



Parliamentary Joint Committee on Human Rights

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

Bills introduced 24 – 27 November 2014

Legislative Instruments received

24 – 30 October 2014

Seventeenth Report of the 44th Parliament

December 2014

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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

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Mr Matthew Corrigan, Principal Research Officer
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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 24 to 27 November 2014 and legislative instruments received during the period 24 to 30 October 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 24 to 27 November 2014

The committee considered 17 bills, all of which were introduced with a statement of compatibility. Of these 17 bills, eight 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 nine bills.

The committee has not identified any 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 1 December 2014 include:

- Acts and Instruments (Framework Reform) Bill 2014
- ACT Government Loan Bill 2014
- Parliamentary Service Amendment Bill 2014

Legislative instruments received between 24 and 30 October 2014

The committee considered 39 legislative instruments received between 24 and 30 October 2014. All instruments tabled in this period are listed in the Journals of the Senate.¹

Of these 39 instruments, none appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate.

Responses

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

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

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 1 December 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 six bills introduced between 24 and 27 November 2014, in addition to two bills which have been previously deferred.

ACT Government Loan Bill 2014

Portfolio: Finance

Introduced: House of Representatives, 27 November 2014

Purpose

- 1.1 The ACT Government Loan Bill 2014 (the bill) seeks to:
- provide legislative authority for the entering into an agreement to make a loan to the ACT for an amount not exceeding \$1 billion, for the purpose of the ACT undertaking an asbestos remediation program and for purposes related to that program; and
 - propose an appropriation from the Consolidated Revenue Fund (CRF) of \$750 million for the loan of money to the ACT for the purposes of the above program and for purposes related to that program.

Committee view on compatibility

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

Acts and Instruments (Framework Reform) Bill 2014

Portfolio: Attorney-General

Introduced: House of Representatives, 22 October 2014

Purpose

1.3 The Acts and Instruments (Framework Reform) Bill 2014 (the bill) seeks to amend the *Legislative Instruments Act 2003* to:

- amend the short title of the Act to the *Legislation Act 2003* to reflect the consolidation of the legislative frameworks of the publication of Commonwealth Acts and the registration of Commonwealth instruments;
- clarify the definition of 'legislative instrument' and 'legislative character';
- provide that certain instruments are notifiable instruments which are registrable but not subject to parliamentary scrutiny or sunseting;
- establish the Federal Register of Legislation; and
- allow the First Parliamentary Counsel to make editorial changes to Acts and instruments in the Register.

1.4 The bill would also amend the *Acts Interpretation Act 1901* to clarify references to ministers, departments and other government authorities; and confirm the continued validity of the exercise of powers, functions and duties under Commonwealth agreements following machinery of government changes.

Committee view on compatibility

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

Australian Broadcasting Corporation Amendment (Local Content) Bill 2014

Sponsor: Senator Nick Xenophon

Introduced: Senate, 27 November 2014

Purpose

1.6 The Australian Broadcasting Corporation Amendment (Local Content) Bill 2014 (the bill) seeks to amend the *Australian Broadcasting Corporation Act 1983* to insert specific local content provisions into the Australian Broadcasting Corporation's Charter (the Charter). Under this bill, the ABC would be obligated under the Charter to have a distinct and discernible presence in each State and Territory across all platforms on which the Corporation disseminates content, including locally produced news programs.

Committee view on compatibility

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

Freedom to Marry Bill 2014

Sponsor: Senator David Leyonhjelm

Introduced: Senate, 26 November 2014

Purpose

1.8 The Freedom to Marry Bill 2014 (the bill) seeks to amend the *Marriage Act 1961* (the Act) to:

- amend the words spoken by an authorised celebrant, inserting 'two people' to replace 'a husband and wife';
- ensure that authorised celebrants who are state employees must solemnise marriages that are in accordance with the Act, including marriages that are not between a man and a woman;
- introduce an avoidance of doubt provision to ensure that the amendments will not change or affect in any way the existing conditions in the Act relating to ministers of religion, or other authorised celebrants in order to protect all claims of conscience, not being bound to solemnise marriage;
- repeal section 88EA of the Act, which prohibits the recognition of marriages between same sex couples solemnised in a foreign country;
- insert 'or partner or spouse' into the choice of words that may be spoken by each of the parties in the presence of an authorised celebrant when solemnising a marriage; and
- replace 'a brother and a sister' with 'siblings' in relation to marriages of parties within a prohibited relationship.

Committee view on compatibility

1.9 The committee notes that the Statement of Compatibility for the bill states that it does not engage human rights. However, the committee is of the view that the bill does engage a number of rights protected by the International Covenant on Civil and Political Rights (ICCPR).

1.10 Firstly, the committee considers that the bill is compatible with the right to freedom of religion as contained in article 18 of the ICCPR, as the bill allows those opposed to same-sex marriage on religious grounds (or on the grounds of conscience) to refuse to solemnise (or conduct) such marriages.

1.11 At the same time, the bill also promotes rights to equality and non-discrimination in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and the right to respect for the family in articles 23 and 17(1) of the ICCPR.

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

Parliamentary Service Amendment Bill 2014

Introduced: House of Representatives, 26 November 2014

Purpose

1.13 The Parliamentary Service Amendment Bill 2014 (the bill) seeks to amend the *Parliamentary Service Act 1999* (the Act) to provide that the Commissioner of the Australian Federal Police (AFP), or a Deputy Commissioner or a senior executive AFP employee who is nominated by the Presiding Officers, may be a member of the Security Management Board (established under section 65A of the Act). The bill would also amend the existing function of the Board to include the operation of security measures.

Committee view on compatibility

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

Regulator of Medicinal Cannabis Bill 2014

Sponsors: Senator Richard Di Natale; Senator Ian Macdonald; Senator David Leyonhjelm; Senator Anne Urquhart

Introduced: Senate, 27 November 2014

Purpose

1.15 The Regulator of Medicinal Cannabis Bill 2014 (the bill) seeks to establish a Regulator of Medicinal Cannabis to formulate rules for licensing the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis. Under this bill the Regulator would have powers to:

- monitor compliance and investigate breaches;
- approve medicinal cannabis products for inclusion in the register of regulated medicinal cannabis products; and
- regulate products included in the register under this bill, rather than under the *Therapeutic Goods Act 1989*.

Committee view on compatibility

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

Social Security and Other Legislation Amendment (Caring for Single Parents) Bill 2014

Sponsor: Senator Rachel Siewert

Introduced: House of Representatives, 22 October 2014

Purpose

1.17 The Social Security and Other Legislation Amendment (Caring for Single Parents) Bill 2014 (the bill) seeks to:

- amend the *Social Security Act 1991* to enable single parents to access the parenting payment (single) until their youngest child has turned 16 years of age;
- amend the *Social Security (Administration) Act 1999* to provide for payments under this Act; and
- amend the *Fair Work Act 2009* to provide for an enforceable right to request flexible work arrangements for people with caring responsibilities, including single parents.

Committee view on compatibility

1.18 The committee agrees with the Statement of Compatibility which states that the bill engages and promotes the right to social security in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the right to work under just and favourable conditions in articles 6 and 7 of the ICESCR.

1.19 The committee is of the view that the bill also engages and promotes rights to equality and non-discrimination in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights; the right to family in article 8 of the ICESCR; women's right to non-discrimination in work in article 11 of the Convention on the Elimination of All Forms of Discrimination against Women; and children's rights to family and development in articles 18 and 20 of the Convention on the Rights of the Child.

1.20 **The committee considers that the bill promotes human rights and has concluded its examination of the bill.**

Tax Laws Amendment (Tax Transparency) Bill 2014

Sponsor: Dr Andrew Leigh MP

Introduced: House of Representatives, 24 November 2014

Purpose

1.21 The Tax Laws Amendment (Tax Transparency) Bill 2014 (the bill) seeks to amend the *Tax Laws Amendment (2013 Measures No. 2) Act 2013* to bring forward to 2012-13 the requirement for the tax commissioner to publish certain tax information for corporate entities with a total income of \$100 million or more.

Committee view on compatibility

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

Deferred bills and instruments

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

Australian Citizenship and Other Legislation Amendment Bill 2014

Biosecurity Bill 2014

Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014

Fair Work Amendment (Bargaining Processes) Bill 2014

Family Tax Benefit (Tighter Income Test) Bill 2014

Federal Courts Legislation Amendment Bill 2014

Freedom of Information Amendment (New Arrangements) Bill 2014

Gambling Harm Reduction (Protecting Problem Gamblers and Other Measures) Bill 2014

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Omnibus Repeal Day (Spring 2014) Bill 2014

Quarantine Charges (Imposition—General) Amendment Bill 2014

Quarantine Charges (Imposition—Customs) Amendment Bill 2014

Quarantine Charges (Imposition—Excise) Amendment 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 1 December 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.

Social Services and Other Legislation Amendment (2014 Budget Measures No 1) Bill 2014

Portfolio: Social Services

Introduced: House of Representatives, 18 June 2014

Purpose

2.1 The Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the bill) seeks to amend various Acts relating to social security, family assistance, veterans' entitlements, military rehabilitation and compensation and farm household support. The bill would:

- cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card and the Veterans' Affairs Gold Card from 20 June 2014;
- rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014;
- pause indexation for three years of the income-free areas and assets-value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014;
- index the parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014;
- pause indexation for three years of several family tax benefit free areas from 1 July 2014;
- review disability support pension recipients under age 35 against revised impairment tables and apply the Program of Support requirements from 1 July 2014;
- limit the six-week overseas portability period for student payments from 1 October 2014;
- extend and simplify the ordinary waiting period for all working age payments from 1 October 2014; and

- pause indexation for two years of the family tax benefit Part A and family tax benefit Part B standard payment rates from 1 July 2014.

2.2 The bill would also add the Western Australian Industrial Relations Commission decision of 29 August 2013 as a pay equity decision under the *Social and Community Services Pay Equity Special Account Act 2012*, to allow payment of Commonwealth supplementation to service providers affected by that decision.

Background

2.3 The committee reported on the bill in its *Ninth Report of the 44th Parliament* and *Twelfth Report of the 44th Parliament*.

Committee view on compatibility

Right to equality and non-discrimination

Potential indirect discrimination against women

2.4 The committee sought the further advice of the minister 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.

Minister's response

The Committee is seeking further advice 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.

Consistent with my response to the Committee that I provided in July 2014, the proposed changes affect all recipients, regardless of their gender. The measures are aimed at ensuring that social security is targeted, sustainable and consistent over the long term, consistent with statements from the UN Committee on Economic, Cultural and Social Rights.

The measures will help ensure ongoing assistance is targeted to those who need it most, and the impacts are sufficiently small as to be proportionate to the objective of preserving access to the payments system over the long term.

These measures are compatible with the rights to equality and non-discrimination on the basis of gender and family responsibilities and apply irrespective of gender, reflecting a commitment to payments with no gender bias.¹

Committee response

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

2.6 The committee acknowledges that the measures apply equally to all Australians regardless of gender and, accordingly, that the measures in the bill appear neutral on their face.

¹ See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 21/10/2014) 1.

2.7 However, as previously noted, the International Covenant on Civil and Political Rights 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

2.8 As discrimination may arise indirectly as well as directly, the committee reiterates its concern that the measures in the bill may have a greater impact on women than men because women are more likely to be recipients of social security, and particularly of payments provided to the primary caregiver of children.

2.9 In this respect, the committee notes that the minister's advice that the measures do not directly discriminate against women does not address the issue of indirect discrimination raised by the committee. In particular, the response does not provide any information as to the potentially disproportionate effect of the measures on women, and how any such disproportionate effect may be regarded as permissible in human rights terms (that is, may be regarded as reasonable, necessary and proportionate).

2.10 Based on the information provided, the committee therefore considers that the measure may be indirectly discriminatory on the basis of having a disproportionate impact on women. On this basis, the committee considers that the measure may be incompatible with the right to equality and non-discrimination.

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].

Dissenting Report

1.1 The Committee has concluded that measures contained in *The Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014* may be incompatible with the human right to equality and non-discrimination.

1.2 We disagree with these findings and, in particular, we have concerns with the blunt and inconsistent application of the indirect discrimination test in the Committee's report.

1.3 The Committee has concluded that the bill may be incompatible with human rights because payments provided to the primary caregiver of children are likely to have a greater impact on women than men. Yet, the Committee did not raise any concerns in regards to how parts of the bill may have a greater impact on men than women. For example, the bill makes changes that affect disability support pension recipients under the age of 35 and, on the logic employed by the Committee, these could be argued to discriminate against men. There are a larger number of male recipients of the disability pension in this age group (and indeed for the DSP overall) than women. For people on the DSP aged under 35, there were 44 per cent more men than women, or around half as many again, in 2013.¹

1.4 In our view, this inconsistent treatment shows the perils of relying too heavily on a pure interpretation of the indirect discrimination test. There are unlikely to be many changes to government policy (and especially social security) that affect all parts of society equally.

1.5 While indirect discrimination is a consideration when evaluating human rights issues, it must be balanced against the proportionate, necessity and reasonableness of any change. In our view, the Committee has failed to adequately examine this balance.

1.6 The Committee was most concerned by the changes that make the Consumer Price Index as the sole escalator for the parenting payment rather than benchmarking the payment to Male Total Average Weekly Earnings. This change will still allow payments to maintain their purchasing power relative to wider inflationary pressures. On this basis, such a change therefore would appear to sit well within the bounds of what is a reasonable, necessary and proportionate policy measure given the Government's broader commitment to ensure the sustainability of the welfare system.

¹ In June 2013, over 81,100 of the 137,300 persons in receipt of the DSP under the age of 35 were male, compared with only 56,200 females. (Australian Government Department of Social Services 2013, *Characteristics of Disability Support Pension Recipients*, June.)

1.7 The Committee based its finding on the Minister's alleged lack of explanation in response to the Committee's request for further advice as to whether the measures in the bill are compatible with the rights to equality and non-discrimination. In our view, the Minister has explained that the measure is a proportionate and appropriate means of addressing the need to maintain a sustainable welfare system for the community.

1.8 In fact the Minister states:

The measures are aimed at ensuring that social security is targeted, sustainable and consistent over the long term, consistent with statements from the UN Committee on Economic, Cultural and Social Rights.

The measures will help ensure ongoing assistance is targeted to those who need it most, **and the impacts are sufficiently small as to be proportionate to the objective of preserving access to the payments system over the long term.**²
[emphasis added]

1.9 In summary then, while we acknowledge that the Minister could have provided a more extensive discussion of potential indirect impacts on the basis of gender, we cannot support the Committee's strong conclusion that the measure may be incompatible with the right to equality and non-discrimination.

Senator Matthew Canavan
Committee Member

Dr David Gillespie MP
Committee Member

² See Appendix 1, Letter from the Hon. Kevin Andrews MP, Minister for Social Services, to Senator Dean Smith (dated 21/10/2014).

Appendix 1

Correspondence



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MC14-011987

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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Dear Senator Smith *Dean*,

Thank you for your letter of 23 September 2014 about the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014*.

I have noted the comments in the Committee's *Twelfth Report of the 44th Parliament* and have provided my response to these comments in the enclosed document.

Thank you again for writing.

Yours sincerely *KA*

KEVIN ANDREWS MP

Encl.

21 OCT 2014

Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought further advice from the Minister for Social Services on whether measures included in the Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 are compatible with rights to equality and non-discrimination on the basis of gender and family responsibilities.

This document provides a response to the Committee's request for advice on compatibility of the measures with those rights.

Right to equality and non-discrimination

Potential indirect discrimination against women

All Schedules

1.182 The committee requested the Minister for Social Services' advice on the compatibility of each schedule in the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

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

1.183 The committee thanks the Minister for Social Services for his response.

1.186 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.

1.187 The committee notes the minister's advice that the measures affect all recipients, regardless of their gender. While the measures therefore appear neutral on their face the committee remains concerned that they may have a greater impact on women than men, as women are more likely to be recipients of social security and, particularly payments provided to the primary caregiver of children.

1.188 Accordingly, the committee seeks the further advice of the minister 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.

The Committee is seeking further advice 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.

Consistent with my response to the Committee that I provided in July 2014, the proposed changes affect all recipients, regardless of their gender. The measures are aimed at ensuring that social security is targeted, sustainable and consistent over the long term, consistent with statements from the UN Committee on Economic, Cultural and Social Rights.

The measures will help ensure ongoing assistance is targeted to those who need it most, and the impacts are sufficiently small as to be proportionate to the objective of preserving access to the payments system over the long term.

These measures are compatible with the rights to equality and non-discrimination on the basis of gender and family responsibilities and apply irrespective of gender, reflecting a commitment to payments with no gender bias.

Appendix 2

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role>

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

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This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, [522]* (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that civil penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

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

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

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

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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