



Parliamentary Joint Committee on Human Rights

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

Bills introduced 30 September – 2 October 2014

Legislative Instruments received

13 – 19 September 2014

Fourteenth Report of the 44th Parliament

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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/

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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
Senator Claire Moore	Queensland, ALP
Ms Michelle Rowland MP	Greenway, New South Wales, ALP
Ms Fiona Scott MP	Lindsay, New South Wales, LP
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

External Legal Adviser

Professor Simon Rice

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

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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 30 September to 2 October 2014 and legislative instruments received during the period 13 to 19 September 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 30 September to 2 October 2014

The committee considered 12 bills, all of which were introduced with a statement of compatibility. Of these 12 bills, four 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 four bills.

The committee has identified four bills that it considers require 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 27 October 2014 include:

- Albury-Wodonga Development Corporation (Abolition) Bill 2014
- Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014
- Parliamentary Entitlements Legislation Amendment Bill 2014
- Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014
- Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

Legislative instruments received between 13 and 19 September 2014

The committee considered 35 legislative instruments received between 13 and 19 September 2014. All instruments tabled in this period are listed in the Journals of the Senate.¹

Of these 35 instruments, none appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate.

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

Responses

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

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 27 October 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 eight bills introduced between 30 September and 2 October 2014.

Albury-Wodonga Development Corporation (Abolition) Bill 2014

Portfolio: Finance

Introduced: House of Representatives, 1 October 2014

Purpose

1.1 The Albury-Wodonga Development Corporation (Abolition) Bill 2014 (the bill) seeks to:

- repeal the *Albury-Wodonga Development Act 1973* to abolish the Albury-Wodonga Development Corporation (AWDC);
- provide for transitional arrangements, including the transfer of AWDC's property management functions, and assets and liabilities to the Commonwealth; and
- make consequential amendments to the *Freedom of Information Act 1982*, *Remuneration and Allowances Act 1990* and *Urban and Regional Development (Financial Assistance) Act 1974*.

Committee view on compatibility

1.2 The committee has concluded its examination of the bill.

1.3 However, the committee notes that Division 4 of the bill provides that no employee, officer or member of the Albury-Wodonga Development Corporation will transfer to the Commonwealth upon abolition of the corporation.¹ The committee considers that, as these provisions seek to terminate the employment of all those currently employed with the Albury-Wodonga Development

1 EM 7.

Corporation, the bill is likely to engage the right to work. The committee notes that the Albury-Wodonga Development Corporation currently employs only 5 staff. However, it does not consider that the small number of employees justifies not considering the engagement of the right to work in the statement of compatibility.

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

1.5 The committee recommends that where a measure will result in employment terminations an assessment against the right to work should ordinarily be completed.

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Portfolio: Attorney-General

Introduced: Senate, 24 September 2014

Purpose

1.6 The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) seeks to make amendments to a number of Acts, primarily the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Australian Security Intelligence Organisation Act 1979*, the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979*, the *Australian Passports Act 2005*, the *Foreign Passports (Law Enforcement and Security) Act 2005*, the *Terrorism Insurance Act 2003*, the *Customs Act 1901*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Migration Act 1958*, the *Foreign Evidence Act 1994*, the *A New Tax System (Family Assistance) Act 1999*, the *Paid Parental Leave Act 2010*, the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*.

1.7 The bill also seeks to make consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977*, the *Sea Installations Act 1987*, the *National Health Security Act 2007*, the *Proceeds of Crime Act 2001* and the *AusCheck Act 2007*.

1.8 Key amendments proposed in the bill are set out below.

1.9 Schedule 1 of the bill would:

- amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to expand Australian Transaction Reports and Analysis Centre's (AUSTRAC) ability to share information;
- amend the *Australian Passports Act 2005* (Passports Act) to introduce a power to suspend a person's Australian travel documents for 14 days and introduce a mechanism to provide that a person is not required to be notified of a passport refusal or cancellation decision by the Minister for Foreign Affairs;
- amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) in relation to the power to use force in the execution of a questioning warrant, and provide for the continuation of the questioning and questioning and detention warrant regime for a further 10 years;
- amend the *Crimes Act 1914* (Crimes Act) to:
 - introduce a delayed notification search warrant scheme for terrorism offences;

- extend the operation of the powers in relation to terrorist acts and terrorism offences for a further 10 years;
- lower the legal threshold for arrest of a person without a warrant for terrorism offences and the new advocating terrorism offence;
- amend the *Criminal Code Act 1995* (Criminal Code Act) to:
 - limit the defence of humanitarian aid for the offence of treason to instances where the person did the act for the sole purpose of providing humanitarian aid;
 - create a new offence of 'advocating terrorism';
 - make various amendments to the terrorist organisation listing provisions;
 - amend the terrorist organisation training offences;
 - extend the control order regime for a further 10 years and make additional amendments to the regime;
 - extend the preventative detention order (PDO) regime for a further 10 years and make additional amendments to the regime;
- make various amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978*;
- amend the *Foreign Evidence Act 1994* to increase the court's authority to admit material obtained from overseas in terrorism-related proceedings; and
- amend the *Foreign Passports (Law Enforcement and Security) Act 2005* to introduce a 14-day foreign travel document seizure mechanism.

1.10 Schedule 2 of the bill would amend the *A New Tax System (Family Assistance) Act 1999*, *Paid Parental Leave Act 2010* and the *Social Security Act 1991* to provide for the cancellation of a number of social welfare payments for individuals on security grounds.

1.11 Schedule 3 of the bill would amend the *Customs Act 1901* to expand the detention power of customs officials.

1.12 Schedule 4 of the bill would amend the *Migration Act 1958* to include an emergency visa cancellation power.

1.13 Schedule 5 would amend the *Migration Act 1958* to enable automated border processing control systems, such as SmartGate or eGates, to obtain personal identifiers (specifically an image of a person's face and shoulders) from all persons who use those systems.

1.14 Schedule 6 would amend the *Migration Act 1958* to extend the Advance Passenger Processing (APP) arrangement, which currently applies to arriving air and maritime travellers, to departing air and maritime travellers.

1.15 Schedule 7 would amend the *Migration Act 1958* to grant the Department of Immigration and Border Protection (DIBP) the power to retain documents presented that it suspects are bogus.

Background

1.16 The committee recognises the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of all Australians. Moreover, the committee recognises the specific importance of protecting Australians from terrorism.

1.17 The committee notes that legislative responses to issues of national security are generally likely to engage a range of human rights. For example, legislative schemes aimed at the prevention of terrorist acts may seek to achieve this through measures that limit a number of traditional freedoms and protections that are characteristic of Australian society and its system of government.

1.18 The committee notes that human rights principles and norms are not to be understood as inherently opposed to national security objectives or outcomes. Rather, international human rights law allows for the balancing of human rights considerations with responses to national security concerns.

1.19 International human rights law allows for reasonable limits to be placed on most rights and freedoms, although some absolute rights cannot be limited.¹ All other rights may be limited as long as the limitation is reasonable, necessary and proportionate to the achievement of a legitimate objective. This is the analytical framework the committee applies when exercising its statutory function of examining bills for compatibility with human rights. The committee expects proponents of legislation, who bear the onus of justifying proposed limitations on human rights, to apply this framework in the statement of compatibility required for bills.

1.20 The committee notes also that the apparent urgency with which the national security legislation is being passed through the Parliament is inimical to legislative scrutiny processes, through which the committee's assessments and dialogue with legislation proponents is intended to inform the deliberations of senators and members of the Parliament in relation to specific legislative proposals. The committee is concerned that the capacity of legislative scrutiny to contribute to

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; and the right to recognition as a person before the law.

achieving the fine balance between the preservation of traditional human rights and freedoms and the maintenance of national security is limited where the passage of such legislation is expedited.

1.21 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires the committee to inform the Parliament as to the compatibility of legislation with Australia's international human rights obligations. Recognising the committee's role in Australia's broader human rights framework in this way also underpins the importance of balancing the need for legislation with legislative timeframes that support the committee's critical scrutiny function.

Committee view on compatibility

Right to equality and non-discrimination

1.22 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal and non-discriminatory protection of the law.

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

1.24 The rights to equality and non-discrimination are also protected by articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), specifically to eliminate discrimination on the basis of race, colour, descent, national or ethnic origin. The CERD also defines discrimination to encompass both direct and indirect discrimination.⁵

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

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

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

5 Committee on the Elimination of Racial Discrimination, *General Recommendation 14* (1993).

National security law and indirect discrimination

1.25 The committee notes that the proposed legislation does not have as its purpose discrimination against any person; it would apply to all Australians, and is not directly discriminatory.

1.26 The committee notes, however, that the UN Committee on the Elimination of Racial Discrimination has previously raised concerns that counter-terrorism legislation in Australia may disproportionately affect Arab and Muslim Australians.⁶ In its most recent concluding observation on Australia, that committee emphasised Australia's obligation 'to ensure that measures directed at combating terrorism do not discriminate in purpose *or effect* on grounds of race, colour, descent, or national or ethnic origin'⁷(emphasis added).

1.27 The committee notes that, under international human rights law (see 1.22 and 1.24 above), Australia is required to ensure that the enforcement of counter-terrorism legislation does not disproportionately impact on specific ethnic groups, people of other national origins or religious groups, and that the potential for disproportionate impact should therefore be addressed as part of the human rights compatibility assessment of the measures.

1.28 The committee therefore requests the advice of the Attorney-General as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination.

Multiple rights

1.29 The explanatory memorandum for the bill (EM) notes that the bill seeks to introduce substantive changes to the criminal law regime in respect of terrorism offences,⁸ and generally identifies the specific human rights that are potentially engaged and limited by the proposed legislation. These include:

- Right to life⁹
- Right to equality and non-discrimination¹⁰

6 UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/14 (14 April 2005); Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/15-17 (13 September 2010).

7 UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention*, Australia, CERD/C/AUS/CO/15-17 (13 September 2010).

8 EM 3.

9 Article 6, International Covenant on Civil and Political Rights (ICCPR).

- Right to security of the person and freedom from arbitrary detention¹¹
- Right to freedom of movement¹²
- Right to a fair trial and the presumption of innocence¹³
- Right to privacy¹⁴
- Right to freedom of expression¹⁵
- Right to freedom of association¹⁶
- Right to the protection of family¹⁷
- Prohibition on torture and cruel, inhuman or degrading treatment¹⁸
- Prohibition on the use of evidence produced as a result of torture¹⁹
- Right to work²⁰
- Right to social security and an adequate standard of living²¹
- Rights of the child.²²

1.30 Specific rights engaged by particular measures are identified in the discussion below.

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

11 Article 9, ICCPR.

12 Article 12, ICCPR.

13 Article 14, ICCPR.

14 Article 17, ICCPR.

15 Article 19, ICCPR.

16 Article 22, ICCPR.

17 Article 23 and 24, ICCPR.

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

19 Article 15, CAT.

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

21 Article 9 and 11, ICESCR.

22 Convention on the Rights of the Child.

Inadequate statement of compatibility – legitimate objective

1.31 The committee considers that the statement of compatibility, in respect of most measures, does not provide a detailed and evidence based assessment of whether limitations on human rights are justified and, in particular, does not provide sufficient analysis of whether proposed limitations are reasonable, necessary and proportionate to achieving a legitimate objective.

1.32 The committee recognises that national security related information may be necessarily classified. However, it is essential that such restrictions not inhibit the meaningful description and discussion of the nature of the security concerns, and any shortcomings in the existing legislative framework.

1.33 With this in mind, the committee considers that the statement of compatibility is inadequate in establishing that the measures are necessary to achieve the broadly stated objective of maintaining or improving Australia's national security. For example, the EM says:

Australia faces a serious and ongoing terrorist threat. The escalating terrorist situation in Iraq and Syria poses an increasing threat to the security of all Australians both here and overseas. Existing legislation does not adequately address the domestic security threats posed by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas ('foreign fighters').²³

1.34 Similarly, in its submission to the Joint Parliamentary Committee on Intelligence and Security's inquiry into the bill, the Attorney-General's Department provided the following general account of the concerns to which the proposed measures are directed:

Around 60 Australians are participating in the conflict zones in Syria and Iraq. In total, as many as 160 Australians are assessed to be involved in or supporting the Syria and Iraq conflicts both onshore and offshore, from engagement in fighting to providing support such as funding or facilitation. These individuals pose a significant risk to Australia and Australians.

...Australia has a range of national security and counter-terrorism legislation in place, including criminal offences for engaging in hostile acts overseas and provisions authorising the cancellation of passports in limited circumstances. However, the dynamic and fluid nature of the challenges Australia faces means the current legislation does not sufficiently address the domestic security threats posed by the return of Australians who have

participated in foreign conflicts or undertaken training with extremist groups overseas.²⁴

1.35 The committee notes that such statements, while pointing to significant national security risks, are merely general assertions of the link between persons fighting in certain overseas conflicts and the threat they may pose to Australia's national security. As the committee has previously observed, such generalised statements are inadequate to support an assessment of the limits imposed on human rights. In accordance with international human rights law,²⁵ the Attorney-General's Department's own guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.²⁶ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.²⁷

1.36 The committee notes that a number of factors are relevant to the assessment of whether the bill is in pursuit of a legitimate objective, including:

- whether and to what extent existing offence provisions relating to the same or similar conduct are inadequate to address the perceived threat (for example, the *Crimes (Foreign Incursions) Act 1978* prohibits engaging in hostile activities in foreign countries);
- whether Australians engaging in overseas conflicts in the past (for example, in the former Yugoslavia) have presented similar national security concerns and, if so, how these concerns were managed in the absence of the current proposals;
- with reference to the number of persons engaged in overseas conflicts, as identified by the Attorney-General's Department, the scale of the perceived threat to national security relative to the resources available to Australian law enforcement and intelligence agencies to address that threat; and

24 Attorney General's Department, *Submission 8*, Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 2.

25 United Nations, Economic and Social Council, *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), [10].

26 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues* at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> (accessed 8 July 2014).

27 United Nations, Economic and Social Council, *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), [10]; *Wingrove* [1997] 24 EHRR1 [53]; *Oakes* (1986) 1 SCR 103.

- whether there are less restrictive measures available to manage the threat of persons returning from participating in overseas conflicts involving terrorism.

1.37 Accordingly, the committee considers that more information and analysis is required to establish that the measures in the bill are in pursuit of a legitimate objective. In light of the significant limitations on human rights which are proposed and are discussed below, and in the absence of such further information, the committee would be required to conclude that a number of the measures in the bill are incompatible with human rights.

Schedule 1 – Extension of powers subject to a sunset provision

The ASIO special powers regime

1.38 Under division 3 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), ASIO currently has the power to apply for questioning warrants and questioning and detention warrants (special powers regime). These warrants permit ASIO to question and detain a non-suspect citizen.

1.39 The bill would amend and extend the operation of the special powers regime for a further 10 years until July 2026. Because of its highly invasive nature, the special powers regime was initially established with a three year sunset clause. This was subsequently extended in 2006 for 10 years until July 2016.

1.40 The statement of compatibility for the bill identifies the right to freedom of movement and freedom from arbitrary detention as being engaged by the measures relating to the ASIO special powers regime. The committee agrees, and considers that the measures also engage a number of other human rights, including the right to security of the person and the right to be free from arbitrary detention; the right to freedom of expression; the right to freedom of movement; the right to a fair trial; the right to privacy; and the right of the child to have their best interests a primary consideration (because persons aged 16 to 17 years are subject to these powers).²⁸

1.41 The committee notes that the special powers regime was legislated prior to the establishment of the committee, which means that it has not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.42 Accordingly, the human rights assessment of the proposal to extend the operation of the special powers regime necessarily involves a foundation assessment of whether the powers themselves are compatible with human rights.

1.43 The committee notes that the special powers regime is essentially coercive in nature. A questioning warrant, for example, empowers ASIO to request a person give information or produce records or things that are (or may be) relevant to intelligence in relation to a terrorism offence. Failure to appear for questioning or to answer

28 For references, see [1.14] above.

questions or provide requested records or things, or the giving of false or misleading information is a criminal offence punishable by five years' imprisonment. There is no right to silence or privilege against self-incrimination.

1.44 A questioning and detention warrant allows ASIO to request the detention of a non-suspect for the purpose of intelligence-gathering, and police officers to enter and search any premises where they reasonably believe the person is, and to use reasonable force in order to take the person into custody. In executing a detention warrant, the AFP officer is not required to give the person any information about the grounds for the warrant. A person may be detained for a maximum of seven days.

1.45 The committee notes that the special powers regime is protected by extensive secrecy provisions. For example, a person commits an offence if, prior to the expiry of a warrant, they disclose information about the issuing of the warrant, the content of the warrant or the questioning or detention of a person under the warrant and/or the information is 'operational information' (being information that ASIO has or had, a source of information that ASIO has or had (other than the person who is the subject of the warrant), or an ASIO operational capability, method or plan.

1.46 For two years after the expiry of a warrant, it is an offence for an individual to disclose operational information and/or information which is broadly related to the warrant. The offence applies as an offence of strict liability if the information is operational information or is about the warrant or the questioning and detention of the person who is the subject of the warrant.

1.47 It is important to note that these powers have been granted to ASIO in support of its role as an intelligence gathering agency. ASIO has no direct role in criminal investigations and prosecutions. These powers may apply in relation to individuals not suspected of, and not charged with, any offence, let alone a terrorism-related offence.

1.48 The committee considers that these features of the special powers regime are relevant to an assessment of whether they are reasonable, necessary and proportionate to a legitimate objective.

1.49 The committee considers that, in the absence of further information, the special powers regime is likely to be incompatible with the human rights set out at 1.40.

1.50 The committee therefore seeks the advice of the Attorney-General as to the compatibility of each part of the special powers regime, with the rights listed above at paragraph 1.40, and particularly:

- **whether each part of the special powers regime is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between each part of the special powers regime and that objective; and**

- **whether each part of the special powers regime is a reasonable and proportionate measure for the achievement of that objective.**

Amendment of the ASIO special powers regime

1.51 As noted above, the assessment of the human rights compatibility of the special powers regime is a necessary foundation for the assessment of the proposed amendments to the regime. The further proposed amendments to the special powers regime would:

- amend the provision authorising use of force in executing a questioning warrant;
- amend the requirements for the authorisation of warrants by the Attorney-General; and
- add a new offence for destroying or tampering with a record or thing, with the intention of preventing it being produced, or produced in a legible form, in accordance with a request for production made under a questioning warrant.

1.52 The committee considers that, without a foundational assessment of the measure it is not possible for the committee to consider in detail the proposed amendments. The committee considers that the amendments would increase ASIO's access to, and usage of, the special warrant powers and accordingly in practice this would increase the limitations on human rights already imposed by the existing powers. In the absence of further information, and in light of existing concerns regarding the powers, the committee considers that the proposed amendments to the special powers regime are also likely to be incompatible with human rights.

1.53 The committee therefore seeks the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the special powers regime, with the rights listed above at paragraph 1.40, and particularly:

- **whether each of the proposed amendments are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between each of the proposed amendments and that objective; and**
- **whether each of the proposed amendments is a reasonable and proportionate measure for the achievement of that objective.**

Extension of the period for the ASIO special powers regime

1.54 The committee considers that, in the absence of further information, the proposed extension of the period for the operation of the special powers regime is also likely to be incompatible with human rights. The committee notes that the statement of compatibility provides mostly descriptive information in relation to this proposal, and includes only the following general assertion in relation to the need for the extension:

This amendment recognises the enduring nature of the terrorist threat and provides ASIO with the necessary tools to respond effectively to the evolving counter-terrorism landscape.²⁹

1.55 As noted above, general assertions of this type are inadequate as a basis for assessing whether a proposed measure is reasonable, necessary and proportionate to the achievement of a legitimate objective.

1.56 The committee further notes that the special powers regime measures have been little used. For example, between 2004 and 2010 a total of 16 questioning warrants were issued in relation to a total of 15 individuals; and no questioning and detention warrants were issued in that period.³⁰ Between 2010 and 2013, the powers were not used at all.

1.57 The committee notes further that the special powers regime is not due to expire until July 2016.

1.58 In light of this, the committee is concerned that the 10 year extension of the regime is being proposed for expedited consideration by the Parliament, notwithstanding that the relevant powers are little used and well ahead of their current sunset date of July 2016. Accordingly, there is no specific urgency to extend the ASIO special powers regime in order to address current changes in the threat posed by terrorism to Australia highlighted in the EM.

1.59 In this regard, the committee also notes that the special powers regime is currently due to be reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) by 22 January 2016 (prior to the current sunset date). However, the bill seeks to postpone this review until January 2026.

1.60 The committee considers that the PJCIS inquiry should be conducted before any extension or amendment to the regime. Such a review would assist in establishing that the ASIO special powers regime supports a legitimate objective, and that the powers are rationally connected to a legitimate objective.

1.61 The committee therefore recommends that the extension and amendments to the special powers regime not proceed until such time as the PJCIS has conducted the review of the ASIO special powers regime in accordance with current section 29(1)(bb) of the *Intelligence Services Act 2001*.

29 EM 17.

30 See ASIO, *Annual Report to Parliament 2003-2004*, *Annual Report to Parliament 2004-2005*, *Annual Report to Parliament 2005-2006*, *Annual Report to Parliament 2006-2007*, *Annual Report to Parliament 2007-2008*, *Annual Report to Parliament 2008-2009*, *Annual Report to Parliament 2009-2010*, *Annual Report to Parliament 2010-2011*, *Annual Report to Parliament 2011-2012*, and *Annual Report to Parliament 2012-2013* available at <http://www.asio.gov.au/Publications/Report-to-Parliament/Report-to-Parliament.html>.

1.62 The committee also recommends that the extension and amendments to the special powers regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the special powers regime and the amendments proposed in Schedule 1 to the bill.

1.63 The committee seeks the advice of the Attorney-General as to the compatibility of the proposed 10 year extension of the special powers regime, with the rights listed above at paragraph 1.40, and particularly:

- whether the proposed 10 year extension of the special powers regime is aimed at achieving a legitimate objective;
- whether there is a rational connection between the proposed 10 year extension and that objective; and
- whether the proposed 10 year extension is a reasonable and proportionate measure for the achievement of that objective.

The control orders regime

1.64 The bill proposes to amend and extend the control orders regime under division 104 of the Criminal Code Act 1995 for a further 10 years. Because of its highly invasive nature, the control orders regime is currently subject to a sunset provision, which will see the relevant measures cease in December 2015.

1.65 The committee considers that the control order regime engages a number of human rights, including the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work.³¹

1.66 The committee notes that the control orders regime was legislated prior to the establishment of the committee, which means that it has not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.67 Accordingly, the human rights assessment of the proposal to extend and amend the operation of the control orders regime necessarily involves a foundation assessment of whether the powers, in and of themselves, are compatible with human rights.

1.68 In this respect, the committee notes that the control orders regime is essentially coercive in nature. The control orders regime grants the Federal Court the power to impose a control order on a person at the request of the Australian Federal Police with the Attorney-General's consent. The terms of a control order may impose

31 For references, see [1.14] above.

a number of obligations, prohibitions and restrictions on the person the subject of the order. These include:

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

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

- a senior AFP member must obtain the Attorney-General's written consent to seek a control order on prescribed grounds (these grounds would be expanded under the proposed amendments);
- once consent is granted, the AFP member must seek an interim control order from an issuing court, which must be satisfied on the balance of probabilities (a) that the order will satisfy the grounds on which the order is requested and (b) that the obligations, prohibitions or restrictions to be imposed are 'reasonably necessary and reasonably appropriate' for the purpose of protecting the public from a terrorist act. The AFP must subsequently seek the court's confirmation of the order, with a confirmed order able to last up to 12 months; and
- at the request of the AFP or the subject of a control, the court may revoke or vary a confirmed control order.

1.70 The statement of compatibility acknowledges that the control orders regime engages and limits a variety of human rights,³² and identifies the retention of the regime as being in pursuit of the legitimate objective of 'providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia'.³³ The committee acknowledges that this objective may properly be regarded as a legitimate objective for the purposes of international human rights law.

32 EM 32-33.

33 EM 31.

1.71 The committee notes that, as evidence of the proportionality of the regime, the statement of compatibility points to a number of features and safeguards, such as the requirement that the court be satisfied that restrictions imposed on a person are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist attack;³⁴ notification requirements; and an individual's right to apply for an order to be varied.

1.72 The committee notes that the features of the control orders regime set out in paragraphs 1.68 to 1.71 are relevant to an assessment of whether they may be considered reasonable, necessary and proportionate to a legitimate objective.

1.73 The control orders regime involves very significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

1.74 The committee considers that, notwithstanding the safeguards identified, the control orders regime may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of their legitimate objective. There are a range of offences that cover preparatory acts to terrorism offences currently prescribed by the *Criminal Code Act 1995*, which allow police to detect and prosecute terrorist activities at early stages. The former INSLM described control orders as 'not effective, not appropriate and not necessary' in circumstances where a person has not previously been convicted of a terrorism offence;³⁵ and noted that policing of terrorism-related offences should generally accord more closely with traditional approaches to the investigation and prosecution of criminal behaviour.³⁶

1.75 The committee considers that, in the absence of further information regarding its necessity and proportionality, the control order regime is likely to be incompatible with the human rights set out at 1.65 above.

1.76 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the control orders regime with the rights listed above at paragraph 1.65, and particularly:

- **whether the control orders regime is aimed at achieving a legitimate objective;**

34 EM 32-33.

35 Independent National Security Legislation Monitor, Declassified annual report 20 December 2012, http://www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf (accessed 25 September 2014), 8-9.

36 Independent National Security Legislation Monitor, Declassified annual report, 20 December 2012, http://www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf (accessed 25 September 2014), 39.

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

Amendments to the control orders regime

1.77 As noted above, the assessment of the human rights compatibility of the control orders regime is a necessary foundation for the assessment of the proposed amendments to the regime. The further proposed amendments to control orders would:

- introduce new grounds on which a control order can be issued, namely engaging in 'hostile activity' in a foreign country or being convicted of an offence related to terrorism in Australia or a foreign country. For the offence to be established, a court will be required to be satisfied on the balance of probabilities that:
 - the person has provided training to, received training from or participated in training with a listed terrorist organisation;
 - the person has engaged in a hostile activity in a foreign country; or
 - the person has been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation; and
 - the proposed terms of the control are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

1.78 The amendments would also lower the required threshold for an AFP member to seek the Attorney-General's consent to a control order. This would allow an order to be sought where the AFP member 'suspects' rather than 'considers' on reasonable grounds that the order would substantially assist in preventing a terrorist act; or that the person has provided or received training from a listed terrorist organisation.

1.79 The committee considers that, without a foundational assessment of the control orders regime it is not possible for the committee to consider in detail the proposed amendments. The committee considers that the amendments would increase intelligence and law enforcement authorities' access to, and usage of, control orders and accordingly would increase the impact of the measures on human rights when compared to the existing powers. In the absence of further information, the committee considers that the proposed amendments to the control orders regime are also likely to be incompatible with human rights.

1.80 The committee therefore seeks the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the control orders regime, with the rights listed above at paragraph 1.65, and particularly:

-
- **whether each of the proposed amendments are aimed at achieving a legitimate objective;**
 - **whether there is a rational connection between each of the proposed amendments and that objective; and**
 - **whether each of the proposed amendments are a reasonable and proportionate measure for the achievement of that objective.**

Extension of the period of the control orders regime

1.81 The committee notes further that the control orders regime is not due to expire until December 2015.

1.82 In light of this, the committee is concerned that the 10-year extension is being proposed for expedited consideration by the Parliament, notwithstanding that the relevant powers are little used and well ahead of their current sunset date of December 2015. The committee considers that there is more time to properly consider, first, whether the powers are necessary and, second, if so, whether they should be amended and extended in the terms proposed by the bill.

1.83 Noting the committee's comments above in relation to the special powers regime, the committee considers that the PJCIS should also review the control orders regime prior to any extension or amendment of that regime. The committee considers the PJCIS the appropriate committee to conduct such a review as it has considered this bill on the request of the Attorney-General and accordingly has familiarity with the control order regime. Such a review would assist in establishing that the control orders regime supports a legitimate objective, and that the powers are rationally connected to a legitimate objective.

1.84 The committee therefore recommends that Attorney-General refer the extension and amendments to the control orders regime to the PJCIS for review and report. The committee recommends that the extension and amendments to the control order regime not proceed until the PJCIS has reported.

1.85 The committee also recommends that the extension and amendments to the control orders regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the control orders regime and the amendments proposed in Schedule 1 to the bill.

1.86 The committee seeks the advice of the Attorney-General as to the compatibility of the proposed 10 year extension of the control orders regime, with the rights listed above at paragraph 1.65, and particularly:

- **whether the proposed 10 year extension of the control orders regime is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the proposed 10 year extension and that objective; and**

- **whether the proposed 10 year extension is a reasonable and proportionate measure for the achievement of that objective.**

The preventative detention orders regime

1.87 Division 105 of Part 5.3 of the *Criminal Code Act 1995* provides for preventative detention orders (PDO). The AFP may apply for a PDO for the purpose of preventing an imminent terrorist act from occurring or to prevent the destruction of evidence of, or relating to, a recent terrorist act.

1.88 The bill proposes to amend and extend the operation of the preventative detention orders regime for a further 10 years. Because of its highly invasive nature, the regime is currently subject to a sunset provision, which would see the relevant measures otherwise cease in December 2015.

1.89 The committee considers that PDOs engage a number of human rights, including the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to be treated with humanity and dignity; the right to protection of the family; and the rights to equality and non-discrimination.

1.90 The committee notes that the PDO regime was legislated prior to the establishment of the committee, which means that it has not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.91 Accordingly, the human rights assessment of the proposal to extend and amend the operation of the PDO regime necessarily involves a foundation assessment of whether the powers, in and of themselves, are compatible with human rights.

1.92 In this respect, the committee notes that the PDO regime is essentially coercive in nature. In recognition of their extraordinary nature, the threshold for obtaining a PDO is set very high and involves a complex application process.

1.93 Under the PDO regime, an AFP member may make an initial PDO application to an issuing authority (a senior AFP member). An initial PDO can be in force for up to 24 hours from the time a person is first taken into custody.

1.94 An AFP member may apply to an issuing authority for a continued PDO. These can be in force for up to 48 hours from the time a person is first taken into custody. To request a PDO, an AFP member must be satisfied that there are 'reasonable grounds to suspect' that a person:

- will engage in a terrorist act; or
- possesses a thing connected with the preparation for, or the engagement of a person in, a terrorist act; or
- has done an act in preparation for, or planning, a terrorist act.

1.95 In addition, the AFP member must be satisfied that making the PDO would substantially assist in preventing an imminent terrorist act from occurring in the next 14 days; and detaining the person for the period of the PDO is reasonably necessary to substantially assist in preventing the terrorist act from occurring.

1.96 An AFP member can also apply for a PDO if satisfied that:

- a terrorist act has occurred in the last 28 days; and
- it is necessary to detain the person to preserve evidence of, or relating to, the terrorist act; and
- detaining the person for the period of the PDO is reasonably necessary to preserve the evidence.

1.97 It is important to note that a PDO can be applied for regardless of whether or not a person is themselves suspected of involvement in terrorist or criminal activity (for example, a PDO could apply to a witness to a terrorist act).

1.98 A PDO cannot be applied for, or made, in relation to a person who is under 16 years of age, and special rules apply for orders in relation to a person under 18 years of age.

1.99 The committee notes that the features of the PDO regime set out in paragraphs 1.92 to 1.98 are relevant to an assessment of whether the relevant measures may be considered reasonable, necessary and proportionate to a legitimate objective.

1.100 The committee notes that the PDO regime involves very significant limitations on human rights. Notably, it allows the imposition of a PDO on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. Effectively, PDOs permit a person's detention by the executive without charge or arrest. The provision for detention of an innocent person (who may not themselves pose a risk to society) for the purpose of preserving evidence is beyond the scope of what is recognised as a permissible denial of the traditional human right to liberty.³⁷ These have usually been limited to situations where there is reason to believe that an individual would pose a serious danger to society if not detained.

1.101 In this respect, the committee notes that the former INSLM was highly critical of the efficacy and proportionality of PDOs, taking into account the extent of their use and their particular character. In 2012, he noted:

The combination of non-criminal detention, a lack of contribution to CT [(counter-terrorism)] investigation and the complete lack of any occasion

37 The scope of permissible detention of an innocent person is contested. Widely accepted grounds are risk of: flight, collusion, repetition and public disorder.

so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.³⁸

1.102 The INSLM further argued:

There are limited analogies in similar countries of a power to detain preventively without arrest or charge. Past experience of democracies with preventive detention regimes against declared 'enemies' during war time and suspected terrorists points immediately to the dangers of preventive action....This raises a red flag against the appropriateness of Australia's PDO regime from a civil liberties perspective. Its essential elements are at odds with our normal approach to even the most reprehensible crimes.³⁹

1.103 The INSLM also noted that the case for extraordinary powers for policing of terrorism related offences, above the traditional powers and approaches to the investigation and prosecution of criminal behaviour, had not been established:

There has been no material or argument demonstrating that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism. Nor has this review shown that the traditional methods used by police to collect and preserve evidence, eg search warrants, do not suffice for the investigation and prosecution of terrorist suspects. There is, by now, enough experience in Australia of police operations in the detection and investigation, and support for prosecution, of terrorist offences. There is therefore substantial weight to be given to the lack of a demonstrated functional purpose for PDOs as a matter of practical experience.⁴⁰

1.104 In light of the above, and in the absence of further information, the committee considers that the PDO regime is likely to be incompatible with the human rights set out in 1.89 above.

1.105 **The committee therefore seeks the advice of the Attorney-General as to the compatibility of the preventative detention orders regime, with the rights listed above at paragraph 1.89, and particularly:**

- **whether the preventative detention orders regime is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the preventative detention orders regime and that objective; and**

38 Independent National Security Legislation Monitor, 'Declassified annual report 20th December 2012 41, available at <http://www.dpmc.gov.au/INSLM/index.cfm>

39 Independent National Security Legislation Monitor, 'Declassified annual report 20th December 2012 42-43, available at <http://www.dpmc.gov.au/INSLM/index.cfm>.

40 Independent National Security Legislation Monitor, 'Declassified annual report 20th December 2012 47, available at <http://www.dpmc.gov.au/INSLM/index.cfm>.

- **whether the preventative detention orders regime is a reasonable and proportionate measure for the achievement of that objective.**

Amendments to the preventative detention orders regime

1.106 As noted above, the assessment of the human rights compatibility of the PDO regime is a necessary foundation for the assessment of the proposed amendments to the regime. The amendments would:

- enable applications for initial PDOs and prohibited contact orders to be made verbally and electronically in urgent circumstances,
- enable PDOs to be made in respect of a person whose full name is not known, but who is able to be identified as the intended subject of the order,
- amend the issuing criteria for PDOs to make the state of mind of the AFP applicant 'suspect, on reasonable grounds' instead of 'reasonable grounds to suspect', and
- amend the issuing criteria for PDOs such that a person must be satisfied that it is 'reasonably necessary' as opposed to 'necessary' to detain the subject to preserve evidence of, or relating to, the terrorist act.

1.107 The committee considers that, without a foundational assessment of the preventative detention order regime it is not possible for the committee to consider in detail the proposed amendments. The committee considers that the amendments would increase intelligence and law enforcement authorities' access to, and usage of, preventative detention orders and accordingly would increase the impact of the measures on human rights when compared to the existing powers. Accordingly, the committee considers that the proposed amendments to the preventative detention order regime are also likely to be incompatible with human rights.

1.108 The committee therefore seeks the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the preventative detention orders regime, with the rights listed above at paragraph 1.89, and particularly:

- **whether each of the proposed amendments to the preventative detention orders regime are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between each of the proposed amendments to the preventative detention orders regime and that objective; and**
- **whether each of the proposed amendments to the preventative detention orders regime are a reasonable and proportionate measure for the achievement of that objective.**

Extension of the period of the preventative detention orders regime

1.109 Finally, the committee considers that, in the absence of further information, the proposed extension of the PDO regime is also likely to be incompatible with human rights. In relation to the proposed extension, the statement of compatibility states:

The enduring nature of the terrorist threat and the heightened risk posed by returning foreign fighters justifies the continued existence of the PDO regime. In the evolving terrorism landscape, it remains an appropriate preventative mechanism in rare situations where immediate and preventative action is required.⁴¹

1.110 As noted above at 1.35, general assertions of this type are inadequate as a basis for assessing whether a proposed measure is reasonable, necessary and proportionate to the achievement of a legitimate objective.

1.111 The committee notes further that the PDO regime is not due to expire until December 2015.

1.112 In light of this, the committee is concerned that the 10-year extension is being proposed for expedited consideration by the Parliament, notwithstanding that the relevant powers are little used and well ahead of their current sunset date of December 2015. The committee considers that there is more time to consider, first, whether the powers are necessary and, second, if so, whether they should be amended and extended in the terms proposed by the bill.

1.113 Noting the committee's comments above in relation to the special powers and control orders regimes, the committee considers that the PJCIS should also review the PDO regime prior to any extension or amendment of that regime. The committee considers the PJCIS the appropriate committee to conduct such a review as it has considered this bill on the request of the Attorney-General and accordingly has familiarity with the PDO regime. Such a review would assist in establishing that the PDO regime supports a legitimate objective, and that the powers are rationally connected to a legitimate objective.

1.114 The committee therefore recommends that the Attorney-General refer the extension and amendments to the PDO regime to the PJCIS for review and report. The committee recommends that the extension and amendments to the PDO regime not proceed until the PJCIS has reported.

1.115 The committee also recommends that the extension and amendments to the PDO regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the PDO regime and the amendments proposed in Schedule 1 to the bill.

41 EM 41.

1.116 The committee seeks the advice of the Attorney-General as to the compatibility of the proposed 10 year extension to the preventative detention orders regime, with the rights listed above at paragraph 1.89, and particularly:

- whether the proposed 10 year extension to the preventative detention orders regime is aimed at achieving a legitimate objective;
- whether there is a rational connection between the proposed 10 year extension and that objective; and
- whether the proposed 10 year extension is a reasonable and proportionate measure for the achievement of that objective.

Extension of stop, question, search and seizure powers

1.117 Part IAA Division 3A of the *Crimes Act 1914* was introduced in 2005 to provide 'a new regime of stop, question, search and seize powers...exercisable at airports and other Commonwealth places to prevent or respond to terrorism'.⁴²

1.118 Because of their highly invasive nature, the provisions are currently subject to a sunset provision, which will see the relevant measures cease in December 2015.

1.119 The statement of compatibility for the bill identifies the stop, question, search and seizure powers as engaging the right to privacy; the right to security of the person and the right to be free from arbitrary detention; and the right to freedom from cruel, inhuman and degrading treatment or punishment. The committee agrees, and considers that the powers also engage the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to be treated with humanity and dignity in detention; and the rights to equality and non-discrimination.

1.120 The committee notes that these stop, question, search and seizure powers were legislated prior to the establishment of the committee, which means that they have not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.121 Accordingly, the human rights assessment of the proposal to extend the operation of these powers necessarily involves a foundational assessment of whether the powers, in and of themselves, are compatible with human rights.

1.122 The division provides a range of powers that can be exercised by certain officers of the AFP and state and territory police, including powers to:

- require a person to provide their name;
- stop and search persons;

42 EM, Anti-Terrorism Bill (No 2) 2005 1.

- seize terrorism-related items;
- enter premises without a warrant;
- apply to have an area declared to be a prescribed security zone; and
- enter and search premises, and to seize property without the occupier's consent in certain circumstances (since 2010).

1.123 The committee notes that these powers are coercive and highly invasive in nature. For example, in relation to the power to declare a 'prescribed security zone', the minister may do so if he or she considers that it will help prevent a terrorist act or help respond to a terrorist act. Once a prescribed security zone is declared, everyone in that zone is subject to stop, question, search and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. The minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.

1.124 The committee notes further that these powers are in addition to existing police powers under Commonwealth criminal law, including a range of powers to assist in the collection of evidence of a crime. For example, Division 2 of Part IAA of the *Crimes Act 1914* sets out a range of search and seizure powers, including the primary Commonwealth search warrant provisions that apply to all offences against Commonwealth law. Under these provisions, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.⁴³ A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.

1.125 The committee also notes that the COAG review of anti-terrorism laws in 2013 recommended that these powers be extended for a further five years.⁴⁴

1.126 The committee notes that the features and considerations set out in paragraphs 1.122 to 1.125 are relevant to an assessment of whether the stop,

43 Section 3R of the *Crimes Act 1914*.

44 Council of Australian Governments, Council of Australian Governments Review of Counter Terrorism Legislation (2013) available from:
<http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF>.

question, search and seizure powers may be considered reasonable, necessary and proportionate to a legitimate objective.

1.127 In this regard, the committee notes that the statement of compatibility for the bill states that the legitimate objective of the extension of the operation of the powers is 'to assist law enforcement officers to prevent serious threats to Australia's national security interests'.⁴⁵ In relation to the proposed 10-year extension of the operation of the powers, beyond the five-year period recommended by the COAG review, the committee notes that the statement of compatibility asserts that the extension is necessary 'in recognition of the fact that the terrorist threat remains an ongoing and real phenomenon'.⁴⁶

1.128 However, as the committee has previously observed, such generalised statements are inadequate to support a human rights assessment for the purposes of the committee's scrutiny function. The Attorney-General's Department's own guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁴⁷ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.⁴⁸

1.129 Accordingly, the committee considers that more information and analysis is required to establish that the stop, question, search and seizure powers are in pursuit of a legitimate objective.

1.130 In relation to the proportionality of the powers, the committee notes that the statement of compatibility concludes that the powers are reasonable, necessary and proportionate to their stated objective. The statement of compatibility points to threshold criteria for the exercise of the powers (for example an officer may only use stop and search powers when a terrorism item is believed to be present),⁴⁹ and to the fact that the powers are available to be used only in respect of terrorism offences.⁵⁰

45 EM 20.

46 EM 20.

47 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> (accessed 8 July 2014).

48 United Nations, Economic and Social Council, 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), [10]; *Wingrove* [1997] 24 EHRR1 [53]; *Oakes* (1986) 1 SCR 103.

49 EM 20.

50 EM 20.

1.131 However, the committee notes that, in order to demonstrate that a proposed limitation on human rights is permissible, legislation proponents must provide reasoned and evidenced-based explanations of why a measure may be regarded as a proportionate means of achieving a legitimate objective. In this respect, the committee notes that the analysis in the statement of compatibility is inadequate to support the assertions as to the proportionality of the measure.

1.132 In light of the above, the committee considers that the stop, question, search and seizure powers are likely to be incompatible with a number of human rights including: the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to be treated with humanity and dignity; and the rights to equality and non-discrimination.

1.133 The committee also considers that, in the absence of further information, the proposed extension of the stop, question, search and seizure powers is also likely to be incompatible with human rights.

1.134 The committee notes that a proper human rights assessment of the powers must address the considerations outlined above. In particular the committee considers that any assessment of the stop, question, search and seizure powers must consider how such powers are necessary having regard to the existing police powers under Commonwealth criminal law. The statement of compatibility would need to demonstrate how existing powers are insufficient to prevent serious threats to Australia's national security interests.

1.135 The committee therefore seeks the advice of the Attorney-General as to the compatibility of each of the stop, question, search and seizure powers, and their proposed extension, with the rights listed above at paragraph 1.119, and particularly:

- **whether each of the stop, question, search and seizure powers, and their proposed extension, are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between each of the stop, question, search and seizure powers, and their proposed extension, and that objective; and**
- **whether each of the stop, question, search and seizure powers, and their proposed extension, are a reasonable and proportionate measure for the achievement of that objective.**

1.136 Noting the committee's comments above in relation to the special powers regime, control orders regime and PDOs, the committee considers that the PJCIS should also review these stop, question, search and seizure powers prior to any extension. The committee considers the PJCIS the appropriate committee to conduct such a review as it has considered this bill on the request of the Attorney-General and accordingly has familiarity with these powers. Such a review would assist in

establishing that these powers support a legitimate objective, and that the powers are rationally connected to a legitimate objective.

1.137 The committee therefore recommends that the Attorney-General refer the extension of the stop, question, search and seizure powers to the PJCIS for review and report. The committee recommends that the extension and amendments to the stop, question, search and seizure powers not proceed until the PJCIS has reported.

1.138 The committee also recommends that the extension of the stop, question, search and seizure powers not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the stop, question, search and seizure powers.

Schedule 1 – Delayed notification search warrant

1.139 The bill would introduce a delayed notification search warrant (DNSW) regime into Part IAA of the *Crimes Act 1914*. In essence, the DNSW would be a covert search warrant regime.

Right to privacy

1.140 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

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

Introduction of delayed notification search warrant regime

1.142 Whereas existing search warrant provisions require a copy of the warrant to be given to the occupier of the premises and require the occupier to be allowed to observe the search,⁵¹ the proposed DNSW regime would enable the AFP to conduct searches of a warrant premises without the occupier's knowledge, and without notifying the occupier at the time the warrant is executed. Notice of the search will be required to be given to the occupier of a searched premise generally within six months, but as late as 18 months, after the search.

1.143 The DNSW regime would include the power to impersonate a person where reasonably necessary to execute the warrant. The statement of compatibility advises that this power is intended to be utilised to allay the suspicion of other residents of

51 See sections 3H and 3P of the Crimes Act.

the area.⁵² In addition, the DNSW would allow in certain instances the executing officer to leave the warrant premises temporarily, and subsequently re-enter to continue the execution of the warrant without having to apply for a fresh warrant.

1.144 The executing officer is also able to enter the warrant premises via an adjoining premises, where this is required to avoid compromising the prevention or investigation of the relevant offences. This power is limited to accessing the warrant premises and does not allow for the search and seizure of things in the adjoining premises. Notice is to be given to the occupier of an adjoining premises entered to gain access to the warrant premises at a later date, generally within six months (extendable up to 18 months). The bill would also introduce general secrecy provisions around the execution of such warrants.

1.145 The committee notes that the statement of compatibility identifies the legitimate aim of the DNSW regime as 'assisting the AFP to effectively prevent or investigate Commonwealth terrorism offences'. The statement of compatibility provides a lengthy justification for the DNSW regime, and identifies the proposal as engaging and limiting the right to privacy. It states:

The delayed notification search warrant scheme limits the right to privacy by enabling law enforcement officers to enter a warrant premises, including a suspect's home or place of work, without the knowledge or consent of the occupier. The limitation, however, serves the legitimate aim of assisting the AFP to effectively prevent or investigate Commonwealth terrorism offences. This is because allowing for an occupier to be notified of a search warrant sometime after the warrant was executed or otherwise granted provides the AFP with the opportunity to gather evidence, identify additional suspects and locate further relevant premises and evidence while keeping the existence of an ongoing investigation confidential.⁵³

1.146 Regarding the need for the DNSW regime, the statement of compatibility notes:

The ability of federal law enforcement officers to conduct a delayed notification search warrant is critical to enable covert investigation of terrorism offences. Operational experience has shown that the individuals and groups who commit such offences are highly resilient to other investigative methods and pose significant threats to the Australian community...⁵⁴

52 EM 23.

53 EM 23.

54 EM 23.

1.147 The statement of compatibility also notes that the former INSLM recommended the adoption of a DNSW scheme.⁵⁵

1.148 The statement of compatibility concludes that the DNSW regime is reasonable, necessary and proportionate to its stated objective,⁵⁶ and points to a 'number of safeguards' in relation to its operation.⁵⁷ These include:

- restricting the use of the DNSW regime to terrorism-related offences with a maximum penalty of seven years imprisonment;
- a two-step authorisation process; requiring the authorisation of the AFP Commissioner and the issuing officer (being a judge of the Federal Court or the Supreme Court of a state or territory, or a specified member of the Administrative Appeals Tribunal);
- the existence of threshold criteria for the issuing of a DNSW (for example, that there are 'reasonable grounds' to suspect that one or more eligible offences have been, are being, are about to be or likely to be committed);
- requirements for DNSWs to specify particular information (with related offences for making a false or misleading statement in a DNSW warrant);
- requirements for reporting on the use of the DNSW regime; and
- the discretion of the courts to not admit or exclude any illegally or improperly obtained evidence.⁵⁸

1.149 In relation to the proportionality of the power to covertly enter neighbouring premises to gain access to a warrant premises, the statement of compatibility identifies the following safeguards:

- the power is limited to authorising entry onto neighbouring premises for the purpose of obtaining access to the target premises and cannot authorise the search of the neighbouring premises;
- the existence of threshold criteria for allowing access via a neighbouring premises (for example, that the issuing officer is 'satisfied' that entry to the neighbouring premises is reasonably necessary to avoid compromising the investigation);⁵⁹
- requirements for reporting on the use of the DNSW regime; and

55 Independent National Security Legislation Monitor, Annual report 28th March 2014, <http://www.dpmc.gov.au/INSLM/index.cfm> (accessed 20 October 2014), 61.

56 EM 26.

57 EM 23.

58 EM 24-26.

59 EM 26.

- the discretion of the courts to not admit or to exclude any illegally or improperly obtained evidence.⁶⁰

1.150 However, the committee notes that the proposed DNSW scheme involves a significant departure from established principles relating to the use of search warrants and balancing their use with the protection of the right to privacy. In this respect, delayed notification of searches of a person's premises, and the entering of the premises of innocent third parties, represent serious limitations of the right to privacy. Generally, the obligation to notify an occupier, and allow them to witness the search of a warrant premises, allows such persons opportunity to ensure that the exercise of the powers is justified and is conducted in accordance with the terms of the warrant and the law more generally.

1.151 The committee agrees that assisting the AFP to effectively prevent or investigate Commonwealth terrorism offences is likely to be a legitimate objective for the purposes of international human rights law, however, the committee remains concerned that the proportionality of the measure has not been established.

1.152 Specifically, the committee is concerned that, in relation to the threshold criteria for the issuing of a DNSW, no guidance is provided on what basis an officer may '[believe], on 'reasonable grounds', that it is 'necessary' for a DNSW to be conducted.⁶¹ The committee considers that this criteria should include an element relating to the explicit assessment of why an 'ordinary' search warrant would not be sufficient or appropriate in the circumstances as this would demonstrate that the powers would only be used when necessary.

1.153 The committee therefore recommends that the proposed DNSW regime be amended to include, as a threshold requirement for the issue of a DNSW, that an application must demonstrate that it is not possible to obtain the evidence in another way and that it is not possible to obtain that information by an 'ordinary' search warrant.

1.154 In relation to the power to covertly enter neighbouring premises to gain access to a warrant premises, the committee is concerned that the power will be able to be exercised where it is deemed to be 'reasonably necessary'. However, given the significant limitation that this power represents on the privacy of people who are not suspects, the committee considers that such access should only be permitted as a last resort to be a necessary and permissible limit on the right to privacy.

60 EM 24-26.

61 The other two criteria are that the officer suspects, on reasonable grounds, that one or more eligible offences have been, are being, are about to be or are likely to be committed; and that the officer suspects, on reasonable grounds, that entry and search of the premises will substantially assist in the prevention or investigation of one or more of those offences.

1.155 **The committee therefore recommends that the proposed power to enter third-party premises under the DNSW regime be amended to include, as a threshold requirement for its exercise, that an application must demonstrate that it is not possible to obtain the evidence in another way.**

1.156 In terms of the length of delay in notifying an individual that a search warrant has been executed (up to 547 days), the committee notes that the bill proposes a much longer delay than permitted in countries with comparable regimes, such as the United States and Canada. In the US, for example, depending on the circumstances, the permitted delay may be not more than 45 days, and in Canada not more than 90 days. Moreover, the committee notes that the power to delay notification is quite broad and extends beyond a delay that is strictly limited to what is necessary for the investigation of an actual offence.

1.157 **The committee therefore seeks the advice of the Attorney-General as to the compatibility of the delayed notification search warrant regime with the right to privacy, and particularly whether the limitation is a necessary and proportionate measure for the achievement of that objective.**

Right to a fair trial and fair hearing rights

1.158 The committee considers that the measures engage the right to a fair trial and fair hearing.⁶² This right applies to both criminal and civil proceedings, in cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

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

Introduction of delayed notification search warrant regime

1.160 As noted above, the bill would introduce a delayed notification search warrant (DNSW) regime into Part IAA of the *Crimes Act 1914*. In essence, the DNSW would be a covert search warrant regime.

1.161 The committee is concerned that the proposed DNSW regime may not be compatible with the right to a fair trial. This is because the initial secrecy surrounding the warrant, including where a person is not present for a search, is likely to make it more difficult to claim legal professional privilege or to challenge whether a warrant has a proper legal basis. The committee notes these measures may undermine the

62 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

principle of equality of arms which is an essential component of the right to a fair trial. The principle is that a defendant must not be placed at a substantial disadvantage to the prosecution.⁶³

1.162 The committee notes that the statement of compatibility contains no assessment of whether this measure complies with the right to a fair trial. The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.163 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the delayed notification search warrant regime with the right to a fair trial, and particularly:

- **whether the delayed notification search warrant regime is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the delayed notification search warrant regime and that objective; and**
- **whether the delayed notification search warrant regime is a reasonable and proportionate measure for the achievement of that objective.**

Schedule 1 – Declared area offence

Right to a fair trial and fair hearing rights—presumption of innocence

1.164 The right to a fair trial and fair hearing rights are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.165 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.

63 *Moraël v. France*, Comm. 207/1986, U.N. Doc. CCPR/C/36/0/207/1986, AI44/40 (1989) (HRC Jul. 28, 1989) [9/3].

Introduction of 'declared area' offence provision

1.166 The bill would introduce a new offence into the *Criminal Code Act 1995* (the Criminal Code) of entering or remaining in a declared area (proposed section 119.2). The offence is punishable by a maximum sentence of 10 years imprisonment.

1.167 The new offence would allow the Minister for Foreign Affairs (the minister) to 'declare' an area in a foreign country if he or she is 'satisfied that a listed terrorist organisation is engaging in a hostile activity' in that area.⁶⁴ A 'listed terrorist organisation' is an organisation that has been designated as such by a regulation made under the Criminal Code. The minister may 'declare' whole countries, and more than one country, for the purposes of the offence.

1.168 Under proposed section 119.2, it would be an offence for a person to enter, or remain in, a declared area, unless they did so solely for a legitimate purpose. The bill specifies a limited number of legitimate purposes.

1.169 It is not necessary for the person to specifically know that an area has been declared under section 119.3. In order to prove the offence the prosecution would only need to prove that the person intentionally entered into an area and was reckless as to whether or not it had been declared by the minister. In order to be found to have been reckless as to the status of the area as a declared area a person must be aware of a substantial risk that the area was declared; and, having regard to the circumstances known to him or her, it is unjustifiable for the person to take the risk and enter the area.

1.170 The committee notes that the proposed construction of the offence would mean that a person could commit the offence without actually knowing that the area was declared, and without any intention of engaging in or supporting terrorist activity. A person accused of entering or remaining in a declared area would bear an evidential burden—that is, they would need to provide evidence that they were in a declared area solely for a legitimate purpose.

1.171 Regarding the objective of the measure, the statement of compatibility explains:

The legitimate objective of the new offence is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in, a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These people may

64 A declaration of an area would be a legislative instrument and therefore subject to the requirements of the *Legislative Instruments Act 2003*. Declarations would expire after three years. EM, 46.

return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.⁶⁵

1.172 However, while the committee acknowledges that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective for the purposes of international human rights law, the committee considers that the statement of compatibility does not provide a sufficiently detailed or evidence-based analysis to establish that the new offence is necessary. For example, the committee notes that the *Crimes (Foreign Incursions) Act 1978* (CFI Act) already prohibits engaging in hostile activities in foreign countries; and that the bill also seeks to make amendments to the CFI Act to address limitations in prosecuting offences under that Act due to difficulties in admitting foreign evidence.

1.173 The committee notes that proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁶⁶ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.174 In this respect, the committee considers that the statement of compatibility does not provide sufficient information as to the specific need for the new offence provision, and why existing legislation, such as the CFI Act, is inadequate to address that specific need.

1.175 In terms of specific human rights engaged by the proposed offence, the statement of compatibility identifies the measure as engaging the right to a fair trial, and particularly the presumption of innocence in relation to the requirement for a defendant to provide evidence of a 'sole legitimate reason for entering a declared area'.⁶⁷ However, it states:

The new offence does not reverse the onus of proof as guilt is not presumed. However, it requires the defendant to provide evidence of a sole legitimate reason for entering a declared area which shifts an evidential burden to the defendant. This requires the defendant to adduce evidence that suggests a reasonable possibility that they

65 EM 47.

66 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issue, at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> [accessed 15 July 2014].

67 EM 47.

have a sole legitimate purpose or purposes for entering the declared area. Once that evidence has been advanced by the defendant, the burden shifts back to the prosecution to disprove that evidence beyond reasonable doubt.⁶⁸

1.176 The statement of compatibility concludes on this basis that the proposed offence does not limit the presumption of innocence and, to the extent that it does limit the right to a fair trial and the presumption of innocence, that limitations are reasonable, necessary and proportionate to countering the threat posed to Australia and its national security interests by foreign fighters returning to Australia.⁶⁹ However, the committee notes that an offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. The committee acknowledges that under the proposed provision the prosecution would still need to prove each element of the offence beyond reasonable doubt. However, this means that the prosecution must only prove:

- that an individual travelled to an area;
- that they knew or were reckless as to whether it was a declared area; and
- they were an Australian citizen or held one of the prescribed visas.

1.177 Accordingly, criminal liability will be prima facie established where a person enters or remains in a declared area. The prosecution would not be required to prove any intent to engage in terrorist activity or some other illegitimate activity.

1.178 As the mere fact of travel would prove the proposed offence it falls on the defendant to raise the possibility that they were in the declared area solely for a legitimate purpose. This has the effect of placing the evidentiary burden on the defendant to produce evidence of their purpose for travel. Where a statutory exception, defence or excuse to an offence is provided, this must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent.

1.179 The committee also notes that in practice, this could place defendants in the difficult position of having to prove a negative. That is, in addition to proving that they entered into or remained in the declared area solely for one of the prescribed legitimate purposes, they would also need to provide factual evidence that that they

68 EM 47.

69 EM 48.

did not enter into or remain in the declared area solely or in part for an illegitimate purpose.⁷⁰

1.180 Another relevant factor is that the minister may declare an area if he/she is satisfied that a terrorist organisation is 'engaging in a hostile activity' in that area. However, the extent of any such hostile activity is not prescribed as a factor relevant to the minister's decision. The committee is concerned that, for example, the minister would be able to declare an area in cases where a terrorist organisation was engaged in only minor or transitory 'hostile activity' in that area. In such cases, the committee notes that there would be no necessary or strong link between travel to a certain area and proof of intent to engage in terrorist activity.

1.181 In light of the above, the committee considers that the statement of compatibility has not provided sufficient evidence to justify the reverse evidentiary burden as compatible with the right to a fair trial and the right to be innocent until proven guilty.

1.182 The committee therefore considers that the declared area offence provision, as currently drafted, is likely to be incompatible with the right to a fair trial and the presumption of innocence.

Right to liberty—prohibition against arbitrary detention

1.183 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty, understood as the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the State should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

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

Introduction of 'declared area' offence provision

1.185 As noted above, the bill would introduce a new offence into the *Criminal Code Act 1995* (the Criminal Code) of entering or remaining in a declared area (proposed section 119.2). The offence is punishable by a maximum sentence of 10 years' imprisonment.

70 To the extent that individuals who travel to a declared area must prove that they had a legitimate purpose, the committee notes that the provision may engage the right to privacy as individuals will be required to provide sufficient evidence of their movements and the persons they visited. This has not been addressed in the statement of compatibility.

1.186 The statement of compatibility for the bill notes that the proposed offence engages the right to be free of arbitrary detention, and states:

In relation to this offence, arrest, detention or the deprivation of liberty of a convicted person is not 'arbitrary' in the sense that the offence is established by law and its application is clear and predictable.⁷¹

1.187 However, the committee notes, that the prohibition against arbitrary detention is broader. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Whilst the operation of the offence is arguably predictable, the statement of compatibility has not established that the operation of the offence provisions will not operate in an inappropriate or unjust manner.

1.188 In particular, as set out above, the committee notes that no evidence is required to be put forward by the prosecution that a person had any involvement in, or intention to be involved in, a terrorist act. Accordingly, the committee considers that the conviction and detention of an individual for being in a declared area where no evidence has been provided of a nefarious intent could be arbitrary for the purposes of international human rights law.

1.189 The committee therefore considers that the declared area offence provision, as currently drafted, is likely to be incompatible with the prohibition against arbitrary detention.

Right to freedom of movement

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

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

1.192 The obligation requires not only that the state must not prevent people from moving freely, but also that the state must protect people from others who might prevent them from moving freely.

1.193 The right also includes the freedom to choose where to live; although this can be limited to protect the rights of others, for example, to protect the right to private property or the rights of Indigenous people. As the right applies to those

71 EM 48.

lawfully within Australia, Australia may place restrictions on non-citizens entering Australia and may, in certain circumstances, impose limited restrictions on individuals already in Australia.

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

Introduction of 'declared area' offence provision

1.195 As noted above, the bill would introduce a new offence into the *Criminal Code Act 1995* (the Criminal Code) of entering or remaining in a declared area (proposed section 119.2). The offence is punishable by a maximum sentence of 10 years' imprisonment.

1.196 The statement of compatibility acknowledges that the offence provision would limit the right to freedom of movement, and concludes that the measure is reasonable, necessary and proportionate to achieving its stated objective:

This limitation is justified on the basis that it achieves the legitimate objective of deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil. Even with the existence of a legitimate objective, any restriction on the freedom of movement must still be reasonable, necessary and proportionate. Several factors indicate that the restriction achieves an appropriate balance between securing Australia's national security and preserving an individual's civil liberties.⁷²

1.197 However, this explanation suggests that the offence is being introduced merely because a person *may* engage in terrorist activities. There are significant numbers of Australians with connections to countries that may be subject to a declaration by the minister. For example, with reference to the current conflict in Iraq and Syria, the committee notes data from the 2011 Census show that 48 169 Australians identified as being born in Iraq. Many of these individuals could have legitimate and innocent reasons to travel to Iraq and so could be impacted by this new offence. As a result there is not a necessary or strong link between travel to a

certain area and proof of intent to engage in terrorist activity. Given this, the committee notes that the presence of appropriate safeguards is particularly relevant to the assessment of whether the measure may be regarded as proportionate to its stated intention.

1.198 In terms of defences, the statement of compatibility advises:

The sole legitimate purpose defence provides an appropriate safeguard for individuals who have entered, or remained in, areas that have been declared. Individuals may lead evidence highlighting that their presence in a declared area was for a legitimate purpose...The legitimate purpose defence captures common reasons for travelling, including the provision of humanitarian aid, undertaking official duty for a government or the United Nations or an agency of the United Nations, making a news report of events in the area by a professional journalist and making a genuine visit to a family member. Moreover, further legitimate purposes may be prescribed by regulations should additional grounds be required. The breadth of the grounds of defence is intended to ensure that legitimate travel is not unduly restricted by the new offence.⁷³

1.199 However, the committee considers that the list of defences is in fact relatively narrow. For example, it is not a defence to visit friends, transact business, retrieve personal property, attend to personal or financial affairs or to undertake a religious pilgrimage. While it is a defence to be 'making a news report', this is only the case if the person is 'working in a professional capacity as a journalist'. Accordingly, there appear to be a number of significant, innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the sole legitimate purpose defence.

1.200 Further, the committee notes that a person would be required to show they were in the zone *solely* for a specified legitimate purpose or purposes. Thus it would appear that, for example, a person present in a declared zone to visit their parents, and also to attend a friend's wedding, would not be protected by the defence. The committee notes that, while the list of legitimate purposes for travel to a declared area can be added to by regulation, any such additions would only operate prospectively.

1.201 In addition to the sole legitimate purpose defence, the statement of compatibility identifies a number of other safeguards with respect to the operation of the proposed offence, including:

- before declaring an area for the purposes of the offence, the Foreign Affairs Minister must be 'satisfied' that a listed terrorist organisation is engaging in a hostile activity in the area;

- the Leader of the Opposition must be briefed about the declaration;
- the declarations have a three-year duration and are subject to disallowance; and
- the Attorney-General must consent to any prosecution.

1.202 While the committee acknowledges and welcomes these safeguards, it notes that the bill does not contain detailed objective criteria that the minister must consider before making a declaration. The legislation permits whole countries and even more than one country to be listed by the Minister for Foreign Affairs as a declared area, effectively inhibiting those with ties to those countries from freely travelling there. The committee considers that such significant limitations on freedom of movement must be premised on detailed objective criteria to ensure that any declarations for the purposes of the offence are not arbitrary.

1.203 Accordingly, the committee is concerned that the offence provision will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence. As such, the committee considers that the declared area offence provision law unnecessarily restricts freedom of movement, and is therefore likely to be impermissible as a matter of international human rights.⁷⁴

1.204 The committee therefore considers that the declared area offence provision, as currently drafted, is likely to be incompatible with the right to freedom of movement.

Rights to equality and non-discrimination

1.205 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal and non-discriminatory protection of the law.

1.206 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),⁷⁵ which has either the purpose (called

74 The committee notes that, to the extent that individuals are deterred from visiting family, the offence provision may also limit the right to the protection of and non-interference with the family (article 23 and 24). The committee notes that the issues and analysis raised in relation to freedom of movement are equally relevant to the assessment of the measure's compatibility with the right to the protection of the family.

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

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.⁷⁶ 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.⁷⁷

1.207 The rights to equality and non-discrimination are also protected by articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), specifically to eliminate discrimination on the basis of race, colour, descent, national or ethnic origin. The CERD also defines discrimination to encompass both direct and indirect discrimination.⁷⁸

Introduction of 'declared area' offence provision

1.208 As noted above, the bill would introduce a new offence into the *Criminal Code Act 1995* (the Criminal Code) of entering or remaining in a declared area (proposed section 119.2). The offence is punishable by a maximum sentence of 10 years imprisonment.

1.209 The committee is also concerned that the proposed offence provision may limit the right to equality and non-discrimination. As noted above, there are many thousands of Australians with significant personal, family, cultural and business ties to other countries. Criminalising access to certain counties by declaration (in the absence of a sole legitimate purpose as provided for in the bill) may therefore have a greater effect on certain individuals based on their ethnicity and/or country of birth. Such an impact may amount to indirect discrimination under international human rights law.

1.210 Importantly, under international human rights law:

...not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [International Covenant on Civil and Political Rights]...⁷⁹

1.211 As set out above, the committee is concerned that the bill does not have sufficient criteria that must be satisfied before the Minister for Foreign Affairs may list a country or countries as declared areas. The committee considers that in order

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

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

78 Committee on the Elimination of Racial Discrimination, *General Recommendation 14* (1993).

79 UN Human Rights Committee, General Comment No. 18: Non-discrimination, adopted at the Thirty-seventh Session of the Human Rights Committee on 10 November 1989, 3.

for the offence not be considered to be discriminatory, detailed criteria for listing need to be established to ensure declarations are not arbitrary.

1.212 The committee therefore considers that the declared area offence provision, as currently drafted, is likely to be incompatible with the right to equality and non-discrimination.

Schedule 1 – Foreign evidence

Prohibition against torture, cruel, inhuman or degrading treatment

1.213 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.

1.214 The prohibition against torture:

- prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- precludes the use of evidence obtained through torture;
- prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely; and
- requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

Allowing foreign material to be adduced in terrorism-related proceedings

1.215 The bill seeks to overcome perceived limitations in the admissibility of evidence from foreign countries by explicitly allowing foreign material to be adduced in terrorism-related proceedings.

1.216 Part 3 of the *Foreign Evidence Act 1994* (FE Act) currently provides for the admission of evidence received from foreign countries where:

- the Attorney-General makes a formal request for that material to be admitted;
- the evidence has been taken on oath or affirmation; and
- the material purports to be signed or certified by a judge, magistrate or other officer of the foreign country.

1.217 The bill would amend the FE Act to enable material received from foreign countries on an agency-to-agency basis (that is, through police and intelligence channels) to be adduced in terrorism-related proceedings; and as a result of a mutual assistance request in terrorism-related proceedings.⁸⁰

1.218 The statement of compatibility for the bill identifies the measure as engaging the prohibition against torture, cruel, inhuman or degrading treatment, and particularly article 15 of the CAT, which requires States parties to ensure that any statement established to have been made as a result of torture is not invoked as evidence in any proceedings (except against a person accused of torture).⁸¹

1.219 The statement of compatibility implies that the protection against the use of evidence obtained by torture which is protected by article 15 of the CAT may be limited as it states:

The proposed amendments to the rules of evidence are reasonable, necessary and proportionate in respect of crimes that constitute the gravest threat to the lives of Australians and Australia's national security interests.⁸²

1.220 The committee notes that the prohibition against the use of evidence obtained as a result of torture is absolute and therefore may not be subject to limitation. The UN special rapporteur on torture has stated:

The rationale behind the exclusionary rule is manifold and includes the public policy objective of removing any incentive to undertake torture anywhere in the world by discouraging law enforcement agencies from resorting to the use of torture. Furthermore, confessions and other information extracted under torture or ill-treatment are not considered reliable enough as a source of evidence in any legal proceeding. Finally, their admission violates the rights of due process and a fair trial.⁸³

1.221 In this respect, the statement of compatibility notes:

The proposed amendments include provision for foreign material or foreign government material to be admissible unless the court is satisfied that the material or information contained in the material, was obtained **directly** as a result of torture in subsection 27C(3). This provision upholds Australia's international obligations under Article 15 of the CAT (emphasis added).

80 EM 50-51.

81 EM 52.

82 EM 52.

83 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, Twenty-fifth session Agenda item 3, 10 April 2014 6.

1.222 The statement of compatibility also notes that the bill provides a mandatory exception to admissibility for material, or information contained in the material, directly obtained as a result of duress.⁸⁴ It concludes:

The inclusion of these mandatory exceptions recognises the seriousness of threats of the kind contained in the definition of 'duress' and the inherent unreliability of material or information obtained in such a manner. It provides an important safeguard to protect the fair trial rights of the defendant.⁸⁵

1.223 However, in relation to the exception for material, or information contained in material, obtained directly by torture, it is unclear to the committee how, in practice, a court would satisfy itself that material was directly obtained as a result of torture. Generally in criminal cases the burden of proof rests with the prosecution, to prove its case beyond reasonable doubt including adducing evidence to support its case. However, it generally will be for the defence to challenge the admissibility of any of the evidence upon which the prosecution seeks to rely.

1.224 The committee is concerned that in practice the responsibility would fall on the defendant to produce evidence that material was obtained directly through torture in order to have evidence ruled inadmissible under this exception. Noting that the UN Committee against Torture has interpreted the obligation under article 15 of the CAT as imposing a positive duty on States parties to examine whether statements brought before its courts were made under torture,⁸⁶ the committee is concerned that the provision may be inconsistent with article 15.

1.225 The committee therefore recommends that the bill be amended to explicitly provide that, in relation to foreign evidence sought to be adduced in terrorism-related proceedings, the prosecution must satisfy the court that the evidence has not been obtained through the use of torture.

1.226 The committee is also concerned that the provision as drafted would only exclude evidence obtained 'directly' as a result of torture. The committee notes that the word 'directly' does not appear in the text of article 15 of the CAT. All evidence obtained as a result of torture, whether directly or indirectly, is required to be excluded under article 15 of the CAT. The committee considers that the limiting the exclusion to material obtained 'directly' as a result of torture is therefore inconsistent with Australia's obligations under the CAT, and therefore impermissible as a matter of international human rights law.

84 EM 52.

85 EM 52.

86 P.E. v. France, Communication No. 193/2001, at 150, para. 6.3, 3); G.K. v. Switzerland, Communication No. 219/2002, at 185 para.

1.227 **The committee therefore recommends that the bill be amended to remove the word 'directly' from proposed section 27D(2) to clarify that the exception will apply to all evidence obtained directly or indirectly through the use of torture.**

1.228 Finally, the committee notes the advice that it is intended that the definition of 'torture', for the purposes of the torture exception to the admissibility of foreign evidence, be interpreted consistently with the CAT.⁸⁷

1.229 While the committee notes that the proposed definition of torture in the bill is consistent with the definition in the CAT, the committee considers that it would better uphold Australia's international human rights obligations to explicitly rely on the definition in the CAT. Specific reliance on the CAT definition would have the effect of directly incorporating the international law definition of 'torture' into Australian domestic law and provide for consistency of interpretation.

1.230 **The committee therefore recommends that the bill be amended so that the definition of 'torture' in subsection 27D(3) explicitly references the definition of 'torture' in article 1(1) of the Convention Against Torture.**

Schedule 1 – Passport suspension

Right to freedom of movement

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

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

1.233 As with the right to freedom of movement, there can be limitations placed on the right to leave a country. This may include where it is necessary and proportionate to protect the rights and freedoms of others, or to achieve objectives relating to national security, public health or morals and public order. Any such limitations must be lawful and proportionate.

1.234 The right to freedom of movement also includes the right to remain in, return to and enter one's own country. There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable for the purposes of international human rights law. A country cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her 'own country'. The term 'own country' is not

87 EM 163.

necessarily restricted to the country of one's citizenship, and might also apply when a person has very strong ties to the country.

Introduction of power to suspend passports

1.235 As set out above, Schedule 1 of the bill includes measures which would enable the Minister for Foreign Affairs to suspend a person's Australian travel documents for a period of 14 days on the request of ASIO.⁸⁸ This new power augments the existing power that ASIO has to request that an Australian passport be cancelled.

1.236 The amendments would enable ASIO to request a suspension if it suspects on reasonable grounds that the person *may* leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country.

1.237 The committee notes that a key difference between existing powers and the proposed measures is that the power to suspend travel documents for 14 days would operate on a lower threshold.

1.238 Currently, ASIO may request a person's passport be cancelled if it suspects on reasonable grounds that the person would be *likely* to engage in conduct that might prejudice the security of Australia or a foreign country

1.239 The statement of compatibility identifies the measure as engaging and limiting the right to freedom of movement, because it would 'temporarily restrict a person's right to liberty of movement if that person seeks to travel while their Australian travel documents are suspended'.⁸⁹

1.240 The statement of compatibility concludes:

The introduction of the new suspension mechanism is reasonable and necessary to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern.⁹⁰

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

88 Schedule 1 of the bill also includes measures which would permit ASIO to make a request for a 14 day surrender of a person's foreign travel documents. These measures would similarly engage human rights to the suspension of Australian travel documents and accordingly these amendments are not separately considered. The analysis in relation to the suspension of Australian passports applies equally to the suspension of foreign passports.

89 EM 12.

90 EM 12.

why the measures are necessary in pursuit of a legitimate objective. In light of these requirements, the committee notes that the general assertions in the statement of compatibility do not provide a sufficient basis to assess the measures as being reasonable, necessary and proportionate to achieve their stated objective.

1.242 For example, the committee notes that the INSLM's fourth annual report sets out a clear, concise and evidence-based rationale for the proposed suspension powers.⁹¹ The committee notes that the INSLM was particularly concerned to ensure that any suspension power be proportionate with reference to the right to freedom of movement. Accordingly, the INSLM recommended:

...the trade-off [for a lower evidentiary standard for suspension powers] would need to be a strict timeframe on the interim cancellation. It may be that an initial period of 48 hours, followed by extensions of up to 48 hours at a time for a maximum period of seven days may be appropriate. The INSLM is mindful that these timeframes are somewhat arbitrary. Timeframes should be the subject of further discussion with relevant agencies and civil society interlocutors.

1.243 In relation to the INSLM's views, the statement of compatibility notes:

While the suspension period [in the bill] is longer than the maximum period proposed by the INSLM, it is necessary to ensure the practical utility of the suspension period with regard to both the security and passports operating environment.⁹²

1.244 The committee notes that the asserted necessity of a power to suspend passports for longer than seven days is not supported by empirical evidence as to why a 14-day period would 'ensure the practical utility' of the proposed suspension power.

1.245 In terms of proportionality, the committee also notes that the measures exclude both administrative review of a decision to suspend a passport and judicial review under the *Administrative Decisions (Judicial Review) Act 1977*; and would provide, in certain circumstances, that a person did not have to be notified of a decision not to issue or to cancel a passport on the grounds of national security. The committee notes that these additional measures would make it more difficult for an individual to challenge a decision to suspend their passport, and that this could potentially compound the limitation on the right to freedom of movement.

1.246 In light of the above, the committee considers that the statement of compatibility has not established that the measure may be regarded as proportionate.

91 Independent National Security Legislation Monitor, 'Declassified annual report 28 March 2014 46-48, available at http://www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20140328.pdf.

92 EM 13.

1.247 The committee therefore seeks the advice of the Attorney-General as to whether the proposed introduction of the power to suspend passports for up to 14 days is compatible with the right to freedom of movement, and particularly whether the limitation is reasonable and proportionate to the achievement of its stated objective.

Schedule 1 – Advocating terrorism

Right to freedom of opinion and expression

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

1.249 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*)⁹³, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.⁹⁴

Introduction of advocating terrorism offence provision

1.250 The bill proposes a new offence under the *Criminal Code Act 1995* (the Criminal Code) of advocating terrorism. The offence would be made out where a person (a) advocates the doing of a terrorist act or a terrorism offence; and (b) is reckless as to whether another person will engage in that conduct as a result. The offence would be punishable by a maximum of five years' imprisonment.

1.251 The statement of compatibility notes that the proposed offence engages and limits the right to freedom of expression, and identifies the legitimate objective of the measure as follows:

The restriction on free expression is justified on the basis that advocating the commission of a terrorist act or terrorism offence is conduct which jeopardises the security of Australia, the personal safety of its population and its national security interests. This is because of the severe nature of

93 '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.

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

actions which are defined as terrorist acts in section 100.1 [of the Criminal Code]. Terrorist acts constitute the gravest threats to the welfare of Australians as they include causing serious physical harm or death, damaging property, creating a serious risk to the health or safety of the public and interfering with electronic systems. It is reasonable that such conduct should not be advocated and that reasonable steps should be taken to discourage behaviour that promotes such actions.⁹⁵

1.252 However, the committee considers that the statement of compatibility does not provide a sufficiently detailed or evidence-based analysis to establish that the new offence is in pursuit of a legitimate objective.

1.253 The committee notes that proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁹⁶ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.254 For example, the committee notes that a number of existing provisions in the Criminal Code contain offences that may apply to speech that incites violence. Such incitement offences may capture a range of speech acts, including 'urging', 'stimulating', 'commanding', 'advising' or 'encouraging' a person to commit an unlawful act.

1.255 In this respect, the committee considers that the statement of compatibility does not provide sufficient information as to the specific need for the new offence provision, and why existing legislation, such as the existing incitement offences in the Criminal Code, is inadequate to address that specific need.

1.256 In relation to the proportionality of the measure, the statement of compatibility assesses the measure as reasonable, necessary and proportionate to its stated objective as follows:

These restrictions on freedom of expression are a reasonable, necessary and proportionate measure in order to protect the public from terrorist acts and the terrorism activities that the relevant terrorism offences are designed to deter....The criminalisation of behaviour which encourages

95 EM 28.

96 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issue, at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> [accessed 15 July 2014].

terrorist acts or the commission of terrorism offences is a necessary preventative mechanism to limit the influence of those advocating violent extremism and radical ideologies.⁹⁷

1.257 The statement of compatibility highlights the existence of a number of safeguards to prevent the offence applying in such a way as to impermissibly limit the right to freedom of opinion and expression:

The existence of a good faith defence [in relation to the proposed offence] provides an important safeguard against unreasonable and disproportionate limitations of a person's right to freedom of expression. The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new...[offence]. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.⁹⁸

1.258 However, the committee is concerned that the offence, as drafted, is overly broad in its application, and may result in the criminalisation of speech and expression that does not advocate the commission of a terrorist act or terrorism offence. This is because the proposed offence would require only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). The committee is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind. For example, there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes; the committee is concerned that in such cases the proposed offence could criminalise legitimate (though possibly contentious or intemperate) advocacy of regime change, and thus impermissibly limit free speech.

1.259 The committee therefore considers that the advocating terrorism offence provision, as currently drafted, is likely to be incompatible with the right to freedom of opinion and expression.

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Schedule 1 – AUSTRAC amendments

Right to privacy

1.260 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

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

Expanding the power of AUSTRAC to disclose information

1.262 As set out above, Schedule 1 of the bill would expand the powers of AUSTRAC to share information. Specifically, the bill would amend the AML/CTF Act to permit AUSTRAC to share financial intelligence information with the Attorney-General's Department.

1.263 The statement of compatibility for the bill describes the objective of the measure as follows:

This amendment will result in administrative efficiencies where it is necessary for AGD to consider AUSTRAC information when formulating AML/CTF policy. Access to this information would allow AGD to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government's foreign fighters national security response.⁹⁹

1.264 The statement of compatibility identifies the measure as engaging and limiting the right to privacy, because it will allow the Attorney-General's Department to access personal information without a person's consent.¹⁰⁰

1.265 In concluding that the measure is reasonable, necessary and proportionate to its stated objective, the statement of compatibility states:

The vast majority of AUSTRAC information considered by AGD would be at an aggregated level to enable the Government to more effectively produce anti-money laundering and counter-terrorism financing policy to be developed.¹⁰¹

1.266 However, the committee notes that statement of compatibility does not explain why, and in what circumstances, it would be necessary for any non-

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101 EM 10.

aggregated or otherwise personal information to be disclosed to the Attorney-General's Department.

1.267 Accordingly, it is unclear whether the measure may be regarded as reasonable, necessary and proportionate. The committee considers that, in the absence of further information, the measure would appear to be an arbitrary limitation of privacy.

1.268 The committee therefore seeks the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share financial information with the Attorney-General's Department is compatible with the right to privacy, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the amendments are reasonable and proportionate to the achievement of that objective.**

Expanding the information that AUSTRAC may disclose to partner organisations

1.269 As set out above, Schedule 1 of the bill would expand the information which AUSTRAC may share with partner organisations.

1.270 Currently, AUSTRAC has the power in certain circumstances to request further information from financial institutions that communicate information to AUSTRAC under other provisions of the AML/CTF Act.¹⁰² Information disclosed pursuant to such a request may only be disclosed to partner agencies in limited circumstances.

1.271 The statement of compatibility for the bill identifies the objective of the measure as follows:

This amendment enhances the ability of AUSTRAC to share information it obtains under section 49 of the AML/CTF Act. Currently information obtained by AUSTRAC under section 49 is subject to different requirements compared to other information obtained under the AML/CTF Act. This amendment will enhance the value of information collected by AUSTRAC under section 49 as they will facilitate access to this information by all AUSTRAC's partner agencies, rather than requiring such information to be quarantined.¹⁰³

1.272 The statement of compatibility identifies the measure as engaging and limiting the right to privacy. In support of its assessment of the measure as

102 Section 49 of the AML/CTF Act.

103 EM 10.

reasonable, necessary and proportionate to its stated objective, the statement of compatibility states:

The sharing of information by AUSTRAC with its partner agencies is not in a relevant sense 'arbitrary'. The provision of this information will be clearly established by the AML/CTF Act and will be undertaken in accordance with that regime, which has significant safeguards to protect information. The sharing of AUSTRAC information better enables AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime. The sharing of relevant information to partner agencies enhances the value of information obtained by AUSTRAC. Accordingly, this amendment cannot be characterised as arbitrary and is a reasonable, necessary and proportionate measure to better facilitate the work of AUSTRAC and its partner agencies.¹⁰⁴

1.273 The committee notes that this information explains why it is considered desirable to empower AUSTRAC to share information gathered under the AML/CTF Act. It does not provide a sufficient basis to assess the compatibility of the measure with the right to privacy.

1.274 The committee's analytical framework requires proponents of legislation to identify measures that may engage and limit human rights, and to provide an assessment of whether any such limitations may be regarded as reasonable, necessary and proportionate for the purposes of international human rights law.

1.275 To justify a proposed limitation on human rights, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.276 The committee therefore seeks the advice of the Attorney-General as to whether the proposed amendment to permit AUSTRAC to share information obtained under section 49 of the AML/CTF Act with partner agencies is compatible with the right to privacy, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the proposed amendments are reasonable and proportionate to the achievement of that objective.**

Schedule 2 – Stopping welfare payments

Right to social security

1.277 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.278 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.280 Specific situations and statuses recognised as engaging a person's right to social security include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Right to an adequate standard of living

1.281 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires States parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.282 In respect of the right to an adequate standard of living, article 2(1) of ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

Cancellation of welfare payments to certain individuals

1.283 As noted above, Schedule 2 to the bill would provide that welfare payments can be ceased for individuals whose passports have been cancelled or refused, or whose visas have been refused, on national security grounds. The statement of compatibility for the bill explains that the new provisions will:

...require the cancellation of a person's welfare payment when the Attorney-General provides a security notice to the Minister for Social Services. The Attorney-General will have discretion to issue a security notice where either:

- the Foreign Affairs Minister has notified the Attorney-General that the individual has had their application for a passport refused or had their passport cancelled on the basis that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country; or
- the Immigration Minister has notified the Attorney-General that an individual has had their visa cancelled on security grounds.¹⁰⁵

1.284 The statement of compatibility describes the purpose of the measure as follows:

Specifically, the proposal addresses concerns about public monies in the form of social security payments being used by individuals to facilitate or participate in terrorist activities or fund terrorist organisations.¹⁰⁶

1.285 The assessment of the measure contains no explicit conclusion as to the compatibility of the measure with the right to social security and the right to an adequate standard of living; however, the bill is generally described as compatible with the rights and freedoms relevant to the committee's examination of legislation.¹⁰⁷ While the measure is identified as limiting the right to social security, the statement of compatibility comments on the proportionality of the limitation:

Welfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual and the cancellation of welfare would not adversely impact the requirements of security. This is to ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups are covered. It is not intended that every person whose passport or visa has been cancelled on security grounds would have their welfare payments cancelled, but

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107 EM 3.

would occur only in cases where it is appropriate or justified on the grounds of security.¹⁰⁸

1.286 The statement of compatibility also points to the ability of affected persons to seek review of a decision to cancel welfare payments under the ADJR Act (but with no requirement for the Attorney-General to provide reasons for the decision) and under section 39B of the *Judiciary Act 1903* or section 75(v) of the constitution.

1.287 The committee notes that the prevention of the use of social security to fund terrorism-related activities is likely to be regarded as a legitimate objective for human rights purposes. However, while the intended scope of the measure's application, and the availability of review of decisions to cancel welfare payments, are matters that are relevant to the question of whether the measure is reasonable and proportionate, the committee notes that the general claim as to its human rights compatibility is not supported by a sufficiently reasoned and evidence-based assessment. For example, given the discretionary nature of the power to cancel a welfare payment, and the lack of specific criteria to guide its exercise, it is not clear how or whether it would in practice be restricted to the circumstances and purposes outlined.

1.288 Further, the ability to effectively seek review under the ADJR Act is likely to be limited given there is no requirement to provide reasons for any such decision (with review under the Judiciary Act also being limited in terms of the available grounds and remedies).

1.289 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate in pursuit of its stated objective. Such assessments must be based on a sufficiently reasoned and evidence-based analysis to support the human rights assessment of the measure.

1.290 The committee notes that information regarding the proportionality of the measure, including any safeguards, is especially relevant to an assessment of whether the measure may be regarded as compatible with the right to social security and the right to an adequate standard of living.

1.291 The committee therefore seeks the advice of the Attorney-General as to the compatibility of Schedule 2 with the right to social security and the right to an adequate standard of living, and particularly whether the measure may be regarded as proportionate.

Right to a fair trial and fair hearing rights

1.292 The right to a fair trial and fair hearing are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both

108 EM 55.

criminal and civil proceedings, in cases before both courts and tribunals and in military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

Cancellation of welfare payments to certain individuals

1.293 The committee notes that the proposed power to cancel welfare payments of individuals potentially engages and limits the right to a fair trial and fair hearing rights. Provisions for cancellation of payments on the basis of executive discretion may be regarded as a punishment which is issued without affording the affected person a right to a hearing or right to review.¹⁰⁹ However, the statement of compatibility for the bill provides no assessment as to the compatibility of the measure with the right to a fair trial and fair hearing rights.

1.294 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving the legitimate objective.

1.295 The committee therefore seeks the advice of the Attorney-General as to whether the proposed power to cancel welfare payments is compatible with the right to a fair trial and fair hearing, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Obligation to consider the best interests of the child

1.296 Under article 3(1) of the Convention on the Rights of the Child (CRC), State parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.

1.297 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and

109 *García Pons v Spain*, HRC Communication 454/1991, UN Doc CCPR/C/55/D/454/1991 (1995), [9.3]; *Schuler-Zraggen v Switzerland* [1993] ECHR 29; *Y. L. v Canada*, HRC Communication 112/1981, UN Doc CCPR/C/OP/1 at 28 (1984), [9.3] and *Salesi v Italy* [1993] ECHR, Application no. 13023/87.

assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Cancellation of welfare payments to certain individuals

1.298 The statement of compatibility for the bill identifies the proposed power to cancel welfare payments of individuals as engaging the rights of the child in respect of article 24 of the ICCPR, which provides:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.¹¹⁰

1.299 The statement of compatibility states that the measure limits this right because:

If a security notice is issued to an individual who has a child, the individual the subject of the notice would not be eligible to receive family assistance which would impact on their right to protect their child.¹¹¹

1.300 However, in the committee's view, the withdrawal of social security payments on which a child relies is more accurately assessed as engaging and limiting the obligation to consider the best interests of the child. This is because the discretionary nature of the decision to cancel a person's welfare payments means that, in relation to dependent children affected by a decision to cancel a welfare payment, such decisions may be made without taking into account the best interests of the child as a primary consideration.

1.301 Further, while the bill makes provision for the payment of a person's cancelled benefit to a nominee of either the person or the Attorney-General, any such decision would also be at the discretion of the Attorney-General. Decisions to refuse to make payments to a nominee could therefore be made without taking into account the best interests of the child as a primary consideration.

1.302 **The committee therefore seeks the advice of the Attorney-General as to whether the proposed power to cancel welfare payments is compatible with the obligation to consider the best interests of the child, and particularly:**

- **whether the proposed power to cancel welfare payments is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the proposed power to cancel welfare payments and that objective; and**

110 EM 56-57.

111 EM 57.

- **whether the proposed power to cancel welfare payments is a reasonable and proportionate measure for the achievement of that objective.**

Right to equality and non-discrimination

1.303 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.304 These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal and non-discriminatory protection of the law.

1.305 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),¹¹² which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.¹¹³ 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.¹¹⁴

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

Cancellation of welfare payments to certain individuals

1.307 As noted above, Schedule 2 to the bill would provide that welfare payments can be ceased for individuals whose passports have been cancelled or refused, or whose visas have been refused, on national security grounds.

1.308 The committee notes that this measure does not have as its purpose discrimination against any person. However, the committee is concerned that the wide executive discretion to cancel welfare payments, in practice, could be indirectly discriminatory. The committee considers that the existence of safeguards with respect to the exercise of executive discretion is likely to be particularly relevant to this issue. The committee considers that such significant limitations on the right to

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

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

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

social security must be premised on detailed objective criteria to ensure that any cancellation of welfare payments to individuals is not arbitrary.

1.309 The committee notes that the statement of compatibility does not address the issue of indirect discrimination in relation to the cancellation of welfare payments. As noted above, Australia has an obligation under international human rights law to ensure that such measures do not disproportionately impact on specific ethnic groups, people of other national origins or religious groups.¹¹⁵ The committee considers that potential for disproportionate impact on specific ethnic groups, people of other national origins or religious groups should therefore be addressed as part of the human rights compatibility assessment of the measure.

1.310 The committee therefore requests the advice of the Attorney-General as to whether the operation of powers to cancel welfare payments will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination.

Schedule 3 – Customs detention powers

1.311 As noted above, Schedule 3 to the bill would amend the *Customs Act 1901* to expand the detention power of customs officials. The EM describes the amendments as 'broadly' including:

- extending what constitutes a 'serious Commonwealth offence' to any Commonwealth offence that is punishable upon conviction by imprisonment for a period of 12 months or more;
- expanding the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence;
- expanding the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours; and
- introducing a new section with a new set of circumstances in which a person may be detained in a designated area that relates to national security or security of a foreign country.

115 See UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention, Australia*, CERD/C/AUS/CO/14 (14 April 2005); Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention, Australia*, CERD/C/AUS/CO/15-17 (13 September 2010).

Multiple rights

1.312 As the statement of compatibility for the bill identifies, the measures to expand the detention powers of Customs officials engage and limit a number of human rights, including:

- right to freedom from arbitrary detention;¹¹⁶
- right to freedom of movement;¹¹⁷
- right to freedom from cruel, inhuman or degrading treatment or punishment;¹¹⁸ and
- right to humane treatment in detention.¹¹⁹

Inadequately defined objective

1.313 The committee's analytical framework requires proponents of legislation to identify measures that may engage and limit human rights, and to provide an assessment of whether any such limitations may be regarded as reasonable, necessary and proportionate for the purposes of international human rights law.

1.314 To do this, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney- General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.¹²⁰ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.315 With these requirements in mind, the committee notes that the statement of compatibility for the bill describes its objective as follows:

The enhanced detention powers are part of the targeted response to the threat posed by foreign fighters. A crucial element of the preventative measures undertaken to limit the threat of returning foreign fighters is to prevent Australians leaving Australia to engage in foreign conflicts in the

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

117 Article 12 of the ICCPR.

118 Article 7 of the ICCPR and the Convention Against Torture (CAT).

119 Article 10 of the ICCPR.

120 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issue, at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> [accessed 15 July 2014].

first instance. The detention powers of Customs constitute an important preventative and disruption mechanism. Preventing individuals travelling outside of Australia where their intention is to commit acts of violence in a foreign country assists in preventing terrorists acts overseas and prevents these individuals returning to Australia with greater capabilities to carry out terrorist acts on Australian soil.¹²¹

1.316 In the committee's view, the information contained in the statement of compatibility does not adequately establish that the measures to expand the detention powers of Customs officials are aimed at a legitimate objective. The statement of compatibility provides no discussion of why the current powers are regarded as not sufficient in respect of the range of Commonwealth offences in relation to which they may be exercised, the range of circumstances to which they may be applied and the length of time for which a person may be detained.

1.317 The committee notes that, in the absence of a sufficiently well-defined objective, the statement of compatibility's analysis of whether the identified limitations of human rights may be regarded as reasonable and proportionate is also deficient. The committee notes that the human rights assessment of whether these limitations may be regarded as reasonable and proportionate will need to be conducted in relation to the minister's further advice regarding the objective of the measure.

1.318 The committee therefore seeks the advice of the Attorney-General as to whether the proposed expansion of Customs detention powers is compatible with human rights, and particularly:

- **whether the measures are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the proposed expansion of Customs detention powers are reasonable and proportionate to the achievement of that objective.**

Schedule 4 – Visa cancellation powers

Multiple rights

1.319 As the statement of compatibility for the bill identifies, the proposed measures relating to visa cancellation powers engage and limit a number of human rights, including:

- the obligation to consider the best interests of the child;

121 EM 58.

- the right to respect for the family, and to be free from unlawful interference with family;
- the right to freedom from arbitrary detention;¹²²
- the right to humane treatment in detention.¹²³
- the prohibition on the expulsion of aliens lawfully within the state except in pursuance of a decision reached in accordance with law;¹²⁴ and
- the prohibition against non-refoulement.¹²⁵

1.320 The committee considers that the measure also engages the right to freedom of movement.¹²⁶

Introduction of emergency visa cancellation power

1.321 Schedule 4 would create a new obligation on the Minister for Immigration and Border Protection to cancel a visa held by a non-citizen who is outside Australia.

1.322 The Migration Act currently permits or requires visa cancellation on a range of grounds, including grounds related to character and behaviour. One basis for visa cancellation is that the holder of a visa is assessed by ASIO to be, directly or indirectly, a 'risk to security' (as defined in section 4 of the ASIO Act).

1.323 The bill will provide for mandatory emergency cancellation of a non-citizen's visa where ASIO suspects that the person might, directly or indirectly, be a risk to security (within the meaning of section 4 of the ASIO Act). The emergency cancellation would occur without notice or notification, and would not be merits reviewable.¹²⁷ Within the 28-day period following an emergency cancellation decision, ASIO may either issue an assessment that the person is, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), or provide an assessment containing a recommendation for revocation of the emergency cancellation.

1.324 The EM for the bill identifies the need for (or legitimate objective of) the measure as follows:

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

123 Article 10 of the ICCPR.

124 Article 13 of the ICCPR.

125 Articles 6 and 7 of the ICCPR; and article 3(1) of the CAT.

126 Articles 12 and 13 of the ICCPR.

127 The committee also notes that the denial of merits review following action by the executive to suspend a passport may engage fair hearing rights under article 14 of the ICCPR.

The existing provisions do not adequately provide for a situation where ASIO has information that indicates a person located outside Australia may be a risk to security but is unable to furnish a security assessment that meets existing legal thresholds in the Migration Act due to insufficient information and/or time constraints linked to the nature of security threat.¹²⁸

1.325 In relation to the identification of human rights that may be limited by the measure, the statement of compatibility states:

The proposed amendments have been assessed against the seven core international human rights treaties to which Australia is party and engage the rights articulated below. However, as Australia generally only owes human rights obligations to those within its territory and/or jurisdiction, the below analysis is restricted to persons who are within Australia's territory and/or jurisdiction and who may be impacted by these proposed amendments on that basis. That is, members of the family unit of a person whose visa is cancelled under the emergency cancellation provisions, who are in Australia and whose visas are cancelled pursuant to the abovementioned amendments.¹²⁹

1.326 The committee notes that it has previously raised concerns regarding similar interpretations of Australia's jurisdiction for the purposes of identifying its human rights obligations.¹³⁰ In the committee's view, in making a decision to a issue or cancel a visa, the minister or their delegate would be exercising jurisdiction over the affected individual, and in so doing is required to consider Australia's international human rights obligations. Accordingly, the committee considers the assessment in the statement of compatibility to be deficient in this respect.

1.327 The committee considers that the measure clearly engages and limits the right to freedom of movement. This is because it would permit a permanent visa holder to have their visa cancelled thus restricting the right to freedom of movement. The committee notes that this right includes a right to enter one's own country (as noted above, a person's 'own country' is not necessarily restricted to the country of their citizenship. However, the statement of compatibility provides no assessment of whether this limitation may be regarded as reasonable, necessary and proportionate to achieve the stated objective of the measure.

1.328 The committee further notes that the emergency visa cancellation power will include additional powers to allow for the consequential cancellation of visas. The statement of compatibility explains:

128 EM 187.

129 EM 62

130 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 127.

While members of the family unit of the visa holder will not be subject to the emergency cancellation pursuant to the new provisions outlined above, the proposed amendments do include a consequential cancellation power that would see their visas considered for discretionary cancellation in the event that ASIO provides a final assessment that the primary visa holder is a risk to security.¹³¹

1.329 The statement of compatibility notes that the consequential visa cancellation power may be applied to the family members of individuals who have had their visa cancelled on security grounds, and engages and limits a number of human rights:

This process engages human rights concerning the best interests of the child, family unity, the prohibition on arbitrary detention, expulsion of aliens and non-refoulement.¹³²

1.330 The committee's analytical framework requires proponents of legislation to identify measures that may engage and limit human rights, and to provide an assessment of whether any such limitations may be regarded as reasonable, necessary and proportionate for the purposes of international human rights law.

1.331 To do this, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.332 In light of these requirements, the committee considers that the statement of compatibility does not identify with sufficient detail and evidence the legitimate objective of the proposed consequential visa cancellation power.

1.333 The committee therefore seeks the advice of the Attorney-General as to whether the proposed measures in Schedule 4 are compatible with human rights, and particularly:

- **whether the measures are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measures and that objective; and**
- **whether the measures are reasonable and proportionate to the achievement of that objective.**

131 EM 62.

132 EM 62.

Schedule 5 – Identifying persons in immigration clearance

Right to privacy

1.334 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

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

Collection of personal identifiers at automated border control eGates

1.336 Schedule 5 proposes to amend the Migration Act to provide that the existing automated border clearance systems (SmartGate and eGates) will be an 'authorised system' for the purposes of that Act.

1.337 The statement of compatibility notes that the amendments would allow:

...an authorised system to collect other personal identifiers if those personal identifiers are prescribed by the Migration Regulations 1994 (Migration Regulations). DIBP does not intend to make new regulations in relation to this provision at this time as automated border clearance systems only need to collect a person's photograph of their face and shoulders to confirm their identity. Should the need arise, and technology improve, other personal identifiers such as a persons' fingerprints or iris scan may be prescribed in the Migration Regulations.¹³³

1.338 The committee notes that the statement of compatibility acknowledges that the measure engages and may limit the right to privacy, but concludes that any interference with the right to privacy is 'lawful and reasonable in the sense of necessary and proportionate'.¹³⁴

1.339 However, the committee notes that the proposed amendments would allow, if prescribed by regulation, the collection of more than photographic data, such as iris scans or the collection of finger prints. The committee is concerned that these measures have not been sufficiently justified from the perspective of the right to privacy. This is because, as explained in the statement of compatibility, they are only being included '[s]hould the need arise, and the technology improve'.¹³⁵

1.340 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate

133 EM 66.

134 EM 69.

135 EM 66.

objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.341 The committee therefore seeks the further advice of the Attorney-General as to whether the collection of personal identifiers at automated border control eGates is compatible with the right to privacy, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the collection of personal identifiers at automated border control eGates is reasonable and proportionate to the achievement of that objective.**

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

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 25 September 2014

Purpose

1.342 The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the bill) amends the *Migration Act 1958* (the Migration Act), the *Migration Regulations 1994* (the migration regulations); the *Maritime Powers Act 2013* (the Maritime Powers Act), the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

1.343 The Bill would amend the Maritime Powers Act to:

- expand the existing powers in sections 69 and 72 to move vessels and persons and related provisions;
- explicitly provide the minister with a power to give specific and general directions about the exercise of powers under sections 69, 71 and 72;
- allow maritime powers to be exercised between Australia and another country, provided the minister administering the Maritime Powers Act has determined this should be the case;
- provide that the rules of natural justice do not apply to a range of powers in the Maritime Powers Act, including the power to authorise the exercise of maritime powers, the new ministerial powers and the exercise of powers to hold and move vessels and persons;
- ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;
- amend provisions to allow a vessel or a person to be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons for the purposes of sections 69 and 72;
- amend sections 69 and 72 to provide a "place" is not limited to another country or a place in another country;
- amend the time during which a vessel or person may be dealt with under sections 69, 71 and 72;
- amend the Maritime Powers Act to provide that the section 69, 71 and 72 powers (and a range of related provisions) operate in their own right, and

that no implication is to be drawn from the Migration Act, particularly from the existence of the regional processing provisions in that Act;

- provide an explicit power exempting certain vessels involved in maritime enforcement operations from the application of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, the *Navigation Act 2012* and the *Shipping Registration Act 1981*;
- make a number of minor consequential and clarifying amendments to the Maritime Powers Act, Migration Act and ICOG Act; and
- ensure that decisions relating to operational matters cannot be subjected to the provisions of the *Legislative Instruments Act 2003*, the *Judiciary Act 1903* and the ADJR Act.

1.344 The bill would amend the Migration Act to:

- introduce temporary protection visas (TPVs) as a visa product for unauthorised arrivals, whether by air or by sea, who are found to engage Australia's protection obligations;
- create a new visa class to be known as a Safe Haven Enterprise Visa (SHEV);
- explicitly authorise the making of regulations that deem an application for one type of visa to be an application for a different type of visa;
- amend the application bars in sections 48, 48A and 501E of the Migration Act to apply also in relation to persons in the migration zone who have been refused a visa, or held a visa that was cancelled, in circumstances where the refused application, or the application in relation to which the cancelled visa was previously granted, was an application that was taken to have been made by the person;
- allow for multiple classes of protection visas;
- include a definition of 'protection visas';
- create an express link between certain classes of visas provided for under the Migration Act (including permanent protection visas and temporary protection visas) and the criteria prescribed in the migration regulations in relation to those visas;
- create a new fast-track assessment process, and remove access to the Refugee Review Tribunal (RRT), for fast-track applicants, defined as unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and made a valid application for a protection visa, and other cohorts specified by legislative instrument;
- require the minister to refer fast-track reviewable decisions to the Immigration Assessment Authority (the IAA), which will conduct a limited merits review on the papers and either affirm the fast-track reviewable

- decision or remit the decision for reconsideration in accordance with prescribed directions or recommendations;
- create discretionary powers for the IAA to get new information and permit the IAA to consider new information only in exceptional circumstances;
 - provide the manner in which the IAA is to exercise its functions, notify persons of its decisions, give and receive review documents, disclose and publish certain information and enable the Principal Member of the RRT to issue practice directions and guidance decisions to the IAA;
 - establish the IAA within the RRT and provide that the Principal Member of the RRT is to be responsible for its overall operation and administration, and specify delegation powers and employment arrangements for the Senior Reviewer and Reviewers of the IAA;
 - amend the Migration Act to authorise removal powers independent of assessments of Australia's non-refoulement obligations;
 - remove most references to the Refugee Convention from the Migration Act and replace them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations;
 - amend the Migration Act, with retrospective effect, to provide that children born to UMAs under the Migration Act, either in Australia or in a regional processing country, are also UMAs for the purposes of the Migration Act;
 - amend the Migration Act, with retrospective effect, to provide that children born to transitory persons, either in Australia or in a regional processing country, are also transitory persons for the purposes of the Migration Act;
 - allow children born in Australia to a parent who is a transitory person to be taken to a regional processing country;
 - amend the Migration Act, with retrospective effect, to provide that any visa application of the child of a UMA or transitory person is invalid, unless the minister has allowed the application, or the application of that child's parent, to be made; and
 - amend the provisions governing the government's ability to place a statutory limit on the number of protection visas granted in a program year, including repealing sections 65A and 414A of the Migration Act (which require applications for protection visas to be decided in 90 days) and the associated reporting requirements in sections 91Y and 440A, and providing that the requirement for the minister to grant or refuse to grant a visa in section 65 is subject to sections 84 and 86.

Committee view on compatibility

Schedules 1 and 5 – incorporation of international law into Australian domestic law

Multiple rights

1.345 The committee notes that the measures in Schedules 1 and 5 of the bill engage and limit a number of human rights, including:

- non-refoulement obligations;¹
- the right to security of the person and the right to be free from arbitrary detention;²
- the prohibition on torture, cruel, inhuman and degrading treatment or punishment;³
- the right to freedom of movement;⁴
- the right to a fair trial;⁵ and
- the obligation to consider the best interests of the child.⁶

Amendments affecting the incorporation of Australia's obligations under international law into domestic law

1.346 The committee notes that the Refugee Convention and its Protocol⁷ are not among the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011* as treaties against which the committee assesses the human rights compatibility of legislation. However, many of Australia's obligations in the Refugee Convention and its Protocol overlap with Australia's obligations under the seven core human rights treaties which are listed as part of the committee's mandate. As a result, many provisions of the bill directly engage Australia's obligations under those treaties and are appropriately examined by the committee. In addition, it is an accepted approach in international law that decisions under and interpretations of the Refugee Convention form a specialised body of law which can inform an understanding of the

1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Article 31 of the Refugee Convention.

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

3 Article 7 of the ICCPR.

4 Article 12 of the ICCPR.

5 Article 14 of the ICCPR.

6 Articles 3 and 10 of the Convention on the Rights of the Child (CRC).

7 Australia acceded to the 1951 Convention Relating to the Status of Refugees on 17 January 1954, and acceded to its 1967 Protocol on 13 December 1973.

human rights treaties; the Department of Immigration and Border Protection, for example, refers to the Refugee Convention to inform its own views as to the content of particular human rights obligations.⁸ The committee therefore draws on decisions under and interpretations of the Refugee Convention, as relevant, in its assessment of the bill.

1.347 The Migration Act incorporates into domestic law a number of Australia's obligations under the Refugee Convention. The committee notes that when an Australian law gives domestic effect to treaty obligations, there is a presumption that that law will be construed to facilitate Australia's compliance with its obligations under the treaty. As noted in 1.344 above, however, the bill removes most references to the Refugee Convention from the Migration Act and replaces them with a new statutory framework. This is done with the stated intention of codifying Australia's interpretation of its obligations under the Refugee Convention, and negating any presumption that the Migration Act should be construed to facilitate Australia's compliance with its obligations under the Refugees Convention.⁹ The bill would, therefore, allow Australian domestic law to develop independently from Australia's obligations under international law.¹⁰

1.348 The bill removes the relevant international human rights norms from a role in defining the legal framework and standards within which Australia meets its international human rights obligations.

1.349 The committee acknowledges that Australia has sovereignty to change its domestic laws. However, in the committee's view, this severing of the connection between Australia's international obligations and its domestic law engages, and is likely to significantly limit, a number of human rights protected by international law, including those set out at 1.345 above.

1.350 The following example of how the bill affects Australia's non-refoulement obligations is included due to the very serious and irreversible harm that might occur to persons from a breach of non-refoulement obligations, and also provides a representative example of how the proposed amendments affect Australia's obligations under international law more generally.

1.351 Without further information the committee will be unable to conclude that the measures in Schedules 1 to 5 are compatible with the human rights listed at 1.345 above. The committee notes that the statement of compatibility has not provided a comprehensive analysis of whether the amendments in Schedule 1 and 5 are compatible with these human rights.

8 See, For example, EM, Attachment A, 22.

9 See, for example, Explanatory Memorandum (EM), Attachment A, 6, 28.

10 See, for example, EM, Attachment A, 6, 28.

1.352 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the amendments in Schedule 1 and 5 are compatible with the rights listed at 1.345 above are, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate for the achievement of that objective.

Non-refoulement obligations

1.353 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.¹¹ This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.¹²

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

1.355 The provision of 'independent, effective and impartial' review of non-refoulement decisions including merits review is integral to complying with non-refoulement obligations.¹³

1.356 Australia gives effect its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for

11 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

12 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

13 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and *Fourth Report of the 44th Parliament* (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 201, 513.

the grant of a protection visa, which includes being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

Expansion of powers to intercept and detain people at sea and exclusion of court challenges based on Australia's international obligations

1.357 The proposed amendments in Schedule 1 of the bill expand powers to intercept vessels and detain people at sea, and to transfer people to any country (or a vessel of another country) that the Minister chooses. Further, they exclude court challenges to government actions in this context. Under the bill, proposed new division 8A of the Maritime Powers Act provides that a decision cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations when exercising a power.¹⁴

1.358 The committee notes that the objective of the proposed amendments seems to be prevent legal challenges such as the current challenge in the High Court on behalf of 157 asylum seekers detained by the Australian authorities on board the *Ocean Protector* vessel in June 2014 (*CPCF v Minister for Immigration and Border Protection & Anor* [2014] HCATrans 227). In this respect, the amendments further constrain the already limited ability of the courts to evaluate Australia's treatment of refugees and asylum seekers with reference to its obligations under international human rights law in relation to such operations at sea;¹⁵ and to allow Australia to undertake actions that are inconsistent with its international obligations.

1.359 The statement of compatibility acknowledges that:

...on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which may not be consistent with Australia's non-refoulement obligations, [however] the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of international law. They will not, however, be capable as a matter of domestic law of forming the basis of an invalidation of the exercise of the affected powers. It is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government.¹⁶

1.360 The committee notes that the obligation of non-refoulement is considered in international law as *jus cogens*, which means that it is a fundamental or peremptory norm of international law which applies to all nations, and which can never be limited. Accordingly, compliance with the obligation of non-refoulement requires that sufficient safeguards are in place to ensure a person is not removed in

14 EM, Attachment A, 6.

15 See, for example, *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (The Manus Island Case).

16 EM, Attachment A, 7.

contravention of this obligation. As noted above at 1.355, 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.¹⁷

1.361 The proposed amendments would remove judicial review, and in particular the capacity of individuals to seek judicial review, of executive decisions that may be inconsistent with the government's stated intention to comply with international law. The committee therefore regards the proposed implementation of Australia's non-refoulement obligations through executive action alone, and without any capacity for independent review mechanisms to guard against potential breaches of Australia's non-refoulement obligations, as a limit on a peremptory norm of international law, and so a failure to comply with the obligation of non-refoulement.

1.362 The committee therefore considers that the proposed amendments in Schedule 1 are incompatible with Australia's obligations of non-refoulement under the ICCPR and the CAT.

Authorisation of removal powers regardless of Australia's non-refoulement obligations

1.363 Section 198 of the Migration Act sets out the circumstances in which the mandatory removal of an 'unlawful non-citizen' is authorised. Recent decisions of the full Federal Court have found that this removal power is unavailable when there has not been an assessment of Australia's non-refoulement obligations. Proposed new section 197C(1) would provide that it is irrelevant whether Australia has non-refoulement obligations in respect of such a removal, and the statement of compatibility for the bill states that the purpose of the amendments is to ensure that removal powers are not 'constrained by assessments of Australia's non-refoulement obligations'.¹⁸

1.364 The statement of compatibility acknowledges that the amendments 'may appear to be inconsistent' with Australia's non-refoulement obligations. However, it states:

...anyone who is found through visa or ministerial intervention processes to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations. There are a number of personal non-compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest. The form of administrative arrangements in place to support Australia meeting its *non-refoulement*

17 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014) 45, 49-51; *Fourth Report of the 44th Parliament* (March 2014) 51,55-57.

18 EM, Attachment A, 28; See also EM, 9, 165.

obligations is a matter for the Government. This consideration is separate from the duty established by the removal power.¹⁹

1.365 This statement suggests that visa processes and the minister's discretionary and non-compellable powers to grant a visa are sufficient to enable Australia to comply with its non-refoulement obligations. However, the committee considers that, while the form of *administrative* arrangements is a matter for the Australian government to determine, non-reviewable, discretionary and non-compellable powers in relation to visa protection claims do not meet the requirement of independent, effective and impartial review of non-refoulement decisions, and are in breach of Australia's non-refoulement obligations under the ICCPR and the CAT.

1.366 The committee therefore considers that the proposed power to remove persons from Australia, unconstrained by assessments of Australia's non-refoulement obligations, is incompatible with Australia's obligations under the ICCPR and the CAT.

Creating a new statutory framework to declare Australia's protection obligations

1.367 Schedule 5 of the bill would amend the Migration Act to create a new statutory framework articulating Australia's unilateral interpretation of its protection obligations, rather than interpreting its protection obligations by reference to their definition in international law as is the current approach.

1.368 Specifically, the proposed amendments would remove most references to the Refugee Convention. The statement of compatibility notes:

The amendments set out the Government's intended interpretation of a number of Refugee Convention-related concepts within domestic law when more than one may be valid in international law, and where judicial interpretation of specific provisions has not been consistent with the Government's intended interpretations.²⁰

1.369 The committee notes, however, that it is not for a state to unilaterally determine its obligations under a treaty after ratification.²¹ Rather treaties such as the Refugee Convention have a meaning in international law which is separate from domestic law concepts.²² The committee is concerned that the unilateral interpretation of Australia's international obligations as proposed by the amendments is not in accordance with accepted standards of international human rights law. For example, the proposed amendments include an extensive definition of 'refugee' (proposed sections 5H and 5J) without reference to the Refugee Convention, and would amend existing section 36(2)(a) of the Migration Act, which

19 EM, Attachment A, 28.

20 EM, Attachment A, 28.

21 Articles 26, 27 31(1) of the Vienna Convention on the Law of Treaties.

22 Article 27 3 of the Vienna Convention on the Law of Treaties.

sets out the criteria for the grant of a protection visa, to provide that an applicant needs to satisfy the proposed new definition of a 'refugee' to be granted a protection visa.²³ In contrast, section 36(2) currently requires that the minister be satisfied that Australia owes a person protection obligations under the Refugee Convention.²⁴

1.370 The committee notes that the new proposed definition of 'refugee' includes elements which the committee has already determined are not in accordance with Australia's obligations under international human rights law.²⁵

1.371 The committee is also concerned that other aspects of the definition may not be in accordance with Australia's obligations under the Refugee Convention and international human rights law. For example, the exclusion of a person from the definition of a 'refugee' unless their well-founded fear of persecution 'relates to all areas'²⁶ of their country of origin may be inconsistent with Australia's obligations.²⁷ This is because it may be impossible or impractical for the asylum seeker to move internally. The committee notes that the absolute terms of the proposed section 5J do not take account of recognised internal relocation principles in international law, such as the reasonableness in all the circumstances of the person's seeking refuge in another part of the country.

1.372 While the statement of compatibility acknowledges that the codification in the statutory framework 'may partially affect consideration of...claims in relation to determining whether a person is a refugee', it provides no substantial analysis of the specifics of these provisions and of the basis on which the government has determined that the proposed statutory framework meets Australia's international obligations. The committee's expectations regarding statements of compatibility are set out in the committee's *Practice Note 1*.²⁸

1.373 In summary, the committee acknowledges the government's stated intention to continue to comply with Australia's non-refoulement obligations;²⁹ however, the committee is concerned that the proposed statutory framework would limit judicial review and, in particular, the ability of individuals to seek judicial review of executive

23 EM 10.

24 Migration Act, section 36(2).

25 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (July 2014) 43.

26 See, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Schedule 5, part 2, section 5J(1)(c).

27 See, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, section 5J.

28 See Appendix 2.

29 EM, Attachment A, 29.

decisions that may be inconsistent with this stated intention to comply with Australia's non-refoulement obligations.

1.374 The committee therefore requests the advice of the minister as to whether the proposed amendments in Schedule 5 are compatible with Australia's non-refoulement obligations under the ICCPR and the CAT.

Schedules 2 and 3 - Temporary protection visas and safe-haven enterprise visas

Multiple rights

1.375 The committee notes that the proposed new visa classes engage and may limit a number of human rights including:

- non-refoulement obligations;³⁰
- the right to health;³¹
- the obligation to consider the best interests of the child and the right to the protection of the family.³²

Introduction of temporary protection visas and safe-haven enterprise visas – inadequate statement of compatibility

1.376 As noted above at 1.344, the bill seeks to establish a framework to allow for the introduction of temporary protection visas (TPVs) and safe-haven enterprise visas.

1.377 The committee provides more detailed analysis of each of these rights below in relation to TPVs. However, the committee notes that details of the proposed safe-haven enterprise visas such as eligibility requirements have not been set out in either the bill or the statement of compatibility. The committee notes that these criteria are critical to an assessment of the human rights compatibility of each proposed visa class.

1.378 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the proposed provisions for safe-haven enterprise visas are compatible with human rights.

Non-refoulement obligations

1.379 Australia has non-refoulement obligations, described at 1.353 - 1.355 above.

30 Article 3(1) of the CAT; Articles 6(1) and 7 of the ICCPR; Article 31 of the Refugee Convention.

31 Article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR),

32 Articles 17 and 23 of the ICCPR; Articles 3 and 10 of the CRC.

Introduction of temporary protection visas

1.380 The proposed amendments in Schedules 2 and 3 would establish a framework to allow for the reintroduction of TPVs. The statement of compatibility notes that, under the proposed arrangements, people who were found to engage Australia's non-refoulement obligations would be granted a TPV only for a period of up to three years at one time, rather than being granted a permanent protection visa.³³ The statement of compatibility acknowledges that TPVs engage Australia's non-refoulement obligations, but argues that:

The amendments do not result in the return or removal of persons who are found to engage Australia's protection obligations in contravention of its non-refoulement obligations ... The position of this Government has always been that grant of a protection visa is not the only way of giving protection to persons who engage Australia's protection obligations, and that grant of a temporary visa is a viable alternative.³⁴

1.381 However, the committee notes that TPVs will require refugees to prove afresh their claims for protection every three years, as was the case under the previous TPV regime. The committee notes that the international legal framework does provide for the cessation of refugee status or protection obligations where, for example, the conditions in the person's country of origin have materially altered such that the reasons for a person becoming a refugee have ceased to exist. However, as noted by the UN refugee agency, UNHCR, the international protection regime 'does not envisage a potential loss of status triggered by the expiration of domestic visa arrangements,³⁵ which is to say the expiry of a visa should not, of itself, affect a person's refugee status. The committee notes that the statement of compatibility has not addressed whether there will be sufficient safeguards in place to ensure that any reapplication process takes account of the risk of refoulement if the person is denied continuing protection.

1.382 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the temporary nature of the proposed protection visas complies with Australia's obligations under the ICCPR and the CAT to not place any person at risk of refoulement.

Right to health and a healthy environment

1.383 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to a person's ability to exercise other human rights. The right to health is understood as

33 EM, Attachment A, 9.

34 EM, Attachment A, 10.

35 UNHCR, 'UNHCR concerned about confirmation of TPV system by High Court' (20 November 2006) <http://www.unhcr.org.au/pdfs/TPVHighCourt.pdf> (accessed 14 October 2014).

the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).³⁶

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.385 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Introduction of temporary protection visas

1.386 As noted above at 1.344, the proposed amendments in Schedules 2 and 3 would establish a framework to allow for the reintroduction of TPVs. The statement of compatibility notes that, under the proposed arrangements, people who were found to engage Australia's non-refoulement obligations would be granted a TPV for a period of up to three years at one time (rather than a permanent protection visa).³⁷ The statement of compatibility notes that the right to health is engaged by the amendments, and that TPV holders are entitled to access Medicare and the Australian public health system.³⁸

1.387 However, the committee notes that the practical operation and consequences of TPVs may have significant adverse consequences for the health of TPV holders. TPVs will require refugees to prove afresh their claims for protection every three years. The committee notes that research shows that TPVs lead to

36 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14 on the right to the highest attainable standard of health, E/C.12/2000/4 (2000).

37 EM, Attachment A, 9.

38 EM, Attachment A, 17.

insecurity and uncertainty for refugees which, in turn, may cause or exacerbate existing mental health problems, or cause anxiety and psychological suffering. The committee further notes that such research indicates that restrictions on family reunion places further stress on TPVs holders which may lead to mental health problems.³⁹ The committee notes that these issues were not addressed in the statement of compatibility.

1.388 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the right to health, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to protection of the family

1.389 The right to respect for the family is protected by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental unit of society and, as such, is entitled to protection.

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

Obligation to consider the best interests of the child

1.391 Under the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.⁴⁰

39 See, for example, Greg Marston, *Temporary Protection Permanent Uncertainty* (RMIT University 2003), p 3. http://dpl/Books/2003/RMIT_TemporaryProtection.pdf (accessed 14 October 2014); Australia Human Rights Commission, *A last resort? - Summary Guide: Temporary Protection Visas*, <https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas> (accessed 14 October 2014).

40 Article 3(1).

1.392 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.⁴¹

1.393 The committee notes that, while there is no universal right to family reunification, article 10 of the CRC nevertheless obliges Australia to deal with applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family, and require family unity to be protected by society and the state.

No family reunion with temporary protection visa

1.394 The proposed temporary protection regime provides that refugees granted temporary protection visas will not be eligible to sponsor family members.⁴² While the statement of compatibility identifies this as engaging and potentially limiting the right to the protection of the family and the rights of the child, it assesses the measure as compatible with the obligation to consider the best interests of the child as follows:

The reintroduction of Temporary Protection visas seeks to prevent minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interest, is also a primary consideration. Australia considers that on balance these and other primary considerations outweigh the best interests of the child in seeking family reunification. Therefore, Australia considers that these amendments are consistent with Article 3 of the CRC.⁴³

1.395 The committee notes that the obligation to consider the best interests of the child as a primary consideration may only be limited if the measure is reasonable, necessary and proportionate in pursuit of a legitimate objective. However, the statement of compatibility does not provide an assessment of the measure in these terms, or offer evidence to establish how the rights of children to have their best interests as a primary consideration is outweighed by the policy objectives of preserving the 'integrity of Australia's the migration system' and the 'national interest'.

41 UN Committee on the Rights of Children, General Comment 14 on the right of the child to have his or her best interest taken as primary consideration, CRC/C/GC/14 (2013).

42 EM, Attachment A, 12.

43 EM, Attachment A, 13.

1.396 The statement of compatibility acknowledges that 'some Temporary Protection visa holders may remain separated from their family for years'.⁴⁴ The committee notes that the statement of compatibility does not assess this limitation on the right to protection of the family as compatible with human rights.

1.397 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed introduction of temporary protection visas is compatible with the obligation to consider the right to the protection of the family, and with the best interests of the child, and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Schedule 4 – 'fast-track assessment process'

Multiple rights

1.398 The committee notes that the measures in Schedule 4 of the bill engage and limit a number of human rights, including:

- non-refoulement obligations;⁴⁵
- the right to a fair trial;⁴⁶ and
- the obligation to consider the best interests of the child.⁴⁷

1.399 The analysis below focuses on Australia's non-refoulement obligations, given the serious and irreversible nature of the harm that may result from the breach of these obligations.

1.400 However, the committee also notes that the statement of compatibility has not provided a comprehensive analysis of whether the fast-track assessment process is compatible with the right to a fair trial and the obligation to consider the best interests of the child.

44 EM, Attachment A, 12.

45 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Article 31 of the Refugee Convention.

46 Article 14 of the ICCPR.

47 Articles 3 and 10 of the Convention on the Rights of the Child (CRC).

1.401 The committee therefore requests the further advice of the Minister for Immigration and Border Protection as to whether 'fast track assessment process' is compatible with the obligation to consider the best interests of the child and the right to a fair trial, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

Non-refoulement obligations

1.402 Australia has non-refoulement obligations, described at 1.353 - 1.355 above.

Limitations on independent merits review and 'fast track assessment'

1.403 Schedule 4 to the bill would set up a 'fast track assessment process' for asylum seekers who arrived irregularly in Australia on or after 13 August 2012.⁴⁸ Under the proposed changes the minister would have the power to extend the 'fast track assessment process' to other groups of asylum seekers.⁴⁹ These asylum seekers would no longer have access to the Refugee Review Tribunal (RRT). Instead, the Schedule would create a new statutory body, the Immigration Assessment Authority (IAA), to review the refugee claims of asylum seekers, to be constituted by members of the RRT. Reviews of decisions under this new 'fast-track' system would be conducted on the papers rather than at a hearing before the IAA. The IAA would be unable to consider new information at the review stage unless there are exceptional circumstances.⁵⁰

1.404 In support of its assessment of the measure as compatible with human rights, the statement of compatibility notes:

...the Refugees Convention does not prescribe procedures to be adopted by States in the processing of protection claims. The UNHCR recognises that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms, although it recommends that certain minimum requirements should be met including access to competent officials that will act in accordance with the principle of non-refoulement, access to necessary facilities such as a competent interpreter

48 EM, Attachment A, 19.

49 EM, Attachment A, 19.

50 EM, 133.

to submit their case and being permitted to remain in the country pending a decision on their initial request to the competent authority.⁵¹

1.405 However, the committee notes that, while there is scope for Australia to determine its own process for refugee status determination, those processes must be compliant with Australia's obligations of non-refoulement to avoid placing Australia in breach of its international human rights obligations.

1.406 The committee notes independent, effective and impartial review of claims to protection against non-refoulement is a fundamental aspect of those obligations. In this respect, the committee considers that the proposed fast-track arrangements appear to be primarily directed at ensuring the assessment and review processes are as brief as possible. While the committee acknowledges that administratively efficient processes are generally desirable, it is unclear whether the proposed fast-track process will ensure that genuine claims for protection are identified and, in the case of the fast-track review process, that it is capable of ensuring that the true and correct decision is arrived at. The committee notes that compliance with the obligation of non-refoulement requires that sufficient procedural and substantive safeguards are in place to ensure a person is not removed in contravention of this obligation, given the irreversible nature of the harm that may result.⁵²

1.407 While the committee acknowledges the government's stated intention for competent officials to 'act in accordance with the principle [sic] of non-refoulement', the committee is concerned that the proposed amendments offer a significantly constrained form of merits review, including in respect of executive decisions that may not be in accordance with the government's intention.

1.408 The committee therefore seeks the advice of the minister as to whether the proposed limitation on merits review through the creation of the Immigration Assessment Authority (IAA) is compatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review of claims to protection against non-refoulement.

Exclusion from independent merits review

1.409 Under the proposed system, of 'fast track assessment', a person can be designated by the minister as an 'excluded fast track review applicant' because they are said to 'present baseless or unmeritorious claims, or have protection elsewhere'.⁵³ The minister will be able to specify a person or class of persons to fall

51 EM, Attachment A, 22.

52 See *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000) [11.5], [12] and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003) [12].

53 EM, Attachment A, 19.

within the definition of an excluded fast track review applicant.⁵⁴ 'Excluded fast track applicants' include persons:

- considered to have the right to enter or reside in a third country;
- considered to have made a 'manifestly unfounded claim for protection';
- who were previously refused protection in Australia or elsewhere by UNHCR or another country; or
- considered to have arrived on a 'bogus' document 'without reasonable explanation'.⁵⁵

1.410 Under the proposed amendments, an excluded fast track review applicant would not have access to any form of merits review of the minister's decision.⁵⁶

1.411 The committee notes that the provision of 'independent, effective and impartial' merits review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.⁵⁷ The committee considers that an internal departmental review system, by its nature, lacks the requisite degree of independence required under international human rights law to provide a sufficient safeguard. This concern is most pronounced in respect of the fact that any such internal reviews by the department would be performed by the department itself, which, being the executive arm of government, would amount to executive review of executive decision making. The committee is of the view that rigorous, independent scrutiny of such decisions is required to ensure that mistakes are not made, given the irreversible nature of the harm that may occur through wrongful refoulement.

1.412 The committee therefore considers that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement.

54 EM, Attachment A, 21.

55 EM, Attachment A, 19 - 21.

56 EM, 8.

57 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, February 2014, p 45, at pp 49-51, paras 1.188-1.199 (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament*, March 2014, p 51, at pp 55-57, paras 513.41-3.47 (comments on Minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

Schedule 6 – unauthorised maritime arrivals and new born children

Obligation to consider the best interests of the child

1.413 Under the Convention on the Rights of the Child (CRC), States parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration; see 1.391 - 1.392 above.⁵⁸

The right to nationality

1.414 Every child has the right to acquire a nationality under article 7 of the Convention on the Rights of the Child (CRC) and article 24(3) of the International Covenant on Civil and Political Rights (ICCPR).⁵⁹ 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.

1.415 This is consistent with Australia's obligations under article 1(1) of the Convention on the Reduction of Statelessness 1961 which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless.⁶⁰

Legal status of children born to asylum seekers

1.416 Schedule 6 would designate children born to parents who arrived by sea after 13 August 2012 as 'unauthorised maritime arrivals', the same designation under the Migration Act as their parents. These children would accordingly be treated as 'unauthorised maritime arrivals' (UMAs) and could be subject to transfer or continued detention at an offshore processing country. The statement of compatibility assesses the proposed measure as compatible with the obligation to consider the best interests of the child and notes:

Clarifying that children have a status which is consistent with that of their parents will reduce the number of scenarios in which issues of family separation may arise as in most cases both parents are also UMAs.⁶¹

1.417 However, the committee notes that designating a child as an 'UMA' has implications for the rights of a child beyond issues of family unification, and considers that the proposed measure potentially limits the obligation to consider the best interests of the child as a primary consideration. This is because it allows such children to be treated as an 'UMA' and accordingly be subject to offshore detention

58 Article 3(1) of the CRC.

59 Article 24(3) of the ICCPR.

60 Article 1 of the Convention on the Reduction of Statelessness 1961.

61 EM, Attachment A ,30.

and processing. The committee has previously raised serious human rights concerns in relation to the offshore detention and processing regime.⁶²

1.418 The committee notes that Australia has obligations under article 24(1) of the ICCPR and article 7 of the CRC to ensure that every child has a nationality when born. The committee is concerned that the proposed measure may result in some of these children becoming stateless, depending on the laws relating to nationality in their parents' country of origin. The committee considers that Australia's obligations under article 3 of the CRC should be read in accordance with Australia's obligations under article 1(1) of the Convention on the Reduction of Statelessness 1961, which provides that '[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless', article 7 of the CRC and article 24(1) of the ICCPR.⁶³

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

1.420 The committee notes that the statement of compatibility does not assess how being deemed to be an 'unauthorised maritime arrival' may be considered in the child's best interest or whether the measure constitutes a limitation on the rights of the child.

1.421 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the designation of children as 'unauthorised maritime arrivals' is compatible with the obligation to consider the best interests of the child and the right to acquire a nationality, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

62 Parliamentary Joint Committee on Human Rights, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation* (June 2013).

63 Convention on the Reduction of Statelessness 1961 article 1.

Schedule 7 – cap on protection visas

Right to security of the person and freedom from arbitrary detention

1.422 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and freedom from arbitrary detention. This includes the right of a person:

- to liberty and not to be subjected to arbitrary arrest or detention;
- to security;
- to be informed of the reason for arrest and any charges;
- to be brought promptly before a court and tried within a reasonable period, or to be released from detention; and
- to challenge the lawfulness of detention.

1.423 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those that are in accordance with procedures established by law, provided that the law itself and the enforcement of it are not arbitrary.

Ministerial power to cap protection visas

1.424 Schedule 7 would enable the minister to cap the number of protection visas that can be issued in any year. The statement of compatibility notes that the measure is in response to the recent High Court decision in *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24,⁶⁴ in which the court held that the minister did not have the power, under section 85 of the Migration Act, to limit the number of protection visas that may be granted in a specified financial year. The statement of compatibility acknowledges that the measure may engage and limit the right to security of the person and freedom from arbitrary detention, but states:

...[although] it may be argued that these amendments could result in protracted detention of protection visa applicants...[t]he Act requires people who are not Australian citizens and do not hold a valid visa to be detained unless they are given permission to remain in Australia by being granted a visa.⁶⁵

1.425 The statement of compatibility states that the cap is consistent with the right not to be arbitrarily detained because the protection claim will continue to be processed (notwithstanding that it will be denied due to the cap), and the '[m]inister can consider alternative ways to release someone from detention if they are found

64 EM, Attachment A, 31.

65 EM, Attachment A, 32.

to engage Australia's protection obligations but cannot be granted a protection visa because of a cap'.⁶⁶

1.426 The committee is concerned that the cap may result in a breach of the prohibition against arbitrary detention if a discretion to issue another visa type and to release a person found to engage Australia's protection obligation is not exercised. In this respect, the committee considers that the ministerial power to cap protection visas is a limitation on the right to freedom from arbitrary detention. The statement of compatibility does not assess any such limitation.

1.427 The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to whether the cap is compatible with the right to freedom from arbitrary detention, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Parliamentary Entitlements Legislation Amendment Bill 2014

Portfolio: Special Minister of State

Introduced: House of Representatives, 2 October 2014

Purpose

1.428 The Parliamentary Entitlements Legislation Amendment Bill 2014 (the bill) seeks to amend the *Parliamentary Entitlements Act 1990* to:

- impose a 25 per cent loading on travel claims submitted that require subsequent adjustment; and
- limit the travel entitlement provided to the dependent children of Senior Officers to those who are less than 18 years of age.

1.429 The Bill also seeks to amend the *Members of Parliament (Life Gold Pass) Act 2002* to implement reforms to the Life Gold Pass scheme, including changing the name of the entitlement to the Parliamentary Retirement Travel Entitlement, and reducing, removing, and reforming entitlements under the scheme.

Committee view on compatibility

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

Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014

Portfolio: Social Services

Introduced: House of Representatives, 2 October 2014

Purpose

1.431 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999*, the *Social Security Act 1991*, the *Veterans' Entitlements Act 1986*, and the *Social Security (Administration) Act 1999* to:

- pause indexation on certain income free and income test free areas and thresholds for three years from 1 July 2015;
- index the parenting payment single to the Consumer Price Index;
- pause indexation of income free areas and other means-test thresholds for student payments, including student income bank limits;
- maintain the standard Family Tax Benefit child rates for two years in the maximum and base rate of Family Tax Benefit Part A and the maximum rate of Family Tax Benefit Part B, from 1 July 2015;
- revise end-of-year Family Tax Benefit supplements to their original values and cease indexation;
- extend and simplify the ordinary waiting period for all working age payments from 1 January 2015;
- extend Youth Allowance from 22 to 24 year olds in lieu of Newstart allowance and sickness allowance from 1 January 2015;
- provide for 26-week waiting periods and non-payment periods from 1 January 2015;
- abolish the pensioner education supplement from 1 January 2015;
- abolish the education entry payment from 1 January 2015; and
- remove the three months' backdating of disability pension from 1 January 2015.

Background

1.432 The bill is a reintroduction of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014.

1.433 The committee reported on these bills in its *Ninth Report of the 44th Parliament*,¹ and concluded its examination of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 in the *Twelfth Report of the 44th Parliament*.² The committee requested further information from the Minister for Social Services regarding measures contained within the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014.³

Committee view on compatibility

1.434 The committee notes that it previously considered these measures as part of its consideration of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014. The committee considered that the statement of compatibility for these bills provided insufficient information to conclude that the measures were compatible with human rights. Accordingly, the committee sought further information from the minister. The minister provided further information which enabled the committee to conclude that most of these measures were compatible with human rights.

1.435 The committee notes that only some of this further information has been included in the statement of compatibility for this bill. The committee's usual expectation is that where additional information has been provided by the minister to establish that a measure is compatible with human rights, this information is included in future statements of compatibility for measures of a similar type.

1.436 In relation to the right to equality and non-discrimination, the committee considered that the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 could raise potential issues of indirect discrimination against women.

1.437 Accordingly, the committee seeks the further advice of the Minister for Social Services as to whether the measures in the bill are compatible with the rights to equality and non-discrimination on the basis of gender and family responsibilities.

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67.

3 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 55.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014

Portfolio: Social Services

Introduced: House of Representatives, 2 October 2014

Purpose

1.438 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 5) Bill 2014 (the bill) seeks to amend the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to implement the following changes to Australian Government payments:

- pause indexation of income test free areas for pensions (other than parenting payment single) and deeming thresholds for three years from 1 July 2017;
- index pensions (other than parenting payment single) to the Consumer Price Index from 20 September 2017;
- reduce social security and veterans' entitlements income test deeming thresholds from 20 September 2017; and
- increase the age pension qualifying age, and the non-veteran pension age, from 67 to 70 years by six months every two years, commencing on 1 July 2025.

Background

1.439 The bill is a reintroduction of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014.

1.440 The committee reported on these measures in its *Ninth Report of the 44th Parliament*,¹ and concluded its examination in the *Twelfth Report of the 44th Parliament*.²

Committee view on compatibility

1.441 **The committee notes that it previously considered these measures as part of its consideration of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014. The committee considered that the statement of compatibility for that bill provided insufficient information to conclude that the measures were compatible with human rights. Accordingly, the committee sought further information from the minister. The minister provided further information**

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, (15 July 2014) 83.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament*, (24 September 2014) 67.

which enabled the committee to conclude that the measures were compatible with human rights.

1.442 The committee notes that this further information has not been included in the statement of compatibility for this bill. The committee's usual expectation is that where additional information has been provided by the minister to establish that a measure is compatible with human rights, this information is included in future statements of compatibility for measures of a similar type.

Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014

Portfolio: Social Services

Introduced: House of Representatives, 2 October 2014

Purpose

1.443 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Bill 2014 (the bill) seeks to amend the *Farm Household Support Act 2014*, the *Social Security Act 1991*, the *Veterans' Entitlements Act 1986*, the *A New Tax System (Family Assistance) Act 1999*, the *Social and Community Services Pay Equity Special Account Act 2012*, the *Farm Household Support Act 2014*, the *Income Tax Assessment Act 1997*, the *Military Rehabilitation and Compensation Act Scheme 2004*, and the Veterans' Children Education Scheme to:

- rename the clean energy supplement as the energy supplement and cease indexation of the supplement from 20 September 2014;
- pause indexation of assets value limits for working age allowances, student payments and the parenting payment single for two years from 1 July 2015;
- require certain disability support pension recipients to actively participate in a program of support;
- limit the six-week overseas portability period for the disability support pension and students payments from 1 January 2015;
- extend to 19 weeks the portability period for seniors health cardholders;
- restrict qualification for relocation scholarship payments;
- pause indexation on assets test free areas for all pensions (other than parenting payment single) for three years from 1 July 2017;
- exclude from the social security and veterans' entitlements income test payments made under the Young Carer Bursary Programme from 1 January 2015;
- include tax-free superannuation income in the assessment of income for qualification for the seniors health card; and
- make the following changes to the Family Tax Benefit (from 1 July 2015): limit the large family supplement, remove the per-child add-on, and reduce the primary earner income limit.

Background

1.444 The bill is a reintroduction of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014.

1.445 The committee reported on these bills in its *Ninth Report of the 44th Parliament*,¹ and concluded its examination of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 in the *Twelfth Report of the 44th Parliament*.² The committee requested further information from the Minister for Social Services regarding measures contained within the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014.³

Committee view on compatibility

1.446 The committee notes that it previously considered these measures as part of its consideration of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014. The committee considered that the statement of compatibility for these bills provided insufficient information to conclude that the measures were compatible with human rights. Accordingly, the committee sought further information from the minister. The minister provided further information which enabled the committee to conclude that most of these measures were compatible with human rights.

1.447 The committee notes that only some of this further information has been included in the statement of compatibility for this bill. The committee's usual expectation is that where additional information has been provided by the minister to establish that a measure is compatible with human rights, this information is included in future statements of compatibility for measures of a similar type.

1.448 In relation to the right to equality and non-discrimination, the committee considered that the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 could raise potential issues of indirect discrimination against women.

1.449 Accordingly, the committee seeks the further advice of the Minister for Social Services as to whether the measures in the bill are compatible with the rights to equality and non-discrimination on the basis of gender and family responsibilities.

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, (15 July 2014) 83.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament*, (24 September 2014) 67.

3 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament*, (24 September 2014) 55.

Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014

Portfolio: Social Services

Introduced: House of Representatives, 2 October 2014

Purpose

1.450 The Social Services and Other Legislation Amendment (Seniors Supplement Cessation) Bill 2014 (the bill) seeks to amend the *Social Security Act 1991*, *Social Security (Administration) Act 1999* and the *Veterans' Entitlements Act 1986* to abolish the senior supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 September 2014.

Background

1.451 The bill is a reintroduction of measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No 1) Bill 2014.

1.452 The committee reported on these measures in its *Ninth Report of the 44th Parliament*,¹ and concluded its examination in the *Twelfth Report of the 44th Parliament*.²

Committee view on compatibility

1.453 The committee notes that it previously considered these measures as part of its consideration of the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. The committee considered that the statement of compatibility for that bill provided insufficient information to conclude that the measures were compatible with human rights. Accordingly, the committee sought further information from the minister. The minister provided further information which enabled the committee to conclude that the measures were compatible with human rights.

1.454 The committee notes that this further information has not been included in the statement of compatibility for this bill. The committee's usual expectation is that where additional information has been provided by the minister to establish that a measure is compatible with human rights, this information is included in future statements of compatibility for measures of a similar type.

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, (15 July 2014) 71.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament*, (24 September 2014) 55.

Commonwealth Cleaning Services Guidelines Repeal Instrument 2014

Portfolio: Employment

Authorising instrument: Financial Management and Accountability Regulations 2007

Purpose

1.455 The Commonwealth Cleaning Services Guidelines Repeal Instrument 2014 repeals the Commonwealth Cleaning Services Guidelines 2012 [F2013L00435] (guidelines).

1.456 The guidelines required that Australian Government agencies only enter into a contract for cleaning services in defined locations, where a tenderer has agreed to certain mandatory requirements relating to the pay and working conditions of their employees.

Background

1.457 The committee reported on the instrument in its *Tenth Report of the 44th Parliament*.

Committee view on compatibility

1.458 The committee requested that the Minister for Employment prepare an assessment of the compatibility for the instrument with human rights with particular reference to the specific questions outlined below.

Right to an adequate standard of living

Repeal of Commonwealth Cleaning Services Guidelines

1.459 The committee requested the advice of the Minister for Employment as to whether the repeal of the guidelines is compatible with the right to an adequate standard of living, particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to just and favourable conditions of work

Repeal of Commonwealth Cleaning Services Guidelines

1.460 The committee requested the advice of the Minister for Employment as to whether the repeal of the guidelines is compatible with the right to just and favourable conditions of work, particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;

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

Right to equality and non-discrimination

Repeal of Commonwealth Cleaning Services Guidelines

1.461 The committee requested the advice of the Minister for Employment as to whether the repeal of the guidelines is compatible with the rights to equality and non-discrimination.

Minister's response

The repeal of the Commonwealth Cleaning Services Guidelines (Guidelines) has no relevance to wages and conditions for workers in the industry as a whole. The Guidelines were an internal purchasing policy that only applied to some buildings occupied by some Australian Government agencies. There were only ever around 25 to 30 cleaning contracts influenced by the Guidelines across Australia, covering less than one per cent of employees in the industry, Australia-wide.

It was not the Guidelines but Australia's workplace relations laws, including the modern award system, that provide for fair and decent wages and strong safeguards for all cleaners, no matter where they work. Government intervention in this matter by the previous Government was effectively a vote of no confidence in the Fair Work Commission which sets the wages for all workers, including through the Cleaning Services Award 2010. In fulfilling this role, the Fair Work Commission sets fair and decent wages based on a range of economic factors in the *Fair Work Act 2009*. This includes taking into account the relative living standards of the low paid and the need to encourage enterprise bargaining. If anything, the former Government set a very dangerous precedent by having the Minister of the day seeking to set wages and conditions in a particular sector. I note that these wages and conditions were essentially the same as those contained in the preferred enterprise agreement of the United Voice union.

For the less than one per cent of employees in the industry that are actually working under contracts covered by the Guidelines, there will not be a pay cut. The terms and conditions of all current cleaning contracts, and enterprise agreements that stipulate rates of pay and conditions, will continue to apply. Importantly, enterprise agreements can only be made with a majority of employees' consent and employees must be better off overall in comparison with the relevant award.

Cessation of the Guidelines will not preclude employers from continuing to pay their employees above award pay rates or negotiating other terms and conditions through enterprise agreements, something which also

happened prior to the Guidelines. Government agencies also continue to have the flexibility to engage cleaning companies that provide above award wages and conditions- as was commonly the case prior to the existence of the Guidelines. There were at least 65 such cleaning contracts incorporating the higher pay rates prior to the commencement of the Guidelines.

It is noted that the Guidelines also required that each new employee to be covered by the Guidelines be given information about union membership by union officials. It is disappointing that the Committee has not previously considered whether this may contravene the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87).¹

Committee response

1.462 The committee thanks the Minister for Employment for his response.

1.463 However, the committee does not consider that the minister's response has shown that the repeal of the Guidelines and the consequential likely reduction in pay and working conditions of cleaners working under government contracts in certain areas is reasonable, necessary and proportionate in pursuit of a legitimate objective. That being so, the repeal of the Guidelines is a retrogressive measure, in that it actually reduces the level of protection for the rights of these workers to an adequate standard of living and just and favourable conditions of work.

1.464 The committee's expectation is that legislation proponents provide an assessment of whether the retrogressive measure or limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. This requires reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective, and consideration of whether other, less restrictive measures would achieve the same objective. In the absence of that information from the minister, the committee is unable to say that the repeal of the Guidelines is compatible with rights to an adequate standard of living and to just and favourable conditions of work.

1.465 As noted by the minister the award system provides a critical and important minimum standard for the protection of wages and conditions in Australia. However, this minimum standard does not prevent government ensuring that workers employed under government contracts receive entitlements above these minimum standards. The committee is of the view that, in respect to the supply of services to government, the inclusion of contractual requirements to ensure certain pay standards are met by contractors in relation to their employees may have a significant role in protecting and fulfilling the right to an adequate standard of living and the right to just and favourable conditions of work. The committee notes that

1 See Appendix 1, Letter from Senator the Hon. Eric Abetz, Minister for Employment, to Senator Dean Smith (dated 22 September 2014) 1-2.

government is obliged under international human rights law to take positive steps that lead to the greater enjoyment of the right to an adequate standard of living and the right to just and favourable conditions of work. This is particularly the case where the terms of government contracts and the amount paid for services by government will have a significant impact on the pay and working conditions of those employed under them.

1.466 The committee notes that the minister expressed his disappointment that the committee did not consider whether the requirement in the repealed Guidelines that new employees be given information about union membership by union officials would contravene the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87). While the *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the ILO Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed these ILO standards and jurisprudence are nonetheless relevant to the mandate of the committee. This is because they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. ILO standards and jurisprudence are a specialised body of law which can inform the general protections set out in the human rights treaties (See *Practice Note 1*). In this instance, the committee did not comment on the issue raised by the minister as the committee does not see how a requirement that new employees be given information about union membership would be in breach of the right to freedom of association contained in article 8 of the ICESCR and article 22 of the ICCPR as informed by the standards and jurisprudence of the ILO. A breach of the right to freedom of association would generally entail laws or policies that limited the ability of individuals to associate.

1.467 The committee considers, based on the information provided, that the repeal of the Guidelines is a retrogressive measure and is likely to be incompatible with the right to an adequate standard of living and the right to just and favourable conditions of work.

1.468 The committee notes that the minister's response did not address the committee's previous request as to whether the repeal of the guidelines was compatible with the rights to equality and discrimination. The committee was concerned that the repeal of the guidelines may constitute indirect discrimination, noting the high proportion of people working in the cleaning industry that are from culturally diverse backgrounds.

1.469 The committee seeks the further advice of the minister as to whether the repeal of the guidelines is compatible with the rights to equality and non-discrimination on the basis of race (indirect discrimination).

Deferred bills and instruments

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

Freedom of Information Amendment (New Arrangements) Bill 2014

Migration Amendment (Character and General Visa Cancellation) 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]

Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 27 October 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.

Building and Construction Industry (Improving Productivity) Bill 2013

Portfolio: Employment

Introduced: House of Representatives, 14 November 2013

Purpose

2.1 The Building and Construction Industry (Improving Productivity) Bill 2013 (the bill) was introduced with the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013. The bill seeks to:

- re-establish the Australian Building and Construction Commissioner (ABC Commissioner) and the Australian Building and Construction Commission;
- enable the minister to issue a Building Code;
- provide for the appointment and functions of the Federal Safety Commissioner;
- prohibit certain unlawful industrial action;
- prohibit coercion, discrimination and unenforceable agreements;
- provide the ABC Commissioner with powers to obtain information;
- provide for orders for contraventions of civil remedy provisions and other enforcement powers; and
- make miscellaneous amendments in relation to self-incrimination, protection of liability against officials, admissible records and documents, protection and disclosure of information, powers of the Commissioner in certain proceedings, and jurisdiction of courts.

Background

2.2 The committee reported on the bill in its *Second Report of the 44th Parliament*, and considered the Minister for Employment's response in its *Tenth Report of the 44th Parliament*.

Committee view on compatibility

Right to freedom of association and right to form and join trade unions

Proposed prohibition on picketing and restrictions on industrial action

2.3 The committee sought the further advice of the minister as to whether the proposed prohibition on picketing and further restrictions on industrial action are compatible with the right to freedom of association, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to freedom of assembly and freedom of expression

2.4 The committee sought the further advice of the minister as to whether the proposed prohibition on picketing is compatible with the right to freedom of assembly and freedom of expression, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The Committee has sought my further advice on the proposed prohibition on picketing and restrictions on industrial action and whether these measures are compatible with the right to freedom of assembly and expression and the right to freedom of expression. The Bill will not prevent lawful peaceful assembly.

The Bill's statement of compatibility with human rights and my previous response to the Committee clearly explains the over-arching objective of the Bill - to restore respect for the rule of law in the building and construction industry - and thoroughly sets out the rational connection between the limitations contained in the Bill and this objective.

Existing laws do not adequately regulate the appalling unlawful behaviour that takes place in this industry. The proposed picketing provision will provide a statutory basis for the Australian Building and Construction Commission or directly affected persons to make application to a Court of competent jurisdiction in respect of those engaging in unlawful action, as defined in the Bill; action like that of the CFMEU at the Myer Emporium site in August 2012 which went far beyond an exercise of a right to peaceful assembly and proactively restricted the right of persons to access or leave certain building sites.

In that case, the affected party (Grocon Pty Ltd) took strong and decisive action to seek to enforce and protect its rights. Despite obtaining interlocutory injunctive relief from the Supreme Court of Victoria, the CFMEU-organised conduct continued and ultimately resulted in findings of criminal contempt against the CFMEU. Note, however, that the affected party's underlying substantive claim for compensation for the economic harm inflicted by the conduct is yet to be considered or determined by the Court. There are industry participants who are not able to withstand the economic harm caused by this type of action and do not have the resources to seek and pursue legal remedies to which they are entitled. Some industry participants are also particularly vulnerable to threats of further picketing action should they seek to exercise their rights. Related to the example given above, are allegations made by a contractor to Grocon Pty Ltd that it has suffered retribution from the CFMEU because it sought to protect its interests and exercise its lawful rights (the contractor, Boral Limited, has since commenced its own civil proceedings and its Chief Executive Officer was separately called to give evidence in respect of this circumstance to the Royal Commission into Trade Union Corruption). Whilst noting these matters are still before the Courts and the Royal Commission, if proven, this case is a powerful illustrative example of the practical realities facing the building and construction industry.

Further, section 47 will provide a statutory remedy against defined unlawful picketing which can be pursued by an independent Commonwealth regulator on behalf of affected parties. Whilst directly affected parties are able to make application under the Bill, only very few have the economic resources to enforce their legal remedies and some parties may not seek to pursue legal remedies for fear of future reprisals. Allowing the independent government regulator in the Australian Building and Construction Commission to make application to a Court against parties who engage in unlawful picketing will act as a disincentive to those to who engage in unlawful behaviour and will change the culture of the industry for the better.¹

Committee's response

2.5 The committee thanks the minister for his response.

Right to freedom of association and right to form and join trade unions

2.6 The committee notes that the response does not directly address the committee's request as to whether the proposed measures are compatible with the right to freedom of association. The Minister's reference to 'lawful' 'peaceful assembly' is circular, as it is the way in which assembly is made lawful that is the focus of the committee's inquiry. Based on this response and on the information

1 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith (dated 23 September 2014) 2.

previously provided, the committee does not consider that the prohibition on picketing has been sufficiently justified so as to be a permissible limit on the right to freedom of association in accordance with international human rights law. As noted previously in its *Tenth Report of the 44th Parliament*, the right to strike, including picketing activities, is protected under the right to freedom of association.² As noted by the committee in *Practice Note 1* international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights defined in *Human Rights (Parliamentary Scrutiny) Act 2011*. The Committee notes that ILO standards and jurisprudence are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. ILO supervisory bodies have indicated that the right to strike may be limited on the basis of acute national emergencies, the provision of essential services or in the case of violence.³ The ILO Committee of Experts on the Application of Conventions and Recommendations has specifically stated that 'restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful.'⁴ With respect to picketing, the committee notes that the proposed measures go substantially beyond this kind of limitation.

2.7 The committee further notes that Australia already has in place substantial regulation of industrial action under the *Fair Work Act 2009* and the *Competition and Consumer Act 2010* which goes beyond what UN supervisory bodies have considered permissible for the purposes of the right to freedom of association.⁵ In addition to the proposed prohibition on picketing activity, the committee notes that the bill also seeks to introduce other measures that may further limit the right to strike including those measures contained in proposed sections 8, 48 and 49.

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- 2 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (August 2014) 52; See, eg. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2314863 (accessed 5 August 2014).
 - 3 See, ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth edition, 2006, [547]-[563], [570 – 594].
 - 4 ILO, *General Survey on freedom of association and collective bargaining*, 1994 [174].
 - 5 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (August 2014) p. 54; See, eg. ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:314188 (accessed 5 August 2014).

2.8 The committee therefore considers, based on the information provided, that the prohibition on picketing, and the further restrictions on industrial action, are incompatible with the right to freedom of association and the right to form and join trade unions.

Right to freedom of assembly and freedom of expression

2.9 The committee does not consider that the minister's response demonstrates that the limitations on the right to freedom of assembly and freedom of expression have been sufficiently justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

2.10 The committee notes that the minister's response makes a general reference to the need for the measure due to 'appalling unlawful behaviour that takes place in this [the construction] industry.' Such statements of a generalised nature do not substantially assist the committee in providing a reasoned and evidence based assessment of the human rights compatibility of the measure. It is not a sufficient justification of a limitation on human rights to merely refer to the unlawfulness of conduct (including industrial action or strikes)⁶ under Australian domestic law;⁷ evidence and detailed analysis is required, to show why the limitation is necessary.

2.11 The committee notes that the minister's response identifies another objective of the legislation as being to prevent economic loss. However, there is no consideration by the minister of whether less restrictive measures would support this aim. The committee is concerned that proposed section 47 has potentially very broad application and therefore may lack the requisite degree of proportionality. The committee notes that the section may capture protest activities which incorporate pickets as a form of action, and that to do so goes beyond the legitimate aim of the

6 See, for example, UN Committee on Economic Social and Cultural Rights, Concluding Observations on Australia, E/C.12/AUS/CO/4, 12 June 2009, p. 5: 'The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8). The Committee recommends that the State party continue its efforts to improve the realization of workers rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87 . In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action and consider amending the Fair Work Act. 2009.'

7 See Vienna Convention on the Law of Treaties of 1969, article 27 (a state cannot use the provisions of its own law or deficiencies in that law to answer a claim against it for breaching its obligations under international law).

legislation.⁸ As previously noted by the committee in its *Tenth Report of the 44th Parliament*, protest activities are already regulated under civil and criminal laws relating to protest actions.⁹

2.12 The committee therefore considers, based on the information provided, that the prohibition on picketing is likely to be incompatible with the right to freedom of assembly and the right to freedom of expression.

Right to privacy

Disclosure of information

2.13 The committee sought the further advice of the Minister as to whether the proposed override provisions in proposed sections 61(7) and 105 are compatible with the right to privacy, and particularly:

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

Minister's response

In relation to sections 61(7) and 105 of the Bill, the Committee has sought additional information on 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. The Committee has indicated that it is not satisfied that my response in respect of section 61(7) and 105 demonstrated the need for these provisions.

The legitimate objective of these sections is to grant the Australian Building and Construction Commission sufficient powers and functions to effectively regulate those aspects of the building and construction industry in respect of which the Bill makes the Australian Building and Construction Commission responsible.

Regarding the rational connection between the limitation and the legitimate objective, these provisions (along with the majority of the Bill) are based on the findings of the Cole Royal Commission. This Commission

8 For example, the 'green bans' was an environmental campaign initiated by the Builders' and Labourers' Federation (BLF) that is now credited with saving large parts of Sydney from overdevelopment including areas such as the Rocks and Centennial Park. The builders labourers refused to work on projects in this campaign which they considered were environmentally or socially undesirable.

9 See, for example, *Crimes Act 1900 (NSW) s 5445C* (which sets out the offence of unlawful assembly); *Summary Offences Act 1988 (NSW) s 6* (which sets out the offence of obstruction of people or traffic). See, also, *Competition and Consumer Act 2010, s45D*, *Maritime Union of Australia and oths v Patrick Stedores Operations Pty Ltd and Anor [1998] VICSC*.

undertook an exhaustive investigation into the conduct of parties in the building and construction industry. As a result of its investigations, the Cole Royal Commission produced 23 volumes of findings and 212 recommendations. Rarely has a more thorough investigation of a sector of the Australian economy been undertaken.

Volume II of the Cole Royal Commission gave extensive consideration to the steps that would be needed to achieve cultural change in the building and construction industry. One of the primary recommendations was for the establishment of the Australian Building and Construction Commission. This stemmed from the wide variety of laws and regulators that played a role in the building and construction industry but whose areas of responsibility did not allow for an adequate focus on the industry, or the regulators were hindered by their lack of expertise in dealing with industrial matters in the building and construction industry.¹⁰ Given the wide variety of actors in this field, it would be important for the regulator to operate cooperatively and constructively with other Commonwealth and state agencies.¹¹

In considering the role of an Australian Building and Construction Commission in achieving cultural change in the industry, the Cole Royal Commission noted that:

*The ABCC can be expected to become aware of contraventions of the law within the industry in various ways... Many of the submissions received by the Commissioner suggested that the ABCC should be a 'one stop shop' to which anyone complaining of misconduct in the industry could have resort. I consider that these submissions have merit. This does not necessarily mean that every complaint which is received must be dealt with by ABCC staff. It may be that, depending on the nature of the complaint, there is another agency which might more appropriately respond.*¹²

To do this, it is essential for the Australian Building and Construction Commission to have the ability to share information with other Commonwealth, state and territory agencies in carrying out the functions and powers provided to it by the Bill. It is also essential that the Australian Building and Construction Commission's ability to obtain and share information is not unnecessarily delayed or hindered by uncertainty about whether other laws dealing with secrecy or privacy provisions prevent the disclosure of relevant information when the Bill contains its own protections regarding the use and disclosure of such information.¹³

10 Volume 11, page 27.

11 Volume 11, page 30.

12 Volume 11, p. 31.

13 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith (dated 23 September 2014) 2-3.

Committee's response

2.14 The committee thanks the minister for his response.

2.15 However, with respect to proposed section 61(7), the minister's response does not demonstrate that the coercive information gathering powers need to override *any* other law that prohibits the disclosure of information. While noting that the response refers to the general purposes of the ABCC, these general purposes do not provide sufficient justification of the specific need to override other Australian privacy laws. The committee further notes that no information is provided as to whether less restrictive measures would have been sufficient. It appears to the Committee, therefore, that section 61(7) is not a proportionate means of achieving the legislative aim, and so is an impermissible limit in human right terms on the right to privacy.

2.16 With respect to proposed section 105, which allows disclosure of information to third parties, the minister's response says only that it is 'essential' that the ABCC have the ability to share information without being 'unnecessarily delayed or hindered' by other privacy law. The committee considers that this general information with no specific and detailed analysis does not provide sufficient justification for the limitation on the right to privacy.

2.17 The committee therefore considers, based on the information provided, that proposed sections 61(7) and 105 are incompatible with the right to privacy.

Migration Legislation Amendment Bill (No. 1) 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 27 March 2014

Purpose

2.18 The Migration Legislation Amendment Bill (No.1) 2014 (the bill) consists of six Schedules of amendments to the *Migration Act 1958* (Migration Act) and the *Australian Citizenship Act 2007*. Key changes include:

- amending the existing limitations on applying for a further visa under sections 48, 48A and 501E of the Migration Act to include situations where the first visa applications was made on behalf of a non-citizen, even if the non-citizen did not know of, or did not understand, the nature of the application due to a mental impairment or because they were a minor (Schedule 1);
- providing that a bridging visa application is not an impediment to removal under subsection 198(5) (Schedule 2);
- extending debt recovery provisions for detention costs to all convicted people smugglers and illegal foreign fishers (Schedule 3);
- amending the role of authorised recipients for visa applicants; and the Migration Review Tribunal and Refugee Review Tribunal's obligation to give documents to authorised recipients (Schedule 4);
- providing access to, and use of, material and information obtained under a search warrant in migration and citizenship decisions (Schedule 5); and
- amending the procedural fairness provisions that apply to visa applicants (Schedule 6).¹

Background

2.19 The committee reported on the bill in its *Seventh Report of the 44th Parliament* (June 2014), and subsequently in its *Tenth Report of the 44th Parliament* (August 2014).

2.20 The bill passed both Houses of Parliament and received Royal Assent on 24 September 2014.

1 Explanatory memorandum (EM) 2.

Committee view on compatibility

Right to equality and non-discrimination

Extension of liability for detention and removal costs

2.21 The committee sought the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination on the grounds of race or ethnicity.

Minister's response

As acknowledged in my response to the Committee's comments in its Seventh Report, the amendments to section 262 in the bill are concerned with the conviction of a people smuggler or foreign fisher of an offence against a law in force in Australia. They are not connected with a person's race or ethnicity, or with any other personal characteristic, but only with offences that they have been convicted of. This is evidenced by the fact that proposed paragraphs 262(1)(a), (b) and (ba) are worded specifically to apply to a person who is, or has been, detained under section 189, was on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against the Migration Act or against a prescribed law in force in the Commonwealth or in a State or Territory, being a law relating to the control of fishing, and is convicted of the offence. The amendments are not inconsistent with the rights to equality and non-discrimination on the grounds of race or ethnicity, and do not amount to either direct or indirect discrimination.²

Committee's response

2.22 **The committee thanks the minister for his response.**

2.23 The committee is concerned that the response indicates a misunderstanding of Australia's obligations under international human rights law with respect to equality and non-discrimination.

2.24 The committee notes that the UN Human Rights Committee has set out in General Comment No 18 more information on the interpretation of discrimination and equality including:

...the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the **purpose or effect**

2 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 19 September 2014) 3.

of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³

2.25 Accordingly, discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Importantly:

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁴

2.26 The committee notes the minister's advice that the measures are not connected with a person's race or ethnicity, or with any other personal characteristic, but only with offences on that they have been convicted. The committee agrees that the measures are not directly discriminatory.

2.27 Nevertheless, while the measures appear neutral on their face, the committee remains concerned that they may have a greater impact on particular groups based on their ethnicity.

2.28 Accordingly, based on the information provided, the committee considers the measures in Schedule 3 of the bill are incompatible with the rights to equality and non-discrimination.

3 UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, 3 (emphasis added).

4 UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, 3.

Appendix 1


Correspondence



**SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA**

23 SEP 2014

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

Dear Senator 

Thank you for your letter of 26 August 2014, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Building and Construction Industry (Improving Productivity) Bill 2013.

The Building and Construction Industry (Improving Productivity) Bill 2013 seeks to deliver on the Government's election commitment to re-establish the Australian Building and Construction Commission.

A detailed response to the questions posed by the Parliamentary Joint Committee on Human Rights is enclosed, and I trust this response satisfies any remaining concerns of the Parliamentary Joint Committee on Human Rights.

I also note that this bill and predecessor legislation have been the subject of over a dozen inquiries by various Parliamentary Committees and other bodies over a number of years which have considered similar issues to those your Committee has again recently considered. This has included reviews in 2003, 2004, 2006, 2008, 2009, 2011, 2012, 2013 and, of course, more than one review in 2014.

Should the Parliamentary Joint Committee on Human Rights require further information, please contact my office on (02) 6277 7320.

Yours sincerely

ERIC ABETZ

Encl.

Building and Construction Industry (Improving Productivity) Bill 2013

Please find below responses to each of the Parliamentary Joint Committee on Human Rights' requests for further information

Prohibition on picketing and restrictions on industrial action - Right to freedom of association and right to form and join trade unions

The Committee has sought my further advice on the proposed prohibition on picketing and restrictions on industrial action and whether these measures are compatible with the right to freedom of assembly and expression and the right to freedom of expression. The Bill will not prevent lawful peaceful assembly.

The Bill's statement of compatibility with human rights and my previous response to the Committee clearly explains the over-arching objective of the Bill—to restore respect for the rule of law in the building and construction industry—and thoroughly sets out the rational connection between the limitations contained in the Bill and this objective.

Existing laws do not adequately regulate the appalling unlawful behaviour that takes place in this industry. The proposed picketing provision will provide a statutory basis for the Australian Building and Construction Commission or directly affected persons to make application to a Court of competent jurisdiction in respect of those engaging in unlawful action, as defined in the Bill; action like that of the CFMEU at the Myer Emporium site in August 2012 which went far beyond an exercise of a right to peaceful assembly and proactively restricted the right of persons to access or leave certain building sites.

In that case, the affected party (Grocon Pty Ltd) took strong and decisive action to seek to enforce and protect its rights. Despite obtaining interlocutory injunctive relief from the Supreme Court of Victoria, the CFMEU-organised conduct continued and ultimately resulted in findings of criminal contempt against the CFMEU. Note, however, that the affected party's underlying substantive claim for compensation for the economic harm inflicted by the conduct is yet to be considered or determined by the Court. There are industry participants who are not able to withstand the economic harm caused by this type of action and do not have the resources to seek and pursue legal remedies to which they are entitled. Some industry participants are also particularly vulnerable to threats of further picketing action should they seek to exercise their rights. Related to the example given above, are allegations made by a contractor to Grocon Pty Ltd that it has suffered retribution from the CFMEU because it sought to protect its interests and exercise its lawful rights (the contractor, Boral Limited, has since commenced its own civil proceedings and its Chief Executive Officer was separately called to give evidence in respect of this circumstance to the Royal Commission into Trade Union Corruption). Whilst noting these matters are still before the Courts and the Royal Commission, if proven, this case is a powerful illustrative example of the practical realities facing the building and construction industry.

Further, section 47 will provide a statutory remedy against defined unlawful picketing which can be pursued by an independent Commonwealth regulator on behalf of affected parties. Whilst directly affected parties are able to make application under the Bill, only very few have the economic resources to enforce their legal remedies and some parties may not seek to pursue legal remedies for fear of future reprisals. Allowing the independent government regulator in the Australian Building and Construction Commission to make application to a Court against parties who engage in unlawful picketing will act as a disincentive to those to who engage in unlawful behaviour and will change the culture of the industry for the better.

Right to privacy – disclosure of information

In relation to sections 61(7) and 105 of the Bill, the Committee has sought additional information on 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. The Committee has indicated that it is not satisfied that my response in respect of section 61(7) and 105 demonstrated the need for these provisions.

The legitimate objective of these sections is to grant the Australian Building and Construction Commission sufficient powers and functions to effectively regulate those aspects of the building and construction industry in respect of which the Bill makes the Australian Building and Construction Commission responsible.

Regarding the rational connection between the limitation and the legitimate objective, these provisions (along with the majority of the Bill) are based on the findings of the Cole Royal Commission. This Commission undertook an exhaustive investigation into the conduct of parties in the building and construction industry. As a result of its investigations, the Cole Royal Commission produced 23 volumes of findings and 212 recommendations. Rarely has a more thorough investigation of a sector of the Australian economy been undertaken.

Volume 11 of the Cole Royal Commission gave extensive consideration to the steps that would be needed to achieve cultural change in the building and construction industry. One of the primary recommendations was for the establishment of the Australian Building and Construction Commission. This stemmed from the wide variety of laws and regulators that played a role in the building and construction industry but whose areas of responsibility did not allow for an adequate focus on the industry, or the regulators were hindered by their lack of expertise in dealing with industrial matters in the building and construction industry.¹ Given the wide variety of actors in this field, it would be important for the regulator to operate cooperatively and constructively with other Commonwealth and state agencies.²

In considering the role of an Australian Building and Construction Commission in achieving cultural change in the industry, the Cole Royal Commission noted that:

The ABCC can be expected to become aware of contraventions of the law within the industry in various ways... Many of the submissions received by the Commissioner suggested that the ABCC should be a 'one stop shop' to which anyone complaining of misconduct in the industry could have resort. I consider that these submissions have merit. This does not necessarily mean that every complaint which is received must be dealt with by ABCC staff. It may be that, depending on the nature of the complaint, there is another agency which might more appropriately respond.³

To do this, it is essential for the Australian Building and Construction Commission to have the ability to share information with other Commonwealth, state and territory agencies in carrying out the functions and powers provided to it by the Bill. It is also essential that the Australian Building and Construction Commission's ability to obtain and share information is not unnecessarily delayed or hindered by uncertainty about whether other laws dealing with secrecy or privacy provisions prevent the disclosure of relevant information when the Bill contains its own protections regarding the use and disclosure of such information.

¹ Volume 11, page 27

² Volume 11, page 30

³ Volume 11, p. 31



**SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA**

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

22 SEP 2014

Dear Senator Smith *Dean,*

Thank you for your letter of 26 August 2014 requesting advice in relation to the Parliamentary Joint Committee on Human Rights' review of the Commonwealth Cleaning Services Guidelines Repeal Instrument 2014. From the outset, I note that this instrument is not a disallowable instrument.

The repeal of the Commonwealth Cleaning Services Guidelines (Guidelines) has no relevance to wages and conditions for workers in the industry as a whole. The Guidelines were an internal purchasing policy that only applied to some buildings occupied by some Australian Government agencies. There were only ever around 25 to 30 cleaning contracts influenced by the Guidelines across Australia, covering less than one per cent of employees in the industry, Australia-wide.

It was not the Guidelines but Australia's workplace relations laws, including the modern award system, that provide for fair and decent wages and strong safeguards for all cleaners, no matter where they work. Government intervention in this matter by the previous Government was effectively a vote of no confidence in the Fair Work Commission which sets the wages for all workers, including through the Cleaning Services Award 2010. In fulfilling this role, the Fair Work Commission sets fair and decent wages based on a range of economic factors in the *Fair Work Act 2009*. This includes taking into account the relative living standards of the low paid and the need to encourage enterprise bargaining. If anything, the former Government set a very dangerous precedent by having the Minister of the day seeking to set wages and conditions in a particular sector. I note that these wages and conditions were essentially the same as those contained in the preferred enterprise agreement of the United Voice union.

For the less than one per cent of employees in the industry that are actually working under contracts covered by the Guidelines, there will not be a pay cut. The terms and conditions of all current cleaning contracts, and enterprise agreements that stipulate rates of pay and conditions, will continue to apply. Importantly, enterprise agreements can only be made with a majority of employees' consent and employees must be better off overall in comparison with the relevant award.

Cessation of the Guidelines will not preclude employers from continuing to pay their employees above award pay rates or negotiating other terms and conditions through enterprise agreements, something which also happened prior to the Guidelines. Government agencies also continue to have the flexibility to engage cleaning companies that provide above award wages and conditions—as was commonly the case prior to the existence of the Guidelines. There were at least 65 such cleaning contracts incorporating the higher pay rates prior to the commencement of the Guidelines.

It is noted that the Guidelines also required that each new employee to be covered by the Guidelines be given information about union membership by union officials. It is disappointing that the Committee has not previously considered whether this may contravene the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87).

I hope that this correspondence clarifies the facts in relation to the Commonwealth Cleaning Services Guidelines Repeal Instrument 2014.

Yours sincerely

ERIC ABETZ



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 Legislation Amendment Bill (No. 1) 2014 – Schedule 3

“Accordingly, the committee seeks the Minister for Immigration and Border Protection’s advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination on the grounds of race or ethnicity.”

As acknowledged in my response to the Committee’s comments in its Seventh Report, the amendments to section 262 in the bill are concerned with the conviction of a people smuggler or foreign fisher of an offence against a law in force in Australia. They are not connected with a person’s race or ethnicity, or with any other personal characteristic, but only with offences that they have been convicted of. This is evidenced by the fact that proposed paragraphs 262(1)(a), (b) and (ba) are worded specifically to apply to a person who is, or has been, detained under section 189, was on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against the Migration Act or against a prescribed law in force in the Commonwealth or in a State or Territory, being a law relating to the control of fishing, and is convicted of the offence. The amendments are not inconsistent with the rights to equality and non-discrimination on the grounds of race or ethnicity, and do not amount to either direct or indirect discrimination.

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 templates¹ 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 flowchart² (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 in 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. 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.