.22 The committee's particular expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. Accordingly, the committee considers that a detailed and separate analysis is required for each measure listed in paragraphs 1.14 and 1.15 above. In particular, these should provide a reasoned and evidence-based assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.23 In the absence of an assessment of the measures in these terms, the committee will be unable to conclude that the measures are compatible with the rights and freedoms against which the committee conducts its assessments.

1.24 A particular example of the lack of analysis in the statement of compatibility concerns the proposed expansion of ASIO's powers under warrant. The statement of compatibility acknowledges that these amendments engage the right to privacy because they would::

> …enable ASIO to exercise a wide range of powers – such as entering and searching people's homes and places of business, searching a person on or near specified premises, accessing their computer or computers at their workplace or computers of friends and associates at their premises, interfering with data and using surveillance devices to record, listen to or

9 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/StatementofcompatibilitytemplatesaspX [accessed 8 July 2014].

> track a person. This involves interference with a person's privacy more generally, but also their home and correspondence. The issuing of warrants also requires the collection and use of personal information.[10]

1.25 In addition, the committee notes that the powers in the bill extend to the interference, in certain circumstances, with the computers and premises of third parties not specifically subject to an ASIO investigation.

1.26 However, while the statement of compatibility describes four warrants as engaging the right to privacy, there is only a single analysis of how the new warrant powers may be regarded as a justifiable limitation on the right. Separately, the statement of compatibility notes that the amendments will permit access to third-party premises not specifically mentioned in a warrant in order to gain entry to premises subject to a warrant, but asserts that any interference with privacy will be 'necessary to ensure the efficient exercise of a warrant that authorises entry to a premises'.[11] However, no information is provided as to how the power will be used and why, for example, it would not be possible to have the third-party premises identified in the original warrant, particularly in circumstances where entry through adjacent premises is merely desirable to reduce risk of detection.[12]

1.27 While the committee acknowledges that the maintenance of national security and the protection of the Australian community may be regarded as a legitimate objective, the proposal to significantly expand ASIO's warrant powers clearly involves substantial limitations on the right to privacy. The purpose of the statement of compatibility is to explain and demonstrate how this particular measure has balanced national security imperatives with the right to privacy, rather than to merely assess generally the measure against human rights obligations.[13]

1.28 In light of the stated objective of the bill, the committee notes that information regarding existing safeguards is of particular relevance to the assessment of its compatibility with human rights. The committee notes that, while the REM provides a detailed overview of the existing safeguards in relation to the operation and actions of ASIO, many of these operate in lieu of (rather than in addition to) traditional common law and statutory mechanisms that curtail the operation of executive agencies and ensure they are appropriately scrutinised. A comparative assessment of existing safeguards in relation to ASIO and the AFP and other agencies with law enforcement and investigative powers is therefore important to assessing the proportionality of the measure.

1.29 In addition, the committee notes that the bill is identified as responding to a report by the Parliamentary Joint Committee on Intelligence and Security (PJCIS),

---

10 EM 11.

11 EM 14.

12 EM 12.

13 EM 63.

itself preceded by a detailed discussion paper prepared by the Attorney-General's Department. The committee notes that much of the analysis and justifications for identical or similar measures proposed in those documents is directly relevant to the human rights assessment of the bill. However, this information has not been included in the statement of compatibility despite signpost references to the PJCIS recommendations throughout. The committee would expect that, where the bill effectively adapts or partially implements PJCIS recommendations, the statement of compatibility will identify and assess any such differences as part of the human rights justification for the bill.

1.30 **The committee therefore seeks the advice of the Attorney-General as to whether each of the measures in Schedules 2, 3, 4, 5, and 6 of the bill are compatible with Australia's international human rights obligations, and for each individual measure limiting human rights:**

- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Prohibition against torture, cruel, inhuman or degrading treatment

1.31 Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering. Prolonged solitary confinement, indefinite detention without charge, corporal punishment, and medical or scientific experiment without the free consent of the patient, have all been found to breach the prohibition on torture or cruel, inhuman or degrading treatment.

1.32 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;
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

Immunity from prosecution for action part of special intelligence operations

1.33 As set out above, the bill would introduce provisions that would provide for the establishment of special intelligence operations. The bill provides protection from criminal and civil liability for ASIO employees and affiliates, in relation to

authorised special intelligence operations, subject to certain safeguards and accountability arrangements.

1.34 Under proposed section 35C of the bill, the Attorney-General (on request from the Director General of ASIO, or a senior officer) would be able to grant such an authority only if he or she is 'satisfied on reasonable grounds of certain matters', which include:

> (e) any conduct involved in the special intelligence operation will not:
>
> (i) cause the death of, or serious injury to, any person; or
>
> (ii) involve the commission of a sexual offence against any person; or
>
> (iii) result in significant loss of, or serious damage to, property.

1.35 In addition, pursuant to proposed section 35K, an ASIO officer participating in a special intelligence operation would be immune from civil or criminal liability for conduct in the course, and for the purpose, of that operation if:

> (e) [that] conduct does not involve the participant engaging in any conduct that:
>
> (i) causes the death of, or serious injury to, any person; or
>
> (ii) involves the commission of a sexual offence against any person; or
>
> (iii) causes significant loss of, or serious damage to, property.

1.36 The government introduced amendments in the Senate which amended proposed section 35C and 35K. The amendments mean:

> …that the proposed scheme of special intelligence operations will include two express exclusions of conduct constituting torture.[14]

1.37 The committee welcomes the introduction of these amendments and their passage by the Senate.

1.38 However, the committee remains concerned that torture is not a defined term in the bill and accordingly would be a matter of statutory interpretation by the courts.

1.39 **For consistency with Australia's international obligations, the committee recommends that the term 'torture' used in the bill be defined by reference to the definition set out in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.***

1.40 In addition, the committee is concerned that acts which may fall short of the definition of torture but may nevertheless constitute cruel, inhuman or degrading treatment may therefore be permitted under the bill. For example, a number of

14 Further Supplementary Explanatory Memorandum 3.

investigative techniques which cause psychological distress or physical pain may not be considered serious injury or torture but may nevertheless constitute cruel, inhuman or degrading treatment. Such acts would be covered by the immunity provided in the bill.

1.41 **The committee therefore recommends that the bill be amended to ensure that the proposed immunity afforded to ASIO officers or affiliates involved in special intelligence operations, does not extend to any acts of cruel, inhuman or degrading treatment.**

National Water Commission (Abolition) Bill 2014

Portfolio: Environment
Introduced: Senate, 25 September 2014

Purpose

1.42 The National Water Commission (Abolition) Bill 2014 (the bill) seeks to amend the *National Water Commission Act 2004* in order to abolish the National Water Commission with effect from 1 January 2015.

Committee view on compatibility

1.43 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Private Health Insurance Amendment Bill (No. 1) 2014

Portfolio: Health
Introduced: House of Representatives, 24 September 2014

Purpose

1.44 The Private Health Insurance Amendment Bill (No. 1) 2014 (the bill) seeks to amend the *Private Health Insurance Act 2007* (the PHI Act) to pause the income thresholds which determine the tiers for the Medicare levy surcharge (MLS) and the Australian Government Rebate on private health insurance at 2014-15 rates for three years.

Committee view on compatibility

1.45 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Rural Research and Development Legislation Amendment Bill 2014

Portfolio: Agriculture
Introduced: House of Representatives, 25 September 2014

Purpose

1.46 The Rural Research and Development Legislation Amendment Bill 2014 (the bill) seeks to amend the *Australian Grape and Wine Authority Act 2013*, the *Primary Industries Research and Development Act 1989*, the *Sugar Research and Development Services Act 2013*, the *Australian Meat and Live-stock Industry Act 1997*, the *Dairy Produce Act 1986*, and the *Forestry Marketing and Research and Development Services Act 2007*. It would:

- return the cost of membership fees to international commodity organisations and regional fisheries management organisations from the matching amounts paid to rural research and development corporations (RDCs); and
- remove the requirement for the Minister for Agriculture to organise an annual co-ordination meeting for the chairs of the statutory RDCs.

Committee view on compatibility

1.47 **The committee considers that the bills are compatible with human rights and has concluded its examination of the bills.**

Deferred bills and instruments

The committee has deferred its consideration of the following bills and instruments:

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Migration Amendment (Character and General Visa Cancellation) Bill 2014

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

Racial Discrimination Amendment Bill 2014

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184]

Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014 [F2014L00979]

Social Security (Administration) (Declared income management area - Ceduna and surrounding region) Determination 2014 [F2014L00777]

Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 30 September 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Australian Sports Anti-Doping Authority Amendment Bill 2014

Portfolio: Health
Introduced: House of Representatives, 16 July 2014

Purpose

2.1 The Australian Sports Anti-Doping Authority Amendment Bill 2014 (the bill) seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act) to align Australia's anti-doping legislation with the revised World Anti-Doping Code and International Standards that come into force on 1 January 2015. Key measures in the bill include:

- authorising the making of regulations to allow the Chief Executive Officer (CEO) to implement the new prohibited association anti-doping rule violation;
- extending the time period in which action on a possible anti-doping rule violation must commence from eight to ten years from the date the violation is asserted to have occurred;
- expanding Australian Sports Drug Medical Advisory Committee (ASDMAC) membership to appoint three people for the sole purpose of reviewing decisions, where requested, by ASDMAC in relation to applications for therapeutic use exemptions;
- requiring that at least one ASDMAC primary member possess general experience in the care and treatment of athletes with impairments;
- simplifying information sharing provisions in the ASADA Act to improve the exchange between relevant stakeholders of information that would assist in identifying and substantiating doping violations;
- requiring that ASADA maintain a public record of Anti-Doping Rule Violations (ADRV) to be known as the 'violations list'; and

- allowing ASADA to respond to public comments attributed to an athlete, other person or their representatives with respect to a doping matter.

Background

2.2 The committee reported on the bill in its *Tenth Report of the 44th Parliament*.

Committee view on compatibility

Freedom of association

New prohibited association anti-doping rule violation

2.3 The committee recommended that the bill be amended to include a requirement that the new ADRV will apply only insofar as it is consistent with the right to freedom of association protected under article 22 of the ICCPR.

Minister's response

> The placement of this limitation on the operation of the Prohibited Association ADRV in the Regulations reflects our legislative framework. While the Bill provides for the National Anti-Doping scheme to authorise the Chief Executive Officer to notify an athlete or other person with respect to a violation, the provisions relating to this violation will be largely contained in the Australian Sports Anti-Doping Authority Regulations. Accordingly, it was considered most reasonable to place the limitation on the violation with respect to Article 22 of the International Covenant on Civil and Political Rights in the Regulations.
>
> Nevertheless, I am prepared to re-visit the placement of this provision if and when amendments to the ASADA Act are next being developed.[1]

Committee response

2.4 **The committee thanks the Minister for Sport for his response, and welcomes his decision to revisit the placement of this provision. The committee has concluded its examination of this aspect of the bill.**

Right to a fair hearing

Limitation period for bringing actions in relation to ADRVs

2.5 The committee requested the advice of the Minister for Sport as to the compatibility of the bill with the right to a fair hearing, and particularly:

- whether there is a rational connection between the limitation and the legitimate objective; and

---

1 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Sport, to Senator Dean Smith (dated 24/09/2014) 2.

- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> In implementing these amendments, the Australian Government is meeting its international treaty obligation to abide by the principles of the revised Code.
>
> Generally, anti-doping agencies do not have the same investigative capacity as law enforcement authorities. As evidenced in recent cases, it can take anti-doping authorities a significant amount of time to uncover sophisticated doping programmes. In particular, stakeholders were influenced by the time taken to establish a sustainable doping case against Mr Lance Armstrong. Hence, the Code was revised to provide agencies with more time to expose such practices.
>
> Some substances that are prohibited from sport are currently undetectable. This amendment also provides greater scope to undertake retrospective analysis of stored samples as new technologies to identify prohibited substances are developed.
>
> It should also be noted that the extension of the time period for commencing the anti-doping rule violation process does not reduce the level of proof required to confirm an ADRV. The operation of this provision does not override the need for there to be sufficient evidence to:
>
> - prompt the ASADA Chief Executive to invite the person to make a submission in relation to a possible ADRV;
> - alllow the Anti-Doping Rule Violation Panel to make an assessment of whether a possible ADRV has occurred; and
> - enable a Hearing Panel to be comfortably satisfied that a violation has occurred.[2]

Committee response

2.6 **The committee thanks the Minister for Sport for his response, and has concluded its examination of this aspect of the bill.**

Prohibition against retrospective criminal laws

New prohibited association anti-doping regulation—additional penalties on coaches and support staff

2.7 The committee sought the advice of the Minister for Sport as to whether the prohibited association ADRV is compatible with the prohibition on retrospective criminal laws.

---

2 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Sport, to Senator Dean Smith (dated 24/09/2014) 2-3.

Minister's response

In implementing the Prohibited Association ADRV, the Australian Government is meeting its international treaty obligation to abide by the principles of the revised Code.

In its report into Organised Crime and Drugs in Sport, the Australian Crime Commission highlighted the involvement of sports scientists, doctors, pharmacists, criminal gangs and anti-ageing clinics in the supply of performance and image enhancing drugs. The Prohibited Association ADRV will be the only mechanism available to anti-doping authorities to curb the influence of those professionals operating outside the umbrella of a national sporting organisation from using their expertise to facilitate doping. It aims to deter athletes from associating with outsiders who have demonstrated the capability to facilitate doping in sport but are beyond the reach of officials as they are not bound by an anti-doping policy.

The Committee has made several references to coaches. In most cases, coaches will be subject to the anti-doping policy in their sport. In this situation, coaches who are found to have committed an ADRV will be sanctioned, making them ineligible from participating in sport in any role for the period of their ineligibility. To avoid a prohibited association violation, an athlete would not associate with that coach for the period of the coach's ineligibility from sport. In other words, the current penalty for an ADRV already prevents a coach from associating with athletes for the period of ineligibility.

This also applies to any other support persons who are subject to a sport's anti-doping policy and found to have violated the sport's anti-doping rules. In relation to the example in the report, a sanctioned athlete would not be allowed to enter into the coaching profession until their period of ineligibility is over.

The revised Code will also make it a violation for an athlete to associate in a professional or sports-related capacity with a person who is not subject to a sports anti-doping policy and is found guilty of a crime or professional misconduct for an action that would have constituted an ADRV. Any association by an athlete with such a person (a prohibited person) for six years could incur a Prohibited Association violation.

My understanding is that the prohibition on retrospective criminal laws requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed and that laws must not impose greater punishments than those which would have been available at the time the acts were done.

This violation does not impose a sanction directly on a prohibited person, rather the athlete who continues to associate with them in a professional or sport-related capacity when advised they should desist. It does not prevent the prohibited person from working in their profession; however,

athletes are discouraged from associating with them in a professional or sport-related capacity.

A person would only be considered a 'prohibited person' for actions that occur after 1 January 2015 (subject to the passage of the Bill). Furthermore, under the revised Code, the person is given the opportunity to explain why they should not be classified as a prohibited person.

At the end of the day, athletes rely completely and faithfully on the technical knowledge of various support people to enable them to compete in the international and national sporting arena. These are positions of trust and great responsibility. For the athlete's sake, it is important to limit the scope for them to build relationships with people who persuade them into doping.

In conclusion, noting the concerns raised, it should be remembered that the implementation of the Bill is designed to protect the rights of all clean athletes to pursue sport on a level playing field and without compromise from those unethical individuals who place winning above all moral and health considerations.[3]

Committee response

2.8 **The committee thanks the Minister for Sport for his response, and has concluded its examination of this aspect of the bill.**

3 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Sport, to Senator Dean Smith (dated 24/09/2014) 3-4.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 27 March 2014

Purpose

2.9 The regulation amends the Migration Regulations 1994 requirements relating to public interest criterion 4020, English requirements for applicants of the Subclass 457 (Temporary Work (Skilled)) visa, requirements in Part 202 of Schedule 2 and provisions dealing with disclosure of information under regulation 5.34F.

Background

2.10 The committee reported on the bill in its *Seventh Report of the 44th Parliament*, and considered the Minister for Immigration and Border Protection's response in its *Tenth Report of the 44th Parliament*.

Committee view on compatibility

Requirements for assessment of limitations on human rights

Amendments relating to public interest criterion 4020 – legitimate objective and proportionality, and the ten-year exclusion period for refusal under PIC 4020 on identity grounds

2.11 The committee sought the further advice of the Minister for Immigration and Border Protection as to the compatibility of these measures with the right to a fair hearing.

Minister's response

> I acknowledge the Committee's advice that there is an internationally recognised human right to seek asylum. I note, however, that the measures relating to PIC 4020 do not purport to interfere with that right. In any case, PIC 4020 does not apply to Refugee and Humanitarian visa subclasses, so the identity measures in the PIC have no impact on those seeking asylum.
>
> With regard to compatibility with the right to a fair hearing, as a preliminary point, people whose visa applications are refused on the basis of failing to satisfy PIC 4020 are afforded procedural fairness prior to a refusal decision being made. Where a delegate is not initially satisfied of a person's identity, and that lack of satisfaction would be the reason, or part of the reason, for refusing to grant a visa, this information is provided to the person, and the person is invited to comment on it.
>
> Departmental officers act in accordance with the common law and provide a similar degree of procedural fairness to offshore visa applicants as applies under section 57 of the Migration Act to onshore applicants. Section 57 applies only in respect of an application for a visa that can be

granted when an applicant is in the migration zone and for which there is provision for merits review in respect of the decision to refuse to grant the visa.

I also note that in Schedule 6 to the Migration Legislation Amendment Bill (No. 1) 2014, which has now been passed in the House of Representatives and the Senate, it is proposed to remove the distinction between applications for visas which can be granted when the applicant is in the migration zone and which are subject to merits review, and applications for other types of visas. The amendments will commence on a day to be fixed by Proclamation.

There is no impediment for people whose visa applications are refused on the basis of failing to satisfy PIC 4020 from making an application to the Migration Review Tribunal (MRT) for review on the merits of that refusal decision, if the decision is one provided for under section 338 of the Migration Act. If an application to the MRT is made, and the person receives an adverse decision, they are also able to make an application for judicial review of the MRT's decision. In certain circumstances, it is also open for a person to make an application for judicial review where MRT review is not available to them. The amendments to PIC 4020 do not affect this right.

The measures are consistent with the right to a fair hearing.[4]

Committee's response

2.12 **The committee thanks the minister for his response and has concluded its examination of this measure.**

Amendments relating to public interest criterion 4020 – quality of law test

2.13 The committee requested the advice of the Minister for Immigration and Border Protection on whether the measure meets the standards of the quality of law test for human rights purposes.

Minister's response

As noted in my response to the Committee's Seventh Report, the government does not consider that the amendments interfere with human rights and thus the quality of law test for human rights purposes is not relevant.

With regard to information on how an applicant may satisfy me as to their identity, my department provides publicly accessible information to assist people in providing evidence of their identity. Visa application forms provide instructions on how an applicant must establish identity, including specific documents that may be provided as evidence of their identity. In

1 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 19 September 2014) 1.

addition, my department's Procedures Advice Manual provides policy guidance on what the department considers satisfactory evidence for identity purposes, case law examples and case studies, and the department's website provides an overview of PIC 4020, including the fact that providing bogus documents or information that is false or misleading may result in a visa application being refused.[5]

Committee's response

2.14 **The committee thanks the minister for his response and has concluded its examination of this measure.**

2 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 19 September 2014) 2.

Appendix 1

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC14-011393

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Dean,

Thank you for your correspondence of 26 August 2015 providing the Parliamentary Joint Committee on Human Rights assessment of the Australian Sports Anti-Doping Authority Amendment Bill 2014 (the Bill).

The purpose of the Bill is to amend the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act) to give effect to Australia's international anti-doping treaty obligations under the UNESCO International Convention Against Doping in Sport (UNESCO Convention).

There are over 170 Governments which have ratified the UNESCO Convention. The UNESCO Convention requires State Parties to implement anti-doping programmes and activities consistent with the principles of the World Anti-Doping Code (Code). With recent revisions to the Code, I am obliged to bring forward these legislative amendments to align Australia's anti-doping arrangements with the revised Code.

The revisions to the Code were ratified by the international anti-doping community at the World Conference Against Doping in Sport in Johannesburg in November 2013. The adoption of these revisions followed a comprehensive two-year review that included three phases of consultation with stakeholders. This included athletes, coaches, sports administrators, law enforcement authorities and governments. Throughout these processes, there was wide acknowledgement that the changes to the Code are necessary to ensure the Code remained an effective mechanism for countering modern doping practices.

I note that one of the key themes throughout the Code Review process was the need to protect the rights of athletes and ensure procedural fairness is observed. The World Anti-Doping Agency engaged Mr Jean-Paul Costa, a former President of the European Court of Human Rights, to provide advice on the international human rights aspects of the proposed revisions throughout the review process. Mr Costa's final opinion on the revised Code was tabled at the World Conference in November 2013.

Advice provided by Mr Costa in early 2013 prompted the World Anti-Doping Agency to re-work both the article covering the Prohibited Association anti-doping rule violation (ADRV) and the limitation period for commencing the ADRV process to better align the revised wording with international human rights laws. At the conference, Mr Costa supported the final specification of these provisions.

As noted earlier, Australia has ratified the UNESCO Convention with commits us to abide by the Code. Australia is unable to selectively apply specific provisions of the Code and still expect to be considered compliant in the global commitment to provide a harmonised anti-doping framework. This is why such an extensive consultation process was undertaken to develop the revised 2015 Code.

Whilst there may be some minor areas that are points of difference to governments, the overall benefit in having an international agreement that harmonises anti-doping arrangements around the world far outweighs the impact of individual provisions that we may have considered that could have been settled differently. In doing so, the Code defines what constitutes an ADRV, details a uniform list of substances prohibited from sport, specifies a framework for pursuing and handling allegations of doping and implements a consistent set of sanctions for violations.

In relation to the specific issues you have raised, I note the following:

(a) *The committee recommends that the Bill be amended to include a requirement that the new anti-doping rule violation will apply only insofar as it is consistent with the right to freedom of association protected under Article 22 of the ICCPR.*

The placement of this limitation on the operation of the Prohibited Association ADRV in the Regulations reflects our legislative framework. While the Bill provides for the National Anti-Doping scheme to authorise the Chief Executive Officer to notify an athlete or other person with respect to a violation, the provisions relating to this violation will be largely contained in the Australian Sports Anti-Doping Authority Regulations. Accordingly, it was considered most reasonable to place the limitation on the violation with respect to Article 22 of the International Covenant on Civil and Political Rights in the Regulations.

Nevertheless, I am prepared to re-visit the placement of this provision if and when amendments to the ASADA Act are next being developed.

(b) *The previous limitation period of eight years is considerably longer than the statutory limitation periods that apply in relation to other contractual or civil law claims in Australia, and the proposed period of 10 years is even longer. The committee requests the advice of the Minister for Sport as to the compatibility of the Bill with the right to a fair hearing, and particularly:*

- *whether there is a rational connection between the limitation and the legitimate objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

In implementing these amendments, the Australian Government is meeting its international treaty obligation to abide by the principles of the revised Code.

Generally, anti-doping agencies do not have the same investigative capacity as law enforcement authorities. As evidenced in recent cases, it can take anti-doping authorities a significant amount of time to uncover sophisticated doping programmes. In particular, stakeholders were influenced by the time taken to establish a sustainable doping case against Mr Lance Armstrong. Hence, the Code was revised to provide agencies with more time to expose such practices.

Some substances that are prohibited from sport are currently undetectable. This amendment also provides greater scope to undertake retrospective analysis of stored samples as new technologies to identify prohibited substances are developed.

It should also be noted that the extension of the time period for commencing the anti-doping rule violation process does not reduce the level of proof required to confirm an ADRV. The operation of this provision does not override the need for there to be sufficient evidence to:

- prompt the ASADA Chief Executive to invite the person to make a submission in relation to a possible ADRV;
- allow the Anti-Doping Rule Violation Panel to make an assessment of whether a possible ADRV has occurred; and
- enable a Hearing Panel to be comfortably satisfied that a violation has occurred.

(c) *The Committee seeks the advice of the Minister for Sport as to whether the prohibited association ADRV is compatible with the prohibition on retrospective criminal laws.*

In implementing the Prohibited Association ADRV, the Australian Government is meeting its international treaty obligation to abide by the principles of the revised Code.

In its report into *Organised Crime and Drugs in Sport*, the Australian Crime Commission highlighted the involvement of sports scientists, doctors, pharmacists, criminal gangs and anti-ageing clinics in the supply of performance and image enhancing drugs. The Prohibited Association ADRV will be the only mechanism available to anti-doping authorities to curb the influence of those professionals operating outside the umbrella of a national sporting organisation from using their expertise to facilitate doping. It aims to deter athletes from associating with outsiders who have demonstrated the capability to facilitate doping in sport but are beyond the reach of officials as they are not bound by an anti-doping policy.

The Committee has made several references to coaches. In most cases, coaches will be subject to the anti-doping policy in their sport. In this situation, coaches who are found to have committed an ADRV will be sanctioned, making them ineligible from participating in sport in any role for the period of their ineligibility. To avoid a prohibited association violation, an athlete would not associate with that coach for the period of the coach's ineligibility from sport. In other words, the current penalty for an ADRV already prevents a coach from associating with athletes for the period of ineligibility.

This also applies to any other support persons who are subject to a sport's anti-doping policy and found to have violated the sport's anti-doping rules. In relation to the example in the report, a sanctioned athlete would not be allowed to enter into the coaching profession until their period of ineligibility is over.

The revised Code will also make it a violation for an athlete to associate in a professional or sports-related capacity with a person who is not subject to a sports anti-doping policy and is found guilty of a crime or professional misconduct for an action that would have constituted an ADRV. Any association by an athlete with such a person (a prohibited person) for six years could incur a Prohibited Association violation.

My understanding is that the prohibition on retrospective criminal laws requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed and that laws must not impose greater punishments than those which would have been available at the time the acts were done.

This violation does not impose a sanction directly on a prohibited person, rather the athlete who continues to associate with them in a professional or sport-related capacity when advised they should desist. It does not prevent the prohibited person from working in their profession; however, athletes are discouraged from associating with them in a professional or sport-related capacity.

A person would only be considered a 'prohibited person' for actions that occur after 1 January 2015 (subject to the passage of the Bill). Furthermore, under the revised Code, the person is given the opportunity to explain why they should not be classified as a prohibited person.

At the end of the day, athletes rely completely and faithfully on the technical knowledge of various support people to enable them to compete in the international and national sporting arena. These are positions of trust and great responsibility. For the athlete's sake, it is important to limit the scope for them to build relationships with people who persuade them into doping.

In conclusion, noting the concerns raised, it should be remembered that the implementation of the Bill is designed to protect the rights of all clean athletes to pursue sport on a level playing field and without compromise from those unethical individuals who place winning above all moral and health considerations.

I trust this response is of assistance and welcome the Committee's final assessment of the Bill.

Yours sincerely

PETER DUTTON

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Standing Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 26 August 2014 in which further information was requested on the following bill and legislative instrument:

- *Migration Legislation Amendment Bill (No. 1) 2014*; and
- *Migration Amendment (2014 Measures No. 1) Regulation 2014* [F2014L00286].

My response to your requests is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
19/9/2014

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1

"The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to the compatibility of these measures with the right to a fair hearing."

I acknowledge the Committee's advice that there is an internationally recognised human right to seek asylum. I note, however, that the measures relating to PIC 4020 do not purport to interfere with that right. In any case, PIC 4020 does not apply to Refugee and Humanitarian visa subclasses, so the identity measures in the PIC have no impact on those seeking asylum.

With regard to compatibility with the right to a fair hearing, as a preliminary point, people whose visa applications are refused on the basis of failing to satisfy PIC 4020 are afforded procedural fairness prior to a refusal decision being made. Where a delegate is not initially satisfied of a person's identity, and that lack of satisfaction would be the reason, or part of the reason, for refusing to grant a visa, this information is provided to the person, and the person is invited to comment on it.

Departmental officers act in accordance with the common law and provide a similar degree of procedural fairness to offshore visa applicants as applies under section 57 of the Migration Act to onshore applicants. Section 57 applies only in respect of an application for a visa that can be granted when an applicant is in the migration zone and for which there is provision for merits review in respect of the decision to refuse to grant the visa.

I also note that in Schedule 6 to the Migration Legislation Amendment Bill (No. 1) 2014, which has now been passed in the House of Representatives and the Senate, it is proposed to remove the distinction between applications for visas which can be granted when the applicant is in the migration zone and which are subject to merits review, and applications for other types of visas. The amendments will commence on a day to be fixed by Proclamation.

There is no impediment for people whose visa applications are refused on the basis of failing to satisfy PIC 4020 from making an application to the Migration Review Tribunal (MRT) for review on the merits of that refusal decision, if the decision is one provided for under section 338 of the Migration Act. If an application to the MRT is made, and the person receives an adverse decision, they are also able to make an application for judicial review of the MRT's decision. In certain circumstances, it is also open for a person to make an application for judicial review where MRT review is not available to them. The amendments to PIC 4020 do not affect this right.

The measures are consistent with the right to a fair hearing.

"Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection on whether the measure meets the standards of the quality of law test for human rights purposes."

As noted in my response to the Committee's Seventh Report, the government does not consider that the amendments interfere with human rights and thus the quality of law test for human rights purposes is not relevant.

With regard to information on how an applicant may satisfy me as to their identity, my department provides publicly accessible information to assist people in providing evidence of their identity. Visa application forms provide instructions on how an applicant must establish identity, including specific documents that may be provided as evidence of their identity. In addition, my department's Procedures Advice Manual provides policy guidance on what the department considers satisfactory evidence for identity purposes, case law examples and case studies, and the department's website provides an overview of PIC 4020, including the fact that providing bogus documents or information that is false or misleading may result in a visa application being refused.

Appendix 2

Practice Note 1 and
Practice Note 2 (interim)

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

(i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and

(ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- 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.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether a consistent meaning may be found through the application of statutory interpretation principles.
- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- 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 defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates[1] provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.
- In line with the steps set out in the assessment tool flowchart[2] (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
  1. whether and how the limitation is aimed at achieving a legitimate objective;
  2. whether and how there is a rational connection between the limitation and the objective; and
  3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

1 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx

2 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Tool-for-assessing-human-rights-compatibility.aspx

For further Information please contact:

Parliamentary Joint Committee on Human Rights

Tel. (02) 6277 3823 • Fax. (02) 6277 5767

Email: human.rights@aph.gov.au

PO Box 6100, Parliament House
CANBERRA ACT 2600

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Practice Note 2 (interim)

Civil Penalties

Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

Civil penalty provisions

1.3 The committee notes that 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.[1] These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions 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. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).[2] These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.[3]

1.6 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 if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.[4]

The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as 'non-criminal' in domestic law, this is never determinative and requires its nature and severity to be also assessed.

b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.

c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed 'criminal' if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as 'civil' under domestic law, it may nonetheless be classified as 'criminal' under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty 'criminal', their cumulative effect may be sufficient to allow classification of the penalty as 'criminal'.

When is a civil penalty provision 'criminal'?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 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

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as 'civil' under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

b) The nature of the penalty

1.12 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 punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;[5]
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as 'disciplinary' rather than as 'criminal').

c) The severity of the penalty

1.13 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;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than 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.

The consequences of a conclusion that a civil penalty is 'criminal'

1.14 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 decriminalization. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being 'criminal', the 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 committee's expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, 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 article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.[6]

1.18 The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the 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.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved 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.**

Right not to incriminate oneself

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right 'not to be compelled to testify against himself or to confess guilt' in criminal proceedings. **Civil penalty provisions that are considered 'criminal' and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.[7] If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

Right not to be tried or punished twice for the same offence

1.21 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.**

1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.

2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.

3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.

4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a 'criminal' penalty is a more general one and other 'civil' sanctions imposed under legislation may raise this issue as well.

5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.

6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.

7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered 'criminal') is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

For further Information please contact:

Parliamentary Joint Committee on Human Rights

Tel. (02) 6277 3823 • Fax. (02) 6277 5767

Email: human.rights@aph.gov.au

PO Box 6100, Parliament House
CANBERRA ACT 2600

Articles 14 and 15 of the International Covenant on Civil and Political Rights

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.