Parliamentary Joint Committee on Human Rights

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

Bills introduced 17 – 20 March 2014

Legislative Instruments received
1 – 7 March 2014

Fifth Report of the 44th Parliament

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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.

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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
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

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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 17 to 20 March 2014 and legislative instruments received during the period 1 to 7 March 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 17 to 20 March 2014

The committee considered 22 bills, all of which were introduced with a statement of compatibility. Of these 22 bills, 13 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 three bills.

The committee has identified six 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 24 March 2014 include:

- Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014;
- Clean Energy Finance Corporation (Abolition) Bill 2013 [No.2];
- Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Bill 2014;
- Marriage (Celebrant Registration Charge) Bill 2014 and Marriage Amendment (Celebrant Administration and Fees) Bill 2014; and
- Omnibus Repeal Day (Autumn 2014) Bill 2014.

Legislative instruments received between 1 and 7 March 2014

The committee considered 42 legislative instruments received between 1 and 7 March 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 42 instruments, 40 do not appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. The committee has decided to seek further information from the relevant Minister in relation to one of the two remaining instruments before forming a view about its compatibility with human rights.[1] The committee notes that a statement of compatibility was not provided for this instrument as it is exempt from the statement of compatibility

1 See Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026, pp 49-52.

requirement under the *Human Rights (Parliamentary Scrutiny) Act 2011*. The committee has consistently regarded the preparation of a statement of compatibility for exempt instruments, particularly where they involve limitations on human rights, as a best-practice approach. In relation to the second remaining instrument, the committee has taken the opportunity to draw the relevant Minister's attention to the committee's views with regard to national cooperative schemes of legislation.[2]

Responses

The committee has considered seven responses relating to matters raised in relation to bills and legislative instruments in previous reports. Of these, the responses relating to two bills and two instruments appear to have adequately addressed the committee's concerns.[3]

The committee retains concerns and/or has sought further information or the inclusion of safeguards in relation to two bills and one instrument. The committee will write again to the relevant Ministers in relation to these matters.

Senator Dean Smith
Chair

2 See Marine Order 503 (Certificates of survey — national law) Amendment 2014 (No. 1), pp 47-48.

3 See Australian Jobs (Australian Industry Participation) Rule 2014, pp 71-74, Higher Education (Maximum Amounts for Other Grants) Determination 2013, pp 75-80, Social Security Legislation Amendment (Green Army Programme) Bill 2014, pp 81-86, and Tertiary Education Quality and Standards Agency Amendment Bill 2014, pp 87-90.

Part 1

Bills introduced
17 – 20 March 2014

Bills requiring further information to determine human rights compatibility

Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014

Portfolio: Social Services
Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.1 The committee is unable to assess the human rights compatibility of the bill until it is able to assess the arrangements that will be put in place following the repeal of the Australian Charities and Not-for-profits Commission (the Commission).

Overview

1.2 The Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 (the bill) is the first of two bills intended to implement the Government's election commitment to repeal the Commission. The explanatory memorandum for the bill states that the repeal of the Commission is intended to remove unnecessary regulatory control over the civil sector.[1]

1.3 The Commission is established under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act), and commenced operation on 3 December 2012. Registration as a charity by the Commission is required before an organisation can receive charity tax concessions and other Commonwealth exemptions and benefits from the Australian Taxation Office.

1.4 The bill will repeal the Act, thereby abolishing the Commission. However, the explanatory memorandum for the bill notes that this will not take effect until the enactment of a second bill, which will provide the details of the arrangements replacing the Commission.[2]

Compatibility with human rights

Statement of compatibility

1.5 The bill is accompanied by a statement of compatibility which states that:

1 Explanatory memorandum, p 1.

2 Explanatory memorandum, p 1.

> The Bill does not in and of itself engage any human right, given that the Commission and existing arrangements will continue until enactment of a later Bill outlining replacement arrangements for the Commission. Human rights implications will be discussed in detail in the statement of compatibility for the second Bill.[3]

Committee view on compatibility

1.6 The committee notes the conclusion that the bill does not engage human rights at this stage due to the fact that the repeal of the Commission will not occur until the enactment of a subsequent bill, in which any replacement arrangements for the Commission will be contained. The committee considers that it is unable to assess the human rights compatibility of this bill at this stage.

1.7 However, the committee notes that it will assess the human rights compatibility of the measure to repeal the Commission in its consideration of the subsequent bill and the details of the arrangements replacing the Commission.

3 Statement of compatibility, p 1.

Independent National Security Legislation Monitor Repeal Bill 2014

Portfolio: Prime Minister
Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.8 The committee seeks further information on the types of mechanisms and measures that the government considers will provide continued coverage of the Independent National Security Legislation Monitor's mandate of ensuring that Australia's counter-terrorism and national security legislation are compatible with human rights.

1.9 The committee also seeks information about the stage at which the government's consideration of the recommendations made by the Monitor during his period of appointment has reached, in particular those recommendations relating to the human rights concerns identified by the Monitor.

Overview

1.10 This bill seeks to repeal the *Independent National Security Legislation Monitor Act 2010* (the INSLM Act) and accordingly to abolish the Office of the Independent National Security Legislation Monitor.

Compatibility with human rights

Statement of compatibility

1.11 The bill is accompanied by a statement of compatibility which states that the bill does not engage any human rights. The statement states that '[t]he Monitor's role is not mandated by the relevant international human rights obligations subject to scrutiny under the *Human Rights (Parliamentary Scrutiny) Act 2011*'. Accordingly, '[t]he bill is compatible with human rights as it does not raise any human rights issues'.

Committee view on compatibility

1.12 The INSLM Act was introduced in 2010 for the purpose of establishing a Monitor to review the operation, effectiveness and implications of counter-terrorism and national security legislation[1] and to report his or her comments, findings and recommendations to the Prime Minister, and in turn Parliament, on an annual basis.[2]

1.13 In doing so, the Monitor must, among other things, assist Ministers to ensure that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations, including human rights obligations.[3] According to the explanatory memorandum which accompanied the 2010 bill, these include, for example, Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4]

1.14 In particular, the Monitor's functions require consideration of whether counter-terrorism and national security legislation:

- contains appropriate safeguards for protecting the rights of individuals;
- remains proportionate to any threat of terrorism or threat to national security or both; and
- remains necessary.[5]

1.15 To date, the Monitor has provided three annual reports for the government's consideration. According to the explanatory memorandum accompanying this bill, a fourth and final report from the Monitor is expected in April 2014.

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1 See the definition of 'counter-terrorism and national security legislation' in section 4 of the *Independent National Security Legislation Monitor Act 2010 (*INSLM Act).

2 The institution was modelled on the United Kingdom's Office of the Independent Reviewer of Terrorism Laws, which has a history dating back to the 1970s and was placed on a statutory basis in 2005: David Anderson QC, *The Terrorism Acts in 2012, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (July 2013).

3 INSLM Act, section 3(c) and section 8.

4 Explanatory Memorandum to the 2010 bill, p 6.

5 INSLM Act, section 6(1)(b).

Effective oversight

1.16 The committee notes that Australia's counter-terrorism and national security laws contain a range of coercive and invasive powers, including, for example, Australian Security and Intelligence Organisation questioning warrants and questioning and detention warrants, control orders, and preventative detention orders.[6] These laws have implications for a range of human rights, including: freedom from arbitrary detention;[7] the right to a fair trial (and the minimum guaranteed protections therein);[8] the right to privacy;[9] freedom of movement;[10] freedom of expression;[11] freedom of association;[12] protection of the family, including children's rights;[13] and the right to equality and non-discrimination.[14]

1.17 These rights are not absolute and can be limited where the limitation seeks to achieve a legitimate objective, where there is a rational connection between the limitation and the objective, and where the limitation is proportionate to that objective.

1.18 The committee considers that a key safeguard in ensuring that the limitations placed on human rights by Australia's counter-terrorism and national security legislation are reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security is independent oversight of such laws, including a body with the mandate of ensuring that such laws remain so.

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6 The UN Human Rights Committee has previously raised concerns about the compatibility of Australia's counter-terrorism and national security legislation with the International Covenant on Civil and Political Rights (ICCPR), see 'Concluding Observations of the Human Rights Committee: Australia', CCPR/C/AUS/CO/5, 2 April 2009, para 11 and 'List of issues prior to the submission of the sixth periodic report of Australia' (CCPR/C/AUS/6), adopted by the committee at its 106th session (15 October-2 November 2012)', CCPR/C/AUS/Q/6, 9 November 2012.

7 Article 9 of the ICCPR.

8 Article 14 of the ICCPR.

9 Article 17 of the ICCPR.

10 Article 12 of the ICCPR.

11 Article 19 of the ICCPR.

12 Article 22 of the ICCPR.

13 Articles 17 and 23 of the ICCPR; articles 3(1) and 37 of the Convention on the Rights of the Child.

14 Article 26 of the ICCPR.

1.19 This is supported by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, who has stated that an effective system of oversight must include at least one civilian organization that is independent of both the intelligence services and the executive.[15]

1.20 According to the statement of compatibility accompanying the bill:

> Australia has a comprehensive range of standing and ad hoc oversight and accountability measures already in place. These measures include existing independent oversight bodies such as Parliamentary Committees, and executive powers to appoint ad hoc reviews. Comprehensive oversight of relevant counter-terrorism and national security legislation will remain despite this repeal.

1.21 The committee intends to write to the Prime Minister to seek clarification on the types of mechanisms and measures that the government considers will continue to ensure that Australia's counter-terrorism and national security legislation contains appropriate safeguards, remains proportionate to any threat of terrorism or threat to national security or both, and remains necessary, in the absence of the Monitor.

Monitor's recommendations past and future

1.22 As set out above, the Monitor has thus far released three reports, with a fourth report to be released in April 2014. The first report set out a list of issues for consideration over the three-year period for which the Monitor was appointed.[16] The Monitor also set out the approach he intended to take to his mandate. In particular, the Monitor stated:

> The ICCPR should be to the forefront of the INSLM's task in assessing the appropriateness of the CT Laws because it protects rights, freedoms and immunities considered to have universal value, because it pronounces that protection in specific terms, and because it recognizes and requires civilized balances where individual freedoms and social aims may be in tension.[17]

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15 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight', A/HRC/14/46, 17 May 2010, pp 8-10.

16 Independent National Security Legislation Monitor Annual Report (16 December 2011): A consolidated list of issues for consideration is set out in Appendix 3.

17 Independent National Security Legislation Monitor Annual Report (16 December 2011), pp 18-24.

1.23 The Monitor's second report focussed on reviewing 'the extraordinary powers contained in Australia's CT Laws' and 'the definition of terrorism, which in the CT Laws comprises the statutory meaning of "terrorist act" stipulated in sec 100.1 of the *Criminal Code Act 1995* (Cth)'.[18] The Monitor made 21 recommendations. In summary, the Monitor concluded:

- control orders in their present form are not effective, not appropriate and not necessary – but they may be effective, appropriate and necessary if limited to persons already convicted of terrorist offences whose dangerousness at the expiry of their sentences of imprisonment can be shown;
- preventive detention orders are not effective, not appropriate and not necessary and should be abolished;
- questioning warrants are sufficiently effective to be appropriate, and in a relevant sense necessary and could be made more readily available than the current legislation provides – rejecting the criticism that such warrants are an unjustified infringement of liberty;
- questioning and detention warrants are an unnecessary extension of questioning warrants and detention is appropriately comprehended within provisions relating to questioning warrants; and
- improvements to Australia's definition of terrorism are needed.[19]

1.24 The Monitor's third report covered the issues for consideration set out in the Monitor's first report but which were not considered in his second report. The Monitor made 30 recommendations, relating to:

- enhancing powers in the *Charter of the United Nations Act 1945*;[20]
- streamlining the system of listing, designation and prescription of terrorist organisations with respect to existing terrorism financing offences in the Criminal Code;
- changes to the design of Criminal Code offences concerning associating with terrorist organisations; and
- changes to provisions relating to national security information under the *National Security Information (Criminal and Civil Proceedings) Act 2004*.[21]

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18 Independent National Security Legislation Monitor Annual Report (20 December 2012), p 1.

19 Independent National Security Legislation Monitor Annual Report (20 December 2012), see a consolidated list of recommendations in Appendix A.

20 The committee has raised concerns about the human rights implications of powers under the *Charter of the United Nations Act 1945* and the *Autonomous Sanctions Act 2011*: see PJCHR, *Seventh Report of 2013*, June 2013, pp 47-49 and *Tenth Report of 2013*, June 2013, pp 13-16.

1.25 According to the explanatory memorandum accompanying the bill:

> Together these four reports are expected to cover the extensive list of key issues in Australian national security laws that the Monitor indicated, in his first annual report, would be considered and reviewed during his term. … The Government considers the best way forward is to work through the large number of recommendations made by the Monitor, and to continue engaging with the extensive range of existing independent oversight bodies, including the Inspector-General of Intelligence and Security, Parliamentary Committees, and the Parliament itself.

1.26 The committee intends to write to the Prime Minister to request that the Prime Minister provide the committee with information about the stage at which the government's consideration of the recommendations made by the Monitor has reached, particularly those recommendations which were made on the basis of concerns about the compatibility of existing measures with Australia's international human rights obligations.

21 Independent National Security Legislation Monitor Annual Report (7 November 2013), see consolidated list of recommendations at Appendix A.

Omnibus Repeal Day (Autumn 2014) Bill 2014

Portfolio: Prime Minister
Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.27 The committee seeks further information on the compatibility of the bill with human rights.

Overview

1.28 The explanatory memorandum for the Omnibus Repeal Day (Autumn 2014) Bill 2014 states that it is introduced as part of a whole-of-government initiative to amend or repeal legislation across ten portfolios. The explanatory memorandum notes that the bill includes measures intended to reduce the regulatory burden for business, individuals and the community sector, such as measures to:

- streamline reporting and information provision requirements for telecommunications providers under the *Competition and Consumer Act 2010*;
- remove the certification requirement under the *Aged Care Act 1997* that replicates state, territory and local government building regulations; and
- exempt low-volume importers from the licensing requirements of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.[1]

1.29 The bill also seeks to repeal redundant and spent Acts and provisions in Commonwealth Acts. For example, the bill would repeal the following Acts:

- the *Construction Industry Reform and Development Act 1992*, which established two bodies to promote and facilitate reform of the construction industry; one of these bodies was abolished in 1995 and there are no current members on the other; and
- the *Commonwealth and State Housing Agreement (Service Personnel) Act 1990*, which provided for the transfer of property between the Commonwealth and individual States following the creation of the Defence Housing Authority in 1988 and is now spent.

1 Explanatory memorandum, p 1.

1.30 The explanatory memorandum notes that, in conjunction with the Statute Law Revision Bill (No. 1) 2014 and the Amending Acts 1901 to 1969 Repeal Bill 2014, the bill would repeal over 1000 Commonwealth Acts.

Compatibility with human rights

Statement of compatibility

1.31 The statement of compatibility for the bill identifies the following rights as engaged by the bill:

- the right to water,[2] via the repeal of section 255AA of the *Water Act 2007* (the Water Act); and
- the right to an adequate standard of living,[3] via the repeal of a number of housing assistance funding framework Acts (now replaced by agreements made under the *Federal Financial Relations Act 2009*); and
- the right to an adequate standard of living and the right to health,[4] via the repeal of certification requirements under the *Aged Care Act 1997*, relating to building, equipment and residential care service standards.

1.32 The statement of compatibility assesses these measures as not resulting in any limitation of the rights engaged, and concludes that the bill is therefore compatible with human rights.

Committee view on compatibility

Right to water - repeal of section 255AA of the Water Act 2007

1.33 The statement of compatibility notes that the UN Committee on Economic, Social and Cultural Rights has interpreted the right to an adequate standard of living and the right to health as including a human right to water, which encompasses an entitlement to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[5]

1.6 The committee notes that the right to water may be subject to such limitations 'as are determined by law only in so far as this may be compatible with the nature of … [that right] and solely for the purpose of promoting the general welfare in a democratic society'. Where a measure may limit a right, the committee's

2 Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3 Article 11 of the ICESCR.

4 Articles 11 and 12 of the ICESCR.

5 Statement of compatibility, p 2.

assessment of the measure's compatibility with human rights is based on three key questions: whether the limitation is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective and whether the limitation is proportionate to that objective.

1.34 The statement of compatibility notes that the Water Act engages the right to water through providing the framework for access to sufficient, safe, acceptable and physically accessible water, and particularly through provisions relating to critical human water needs and water quality.[6] The statement of compatibility identifies the following as key relevant elements of the framework:

- water resource plan requirements under the Basin Plan which regulate types of interception that may have a significant impact on water resources within the Murray-Darling Basin; and
- the establishment of the Independent Expert Scientific Committee (IESC) and the inclusion of water resources as a matter of national environmental significance (under the *Environment Protection and Biodiversity Conservation Act 1999* to ensure that actions likely to have significant impacts on water resources are referred, studied and considered under the EPBC Act regime.[7]

1.35 The bill seeks to repeal section 255AA of the Water Act, which relates to 'mitigation of unintended diversions'. Section 255AA provides:

> Prior to licences being granted for subsidence mining operations on floodplains that have underlying groundwater systems forming part of the Murray‑Darling system inflows, an independent expert study must be undertaken to determine the impacts of the proposed mining operations on the connectivity of groundwater systems, surface water and groundwater flows and water quality.

1.36 The statement of compatibility states that the repeal of section 255AA will 'not affect the overall framework of the [Water] Act'.

1.37 However, the committee notes that, to the extent that the removal of the requirement for independent expert study of the impacts of proposed mining operations may increase the risk of unintended diversions or adverse impacts in relation to groundwater systems, surface water and groundwater flows and water quality, the proposed measure may result in a limitation to the right to water.

6 Statement of compatibility, p 2.

7 Statement of compatibility, p 2.

1.38 The committee intends to write to the Parliamentary Secretary to the Prime Minister to seek clarification as to whether the proposed repeal of section 255AA of the Water Act may limit the right to water and, if so:

- **whether the limitation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

Right to an adequate standard of living and the right to health - removal of Aged Care Act 1997 certification requirements

1.39 As noted above, the bill seeks to repeal certification requirements under the *Aged Care Act 1997* (Aged Care Act), relating to building, equipment and residential care service standards. The statement of compatibility states:

> Certification requirements are being repealed because the requirements replicate, in part, the building regulations administered by State and Territory authorities. Insofar as certification takes into account the standard of the residential care being provided by the service, this requirement replicates the monitoring of the service's compliance with the Accreditation Standards by the Australian Aged Care Quality Agency, which will not be affected by the repeal of the certification requirements.[8]

1.40 The committee notes that the proposed repeal of the Aged Care Act certification standards is due to their 'in-part' replication of State and Territory building regulations. However, the explanatory memorandum and statement of compatibility provide no information on what certification standards are not replicated in those regulations, and which, if removed, may result in a reduction in the coverage or quality of residential care service standards.

1.41 The committee intends to write to the Parliamentary Secretary to the Prime Minister to seek his advice as to which of the Aged Care Act standards are not replicated in current State and Territory building regulations, and the compatibility of the repeal of any such standards with the right to an adequate standard of living and the right to work.

8 Statement of compatibility, p 3.

Paid Parental Leave Amendment Bill 2014

Portfolio: Small Business
Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.42 The committee seeks further information on the compatibility of the measure to remove the requirement for employers to provide government-funded parental leave pay with the right to social security, the right to just and favourable conditions of work and the right to equality and non-discrimination.

Overview

1.43 The bill seeks to amend the *Paid Parental Leave Act 2010* (the Act) to remove the requirement for employers to provide government-funded parental leave pay to their eligible long-term employees. Instead, from 1 July 2014, employees would be paid directly by the Department of Human Services (DHS), unless an employer opted in to providing parental leave pay to its employees and an employee agreed for their employer to pay them.

Compatibility with human rights

Statement of compatibility

1.44 The statement of compatibility for the bill states that, while the Paid Parental Leave Scheme engages the right to social security, the measures in the bill are 'limited to administrative arrangements for delivering parental leave pay to customers';[1] and concludes that, as such, the amendments do not engage any human rights.

Committee view on compatibility

Right to social security, including protection of the family and the right to just and favourable conditions of work

1.45 Paid Parental Leave payments are available to persons, whether male or female, who are the primary carer for a newborn child or recently adopted child, provided they satisfy certain work, means and other criteria. This is usually the birth mother of a newborn or the initial primary carer of an adopted child.[2]

1 Statement of compatibility, p 1.

2 Department of Human Services website, 'Eligibility for Parental Leave Pay' (as at 24 March 2014).

1.46 Article 9 of International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

> The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

1.47 In addition, and of relevance to this bill, Article 10 of the ICESCR states that:

> Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

1.48 The committee notes that, in addition to the right to social security, the bill engages the right to work and the right to just and favourable conditions of work.[3] This is because the benefits paid under the scheme are linked to participation in the paid labour force.[4] The right to the enjoyment of just and favourable conditions of work is guaranteed by Article 7 of the ICESCR.[5]

1.49 The bill also engages the obligations to take measures to support the family generally,[6] and the rights of children in relation to family life.[7]

1.50 The committee notes that the right to social security and the right to just and favourable conditions of work are not absolute, and that the rights may therefore be subject to limitations. Article 4 of ICESCR provides that permissible limitations are those that are 'determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. Where a measure may limit a right, the committee's assessment of the measure's compatibility with human rights is based on three key questions: whether the limitation is aimed at achieving a legitimate objective,

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3 Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also articles 5 and 11 of the Convention on the Elimination of All Forms of Discrimination against Women.

4 Department of Human Services website, 'Eligibility for Parental Leave Pay' (as at 24 March 2014).

5 The UN Committee on Economic, Social and Cultural Rights has commented that article 7 of the ICECSR requires States parties to take steps to 'reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.' *General comment No 16* (2005) (The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)), para 24.

6 Article 10 of the ICESCR; and articles 23 and 24 of the International Covenant on Civil and Political Rights.

7 Article 8 of the Convention on the Rights of the Child.

whether there is a rational connection between the limitation and that objective and whether the limitation is proportionate to that objective.[8]

1.51 The Regulation Impact Statement included with the explanatory memorandum for the bill notes that the removal of the mandatory employer role may impact on employees with salary sacrifice arrangements in place. It notes that:

> Where … [an employee's] employer is administering the … [parental leave] payment, these salary sacrifice arrangements are able to continue and so the employee's tax liability would continue to be calculated on a lower salary. However, as DHS does not offer salary sacrifice deduction functionality, an employee's tax liability could increase if the mandatory employer role is removed and their employer does not opt back in. This may be a particular issue for employees in the not-for-profit sector. This impact is not a compliance cost, but is an impact on the after-tax income a person may receive, dependent on an employee's income and the level of salary sacrificed under the arrangement.

1.52 The committee notes that, to the extent that the measure may result in reduced after-tax income for employees with salary sacrifice arrangements in place, the removal of the requirement for employers to provide government-funded parental leave pay may result in a limitation of the right to social security.

1.53 The committee therefore intends to write to the Minister for Small Business to seek clarification as to whether the removal of the requirement for employers to provide government-funded parental leave pay may limit the right to social security and the right to just and favourable conditions of work and, if so:

- **whether the limitation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

Right to equality and non-discrimination

1.54 Article 2(2) of the ICESCR guarantees the right to non-discrimination in the enjoyment of economic, social and cultural rights. Article 2(2) prohibits any direct[9] or indirect[10] discrimination, whether in law or fact, on prohibited grounds, including

8 See PJCHR, *Practice Note 1*. See also, PJCHR, *Annual Report 2012-2013* ('The committee's analytical framework'), pp 14-15.

9 Direct discrimination occurs where a person is subject to less favourable treatment than others in a similar situation because of a particular characteristic.

10 Indirect discrimination occurs where apparently neutral criteria are applied to make decisions but which have a disproportionate impact on persons who share a particular characteristic.

sex, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.[11] The right to non-discrimination is also recognised in a number of other international human rights treaties.[12]

1.55 A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it is (i) aimed a achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

1.56 The committee notes that the statement of compatibility for the bill does not address the question of whether the bill's potential to result in reduced after-tax income for employees with salary sacrifice arrangements may indirectly discriminate against women, given that the majority of paid parental leave recipients may be women.

1.57 The committee notes that the assessment sought above in relation to the right to social security will also be relevant to this analysis. Further, the committee considers that, to the extent the measure is found to be compatible with the right to social security, it is also likely to be consistent with the right to non-discrimination.

1.58 The committee intends to write to the Minister for Small Business to seek further information as to whether the bill is compatible with the right to equality and non-discrimination.

11 See Committee on Economic, Social and Cultural Rights General Comment No. 19 (2008), para 29.

12 International Covenant on Civil and Political Rights, International Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Rights of the Child, Convention on the Elimination of all forms of Racial Discrimination Against Women, Convention on the Rights of Persons with Disabilities.

Regulatory Powers (Standard Provisions) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 20 March 2014

Summary of committee concerns

1.59 The committee notes that this bill has been re-introduced as a result of the lapsing of the Regulatory Powers (Standard Provisions) Bill 2012 (the 2012 Bill) at the end of the 43rd Parliament.

1.60 The committee notes and welcomes the two main changes between the 2012 bill and the current bill, including the removal of the ability of the provisions of the bill to be triggered by regulation and the inclusion of explicit protection for the privilege against self-incrimination and legal professional privilege.

1.61 The committee re-iterates its previous conclusion in relation to the 2012 bill that a final assessment of the compatibility of the application of the standard provisions in the bill to a specific regulatory scheme will need to be made in the context of that particular bill.

Overview

1.62 This bill seeks to establish a framework of standard regulatory powers exercised by Commonwealth agencies. The bill does not itself grant agencies any powers, but must be triggered by another Commonwealth Act which expressly applies the relevant provisions and specifies other requisite information, such as the persons who are authorised to exercise the applicable powers.

1.63 The new framework provides for monitoring and investigation powers that are designed to be used by an agency to determine compliance with provisions of the triggering legislation. The bill also provides for the use of civil penalties, infringement notices and injunctions to enforce provisions and the acceptance and enforcement of undertakings relating to compliance with provisions.

1.64 The explanatory memorandum accompanying the bill notes that, once enacted, new Acts that require monitoring, investigation or enforcement powers will be drafted to trigger the relevant provisions of the bill. Further, over time, existing regulatory schemes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the bill.[1]

1 Explanatory Memorandum, p 2.

Compatibility with human rights

Previous consideration by the committee

1.65 The committee considered the 2012 bill in its *Sixth Report of 2012*.[2] The committee noted that the statement of compatibility accompanying the bill did not appear to meet the committee's expectations as it did not provide sufficient detail about the operation of the individual provisions and how these may impact on human rights. The committee wrote to the then Attorney-General to seek further clarification on how the specific entry, monitoring, search, seizure and information gathering powers in the bill are likely to impact on the right to privacy. The committee also considered that the creation of the infringement notice scheme was unlikely to raise issues of inconsistency with the right to a fair hearing and trial.

1.66 The committee considered the response of the then Attorney-General in its *Tenth Report of 2013*.[3] The committee thanked the Attorney-General for his response. The committee noted that the nature of the legislation was that some or all of its provisions must be triggered by another bill applying selected provisions to the operation of that regulatory scheme. Accordingly, the committee shared the Attorney-General's view that a final assessment of the compatibility of a specific application of the standard provisions will need to be made in the context of a particular bill.[4] In particular, the committee noted that the bill contained a number of civil penalty provisions and that an assessment of whether a particular civil penalty should be classified as 'criminal' for the purposes of human rights law will only be able to be made in the context of the particular regime to which it is applied.

Statement of compatibility

1.67 The statement of compatibility accompanying the bill emphasises that the human rights implications of the bill will differ in each circumstance where the framework contained in this bill is triggered in relation to a particular regulator scheme. It notes that further consideration will need to be given to these implications each time a bill proposes to apply parts of this bill. However, the statement identifies that the bill in and of itself engages the right to privacy[5] and the right to a fair trial.[6]

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2 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2012*, pp 22-24.

3 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013*, pp 97-98.

4 See, for example, Parliamentary Joint Committee on Human Rights, *First Report of 2013*, paras 1.201-1.215 and *Fifth Report of 2013*, p 57 (comments on the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012).

5 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

6 Article 14 of the ICCPR.

1.68 The committee notes that the statement of compatibility contains a considerable amount of additional detail in relation to the operation of the provisions of the bill and their impact on human rights as compared to the statement of compatibility accompanying the 2012 bill.

1.69 The committee expresses its appreciation to the Attorney-General for ensuring that the statement of compatibility complies with the committee's expectation that, where the committee has raised concerns in relation to a statement of compatibility or measures in a bill, any subsequent re-introduction of the same or substantially the same measures is accompanied by a statement of compatibility addressing the committee's previously identified concerns.[7]

Committee view on compatibility

1.70 The committee notes that this bill largely replicates the 2012 bill, with two main exceptions.

1.71 Firstly, the 2012 bill enabled the standard provisions in the bill to apply to a particular regulatory scheme by way of regulation. The current bill before the committee has been amended to remove this power. Accordingly, the provisions of the bill must be triggered through primary legislation.[8] The explanatory memorandum accompanying the bill states that:

> This will mean that any future legislation that proposes to trigger provisions in this Bill will be introduced and scrutinised by Parliament. An assessment of human rights engagement and compatibility will need to be undertaken in the context of each regulatory scheme and the particular provisions of this Bill that have been triggered. The Explanatory Memorandum to each Bill should clearly set out the relevant agency's current regulatory powers, a comparison with the powers in the Regulatory Powers Bill that will be triggered, and in the case of any expansion of the agency's powers, a detailed explanation of the reasons for the expansion of powers.[9]

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7 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, p 6, para 1.18.

8 See, for example, proposed new section 98 of the bill. The committee notes this change was recommended by the Senate Legal and Constitutional Affairs Legislation Committee in its examination of the 2012 bill: *Regulatory Powers (Standard Provisions) Bill 2012 [Provisions]*, March 2013.

9 Explanatory memorandum, p 2.

1.72 The committee welcomes this requirement and considers that it will result in better and more informed parliamentary scrutiny of the human rights implications of the application of the framework provisions of the bill to particular legislative schemes.

1.73 Secondly, the current bill before the committee includes explicit protection of the privilege against self-incrimination and legal professional privilege. Accordingly, these protections will be afforded with respect to the wide range of regulatory schemes to which the provisions of the bill may be applied.

1.74 The committee welcomes these additions and considers that the additional provisions further promote the right to a fair trial.[10]

1.75 The committee re-iterates its previous conclusion in relation to the 2012 bill that a final assessment of the compatibility of a specific application of the standard provisions will need to be made in the context of a particular triggering bill.

1.76 The committee notes it is unable to conclude that the measures in this bill are compatible with human rights until such an assessment occurs in relation to the specific scheme to which the provisions of the bill are applied.

10 Article 14(3) of the ICCPR.

Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.77 The committee seeks further information on the compatibility of the changes to the Comcare licensing scheme with the right to social security and the right to enjoy just and favourable conditions of work.

Overview

1.78 The Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 seeks to make a number of amendments to the *Safety, Rehabilitation and Compensation Act 1988* (the Act). The explanatory memorandum for the bill states that the amendments are intended to reduce the cost of the regulatory burden on the economy by implementing recommendations of the 2012 Review of the *Safety, Rehabilitation and Compensation Act 1988* (the Review).[1] The bill will amend the Act to:

- remove the requirement for the Minister to declare a corporation to be eligible to be granted a licence for self-insurance, while retaining the ability for the Minister to give directions to the Safety, Rehabilitation and Compensation Commission (the Commission);
- enable corporations currently required to meet workers' compensation obligations under two or more workers' compensation laws of a State or Territory to apply to the Commission to join the Comcare scheme (the 'national employer' test);
- allow a Commonwealth authority that ceases to be a Commonwealth authority to apply directly to the Commission for approval to be a self-insurer in the Comcare scheme and be granted a group licence if the former Commonwealth authority meets the national employer test;
- enable the Commission to grant group licences to related corporations;
- make consequential changes to extend the coverage provisions of the *Work Health and Safety Act 2011* to those corporations that obtain a licence to self-insure under the Act; and

1 See Department of Employment website, 'Safety, Rehabilitation and Compensation Act Review', https://employment.gov.au/safety-rehabilitation-and-compensation-act-review-0, accessed 21 March 2014.

- exclude access to workers' compensation where:
  - injuries occur during recess breaks away from an employer's premises; or
  - a person engages in serious and wilful misconduct, even if the injury results in death or serious and permanent impairment.

Compatibility with human rights

Statement of compatibility

1.79 The statement of compatibility for the bill states that it engages the following rights: the right to social security, including social insurance;[2] the right to work, in particular the rights of persons with disabilities to habilitation and rehabilitation and to work and employment;[3] the right to safe and healthy working conditions;[4] and the right to privacy.[5]

Committee view on compatibility

Right to social security

1.80 Article 9 of ICESCR states that:

> 'States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'.

1.81 The statement of compatibility notes that General Comment 19 by the UN Committee on Economic, Social and Cultural Rights elaborates on article 9, stating that the 'States parties should … ensure the protection of workers who are injured in the course of employment or other productive work'.[6]

Changes to the licensing system

1.82 The committee notes that the right to social security may be subject to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general

2 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3 Article 6 of the ICESCR, articles 26 and 27 of the Convention on the Rights of Persons with Disabilities.

4 Article 7 of the ICESCR.

5 Article 17 of the International Covenant on Civil and Political Rights.

6 Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17].

welfare in a democratic society'.[7] Where a measure may limit a right, the committee's assessment of the measure's compatibility with human rights is based on three key questions: whether the limitation is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective and whether the limitation is proportionate to that objective.[8]

1.83 The statement of compatibility notes that, if passed, the bill will have the effect of expanding and changing the eligibility criteria for licensing under the Act, which will bring more employers, and therefore employees, under the (Commonwealth) Comcare scheme. Any such employees will therefore be moving from the relevant State or Territory workers' compensation legislation to the coverage of the Commonwealth legislation. The statement of compatibility notes that, due to 'small variations' between the State or Territory schemes and the Commonwealth scheme, including in the quantum of payments, eligibility criteria and claims processes, employees moving to the Commonwealth scheme may receive a 'different amount of compensation' than they would have under their previous State or Territory scheme.[9]

1.84 On the basis that the schemes in all jurisdictions are 'designed to provide injured workers with fair, timely and appropriate compensation and rehabilitation', the statement of compatibility concludes that that any 'minor variations' in compensation amounts 'are not considered to impact on the human right to social security'.[10]

1.85 However, the committee notes that, to the extent that 'minor variations' in compensation amounts might reduce the amount of compensation being received by an injured worker, such variations may represent a limitation on the right to social security and the right to enjoy just and favourable conditions of work.

1.86 The committee further notes that the proposed changes to licensing measures include a proposal to allow multi-state employers to access a single jurisdiction worker's compensation scheme. To the extent that this proposal would allow a multi-state employer to move from a State or Territory scheme to the Commonwealth scheme, the committee notes that 'minor variations' to compensation amounts could also arise (and hence represent a limitation on the right to social security as set out above).

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7 Article 4 of the ICESCR.

8 See Parliamentary Joint Committee on Human Rights (PJCHR), *Practice Note 1*. See also PJCHR, *Annual Report 2012-2013* ('The committee's analytical framework'), pp 14-15.

9 Statement of compatibility, p ii.

10 Statement of compatibility, p iii.

1.87 The committee therefore intends to write to the Minister for Employment to seek clarification as to whether the proposed changes to the licensing system may limit the right to social security and the right to enjoy just and favourable conditions of work and, if so:

- **whether the limitation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

Bills unlikely to raise human rights concerns

Amending Acts 1901 to 1969 Repeal Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 19 March 2014

1.88 The bill is intended to repeal a number of amending and repeal Acts. The explanatory memorandum for the bill states that it will amend 'over 1000' Acts,[1] and that the repeal of the Acts will not substantially alter existing arrangements or make any change to the substance of the law.

1.89 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[2]

1.90 The committee considers that the bill does not appear to give rise to human rights concerns.

1 Explanatory memorandum, p. 2.

2 Statement of compatibility, p. 1.

Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 19 March 2014

1.91 This bill seeks to amend the *Classification (Publication, Films and Computer Games) Act 1995* (the Classification Act). It also seeks to make consequential amendments to the *Broadcasting Services Act 1992*.

1.92 The bill proposes a range of amendments to implement a number of reforms based on recommendations of the Australian Law Reform Commission's review of the National Classification Scheme.[3] These include amendments to:

- broaden the scope of existing exempt film categories and provide greater flexibility for certain films to be exempt from classification requirements;
- simplify the regulatory requirements for festivals and cultural institutions by removing the need to apply to the Director for a formal exemption from classification requirements;
- enable certain content to be classified using classification tools (such as online questionnaires that deliver automated decisions);
- create an explicit requirement in the Classification Act to display classification markings on all classified content;
- expand the exceptions to the modifications rule so that films and computer games which are subject to certain types of modifications do not require classification again;
- enable the Attorney-General's Department to notify law enforcement authorities of potential Refused Classification content without having the content classified first, to help expedite the removal of extremely offensive or illegal content from distribution; and
- make minor amendments to the Classification Act to improve clarity, address anomalies and enhance administrative efficiency.

3 Australian Law Reform Commission, Final Report, *Classification – Content Regulation and Convergent Media* (ALRC Report 118), tabled 1 March 2012.

1.93 The bill is accompanied by a statement of compatibility which states that the bill engages: the right to freedom of expression;[4] the promotion of the best interests of the child;[5] the right of the child to access information and material from a diversity of national and international sources;[6] the obligation to render appropriate assistance to parents or legal guardians in the performance of their child rearing responsibilities;[7] the obligation to protect children from all forms of sexual exploitation and sexual abuse, including pornographic performances and materials;[8] the right to education;[9] and the right to culture.[10]

1.94 The committee considers that the bill does not appear to give rise to human rights concerns.

4 Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and article 13 of the Convention on the Rights of the Child (CRC).

5 Article 3 of the CRC.

6 Article 17 of the CRC.

7 Article 18(2) of the CRC.

8 Article 34(c) of the CRC.

9 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

10 Article 15 of the ICESCR and article 27 of the ICCPR.

Clean Energy Finance Corporation (Abolition) Bill 2013 [No. 2]

Portfolio: Treasury
Introduced: House of Representatives, 20 March 2014

1.95 This bill proposes to repeal the *Clean Energy Finance Corporation Act 2012* (CEFC Act). The bill seeks to give effect to the government's commitment to abolish the Clean Energy Finance Corporation (CEFC) and will transfer the existing contractual assets and liabilities of the CEFC to the Commonwealth to hold and manage.

1.96 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[11]

1.97 The committee considered an identical bill in its First Report of the 44th Parliament.[12]

1.98 The committee considers that this bill does not appear to give rise to human rights concerns.

11 Statement of compatibility, p 1.

12 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, p 11.

Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Bill 2014

Portfolio: Veteran's Affairs
Introduced: House of Representatives, 20 March 2014

1.99 This bill proposes to amends the *Defence Forces Retirement Benefits Act 1948* and the *Defence Force Retirement and Death Benefits Act 1973* to provide a different pension indexation regime to apply from 1 July 2014 for those Defence Forces Retirement Benefits (DFRB) and Defence Force Retirement and Death Benefits (DFRDB) pensioners who are age 55 or older on either 1 January or 1 July when pensions are indexed.

1.100 The bill is accompanied by a statement of compatibility which states that bill engages a range of human rights, including the right to equality and non-discrimination;[13] the right to social security;[14] the right to an adequate standard of living;[15] and rights in work.[16] The statement of compatibility notes that:

> Pensions paid to pensioners under age 55 will continue to be indexed in line with positive movements in the consumer price index. There will be no reduction in the benefits paid to pensioners aged under 55. They will get the benefit of the new indexation arrangements when they reach age 55.[17]

1.101 The committee considers that the bill does not appear to give rise to human rights concerns.

13 Article 26 of the International Covenant on Civil and Political Rights.

14 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

15 Article 11 of the ICESCR.

16 Article 7 of the ICESCR.

17 Statement of compatibility, p 4.

End Cruel Cosmetics Bill 2014

Sponsor: Senator Rhiannon
Introduced: Senate, 18 March 2014

1.102 This bill amends Part 3B of the *Industrial Chemicals (Notification and Assessment) Act 1989* to prohibit developing, manufacturing, selling, advertising or importing into Australia cosmetics, or ingredients for cosmetics, which have been tested on live animals.[18] The bill does not extend to substances that are animal-tested for use in medicines or other non-cosmetic uses, to therapeutic goods or to prescribed substances.[19]

1.103 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[20] The statement of compatibility adds that the bill does not limit the right to health as it does not impact on medical research and 'only applies to substances that are cosmetics or are developed, manufactured, sold or imported for use as ingredients or components in cosmetics.'[21]

1.104 The committee considers that the bill does not appear to give rise to human rights concerns.

18 Explanatory memorandum, p 2.

19 Explanatory memorandum, p 2.

20 Statement of compatibility, p 6.

21 Statement of compatibility, p 6.

Environment Protection and Biodiversity Conservation Amendment Bill 2014

Sponsor: Senator Ludwig
Introduced: Senate, 18 March 2014

1.105 This bill proposes to amend the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) to repeal the sunset provision in section 390SM of that Act. This will enable the Minister to establish an independent expert panel to conduct an assessment of the potential environmental impacts of a declared commercial fishing activity and to prohibit the declared commercial fishing activity while the assessment is undertaken. The amendments restore to the Minister the powers contained within Chapter 5B of the EPBC Act.

1.106 The powers contained within Chapter 5B of the EPBC Act enable the Minister, with the agreement of the Minister administering the *Fisheries Management Act 1991*, to declare a commercial fishing activity to be a 'declared commercial fishing activity' on an interim basis or for a period of up to 24 months where satisfied of certain criteria. The provisions also create civil penalty and offence provisions for engaging in a declared commercial fishing activity.

Previous consideration by the committee

1.107 The relevant provisions of Part 15B of Chapter 5B of the EPBC Act were included in the EPBC Act by the *Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Act 2012*. The bill for that Act (the 2012 bill)[22] was passed with amendments by the Parliament and received Royal Assent on 19 September 2012.

1.108 The committee considered the 2012 bill in its *Third Report of 2012*,[23] taking into account the amendments that were made. The committee noted that the amendments to the bill did not appear to give rise to any human rights concerns, but noted that it would 'generally be good practice to provide a compatibility assessment

22 The bill was introduced as the Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Bill 2012. Following an amendment to the title and other substantive amendments to the bill, a revised explanatory memorandum was provided, along with a number of supplementary explanatory memoranda. The statement of compatibility contained in the explanatory memorandum to the bill and that contained in the revised explanatory memorandum, are identical.

23 Parliamentary Joint Committee on Human Rights (PJCHR), *Third Report of 2012*, 19 September 2012.

for amendments where practicable and particularly where the amendments could give rise to human rights concerns.'[24]

1.109 The committee wrote to the then Minister for Sustainability, Water, Population and Communities in relation to the strict liability offence created by new section 390SB and the possible penalty of up to 7 years' imprisonment for this offence. The committee asked whether it would be appropriate, given the severity of the penalty, for a defence other than the defence of mistake of fact to be available in relation to this offence.[25] The committee also sought clarification as to whether the matters covered by the bill may be considered to fall within the right to a fair hearing under article 14(1) of the ICCPR and, if so, what review rights were available to affected individuals seeking to challenge a declaration or any decisions following from a declaration.[26]

1.110 The then Minister for Sustainability, Water, Population and Communities responded to the committee in a letter of 17 December 2012,[27] providing information in response to the committee's inquiries. The committee thanked the then Minister for his response and made no further comment on the bill.[28]

Statement of compatibility

1.111 This bill is accompanied by a self-contained statement of compatibility. The statement of compatibility reflects the contents of a revised explanatory memorandum prepared in relation to the 2012 bill. While the statement of compatibility does not include the additional explanation contained in the former Minister's letter to the committee clarifying why only the defence of mistake of fact should be available under section 390SB, it does contain an explanation of the review rights that may be available to a person affected by a declaration under the legislation which reflects the former Minister's response to the committee on that issue.

1.112 The restoration of the powers of the Minister under Chapter 5B of the EPBC Act and the operation of the associated provisions does not appear to raise any additional human rights issues to those already considered by the committee in its examination of the 2012 bill.

1.113 The committee expresses its appreciation to Senator Ludwig for ensuring that the statement of compatibility complies with the committee's expectation

24 PJCHR, *Third Report of 2012*, 19 September 2012, p 10, para 1.31.

25 PJCHR, *Third Report of 2012*, 19 September 2012, p 11, para 1.38.

26 PJCHR, *Third Report of 2012*, 19 September 2012, pp 1-12, paras 1.39-1.40.

27 PJCHR, *First Report of 2013*, 6 February 2013, pp 136-137.

28 PJCHR, *First Report of 2013*, 6 February 2013, p 135.

that, where the committee has raised concerns in relation to particular measures in a bill, any subsequent reintroduction of the same or substantially the same measure is accompanied by a statement of compatibility addressing the committee's previously identified concerns.[29] The committee notes it would have been helpful if the statement of compatibility had also addressed the issue of defences available under section 390SB as previously raised by the committee.

1.114 The committee considers that the bill does not appear to give rise to human rights concerns.

29 PJCHR, *Fourth Report of the 44th Parliament*, March 2014, p 6, para 1.18.

Intellectual Property Laws Amendment Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 19 March 2014

1.115 This bill proposes to amend various intellectual property laws. A similar bill was introduced into the Parliament in May 2013, but the legislation was not passed prior to the Parliament being prorogued.

1.116 Schedules 1 and 2 amends *Patents Act 1990* to implement the Protocol amending the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property to enable Australian pharmaceutical manufacturers to obtain a licence from the Federal Court to make generic versions of patented medicines and to export these medicines to countries with a demonstrated need.

1.117 Schedule 3 amends the *Plant Breeder's Rights Act 1994* to enable the owners of plant breeder's rights in a plant variety with the option to take action in the Federal Circuit Court against alleged infringers.

1.118 Schedule 4 provides for single application and examination processes for trans-Tasman patents. It also provides for a single trans-Tasman patent attorney regime which will include common qualifications for registration as a patent attorney, a single trans-Tasman IP Attorneys Board and a single trans-Tasman IP Attorneys Disciplinary Tribunal.

1.119 Schedule 5 makes a number of minor administrative amendments to the *Patents Act 1990*, *Trade Marks Act 1995* and the *Designs Act 2003*, including repealing document retention provisions which are already governed by the *Archives Act 1983*.

1.120 The bill is accompanied by a statement of compatibility that discusses the bill's engagement with the right to health[30] and the right to privacy,[31] and concludes that the bill is compatible with human rights.

1.121 The committee agrees that the proposed measures to enable the export of generic versions of patented medicines to developing countries that are experiencing serious public health issues and that have no capacity to manufacture the medicines or purchase them in the normal manner is likely to promote the right to health.

1.122 The committee considers that the information sharing provisions in Schedule 4 appear to be suitably circumscribed and do not appear to give rise to

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

31 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

issues of inconsistency with the right to privacy. The committee notes that it had commented on these provisions in its report on the original bill and requested clarification about available safeguards for protecting personal information that is disclosed to officials in New Zealand.[32]

1.123 The committee expresses its appreciation to the Minister for Industry for ensuring that the statement of compatibility for this bill complies with the committee's expectation that, where the committee has raised concerns in relation to particular measures in a bill, any subsequent reintroduction of the same or substantially the same measure is accompanied by a statement of compatibility addressing the committee's previously identified concerns.[33]

1.124 The committee notes that the proposed single Trans-Tasman patent attorney regime which will provide for a single set of standards for the accreditation, registration and discipline of patent attorneys in both Australia and New Zealand appear to be consistent with the right to work,[34] the right to non-discrimination,[35] and the right to a fair hearing.[36]

1.125 The committee considers that the bill does not appear to give rise to human rights concerns.

32 Parliamentary Joint Committee on Human Rights (PJCHR), *Eight Report of 2013*, 19 June 2013, pp 7-8. See also, PJCHR, *Tenth Report of 2013*, 27 June 2013, pp 123-125.

33 PJCHR, *Fourth Report of the 44th Parliament*, March 2014, p 6, para 1.18.

34 Article 6 of the ICESCR.

35 Article 26 of the ICCPR.

36 Article 14(1) of the ICCPR.

Marriage (Celebrant Registration Charge) Bill 2014

Marriage Amendment (Celebrant Administration and Fees) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 20 March 2014

1.126 The *Marriage Act 1961* establishes three categories of celebrants who are authorised to solemnise marriages under Australian law:

- Ministers of religion of a recognised denomination, proclaimed under section 26 of the Act, who are nominated by their denomination and registered and regulated by state and territory registries of births, deaths and marriages.
- State and territory officers who are authorised to perform marriages as part of their duties and are registered and regulated by state and territory registries of births, deaths and marriages, and
- Commonwealth-registered marriage celebrants who are authorised under the Marriage Celebrants Program to perform marriages. This group includes civil celebrants and celebrants who are ministers of religion whose denomination is not proclaimed under section 26 of the Act.

1.127 These two bills propose to implement a 2011-12 Budget measure to introduce cost recovery for the regulation of the third category of authorised celebrants, that is, Commonwealth-registered marriage celebrants. Similar legislation to implement these reforms was introduced into the Parliament in March 2013. However, that legislation was not passed prior to the Parliament being prorogued. These two bills essentially reintroduce the legislative authority for the government to charge Commonwealth-registered marriage celebrants an annual cost recovery levy, the celebrant registration charge.

1.128 The Marriage (Celebrant Registration Charge) Bill 2014 will impose an annual celebrant registration charge with a statutory limit of $600 for the 2014-15 financial year, and provides for indexation of the statutory limit in later financial years. The Marriage Amendment (Celebrant Administration And Fees) Bill 2014 will provide for, among other things:

- a celebrant registration charge to be imposed from 1 July 2014 on Commonwealth-registered marriage celebrants who are authorised under the Marriage Celebrants Program to perform marriages;

- the deregistration of celebrants who do not pay the celebrant registration charge or obtain an exemption; and
- the imposition of a registration application fee for prospective celebrants seeking registration.

1.129 Each bill is accompanied by a statement of compatibility which states that it engages several human rights, including the right to freedom of religion,[37] the right to equality and non-discrimination;[38] and the right to work.[39]

1.130 The committee commented on the original bills in its Sixth Report of 2013.[40] The committee considered that:

- to the extent that the measures involve a limitation on the exercise of the freedom of religion, they are a permissible limitation of that right, noting in particular the possibility for a religious marriage to follow a civil ceremony;
- to the extent that the differential treatment of ministers of religion engages the right to equality and non-discrimination, the fact that ministers of proclaimed religions are regulated by state and territory authorities is an objective and reasonable basis on which to treat the two categories of minister differently; and
- any limitation on the right to work is a reasonable and proportionate measure provided by law in pursuit of a legitimate objective and is permissible.

1.131 The committee considers that these bills do not appear to give rise to human rights concerns.

37 Article 18 of the International Covenant on Civil and Political Rights (ICCPR).

38 Article 26 of the ICCPR.

39 Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

40 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013*, 15 May 2013, pp 115-116.

Parliamentary Joint Committee on the Australia Fund Bill 2014

Sponsor: Mr Palmer
Introduced: House of Representatives, 17 March 2014

1.132 This bill proposes to establish a Parliamentary Joint Committee to investigate establishing an Australia Fund. The Australia Fund would be designed to assist in the support and reconstruction of Australian rural and manufacturing industries in times of crisis, including natural disasters, or in cases of a world financial crisis or unfair market intervention/manipulation.[41]

1.133 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[42]

1.134 The committee considers that the bill does not appear to give rise to human rights concerns.

41 Explanatory memorandum, p 2.

42 Statement of compatibility, p 4.

Personal Property Securities Amendment (Deregulatory Measures) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 19 March 2014

1.135 The bill proposes to amend the *Personal Property Securities Act 2009* (the PPS Act) so that leases of serial numbered goods of 90 days or more will no longer be deemed to be PPS leases for the purposes of the PPS Act. This is intended to simplify the deeming provisions in the PPS Act and minimise the need for small and medium hire businesses to make registrations in respect of leases of a term of less than 12 months.

1.136 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[43]

1.137 The committee considers that the bill does not appear to give rise to human rights concerns.

43 Statement of compatibility, p. 1.

Privacy Amendment (Privacy Alerts) Bill 2014

Sponsor: Senator Singh
Introduced: Senate, 20 March 2014

1.138 This bill proposes to amend the *Privacy Act 1988* to introduce a framework for the mandatory notification by regulated entities of serious data breaches to the Australian Information Commissioner and to affected individuals. The explanatory memorandum explains that:

> Mandatory data breach notification commonly refers to a legal requirement to provide notice to affected persons and the relevant regulator when certain types of personal information are accessed, obtained, used, disclosed, copied, or modified by unauthorised persons. Such unauthorised access may occur following a malicious breach of the secure storage and handling of that information (e.g. a hacker attack), an accidental loss (most commonly of IT equipment or hard copy documents), a negligent or improper disclosure of information, or otherwise.[44]

1.139 The bill seeks to give effect to a recommendation made by the Australian Law Reform Commission in 2008 for the Privacy Act to be amended to require that such notification be given.[45] This is because:

> … with advances in technology, entities were increasingly holding larger amounts of personal information in electronic form, raising the risk that a security breach around this information could result in others using the information for identity theft and identity fraud. A notification requirement on entities that suffer data breaches will allow individuals whose personal information has been compromised by a breach to take remedial steps to lessen the adverse impact that might arise from the breach. For example, the individual may wish to change passwords or take other steps to protect his or her personal information.[46]

1.140 The bill provides that, where a regulated entity has suffered a serious data breach, it must notify the individual(s) whose personal information is the subject of the breach as well as the Australian Information Commissioner. The Commissioner may also direct an entity to notify affected individuals of a serious data breach. An entity which fails to notify affected individuals engages in an interference with the privacy of an individual and the Commissioner may pursue a civil penalty against such an entity.

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44 Explanatory memorandum, p 1.

45 Explanatory memorandum, p 1. See ARLC, Report 108, *For Your Information: Australian Privacy Law and Practice*, 12 August 2008, Recommendation 51-1, p 61.

46 Explanatory memorandum, p 1.

1.141 The bill is accompanied by a statement of compatibility that states that the bill engages the right to privacy,[47] and the right to a fair trial.[48] The statement provides a helpful discussion of the relevant human rights issues and concludes that the bill promotes the right to privacy and that the imposition of civil penalties for breaching the notification requirements is consistent with the right to a fair trial.

Right to privacy

1.142 The committee agrees that the measures proposed by the bill will promote the right to privacy. The committee notes that law enforcement bodies are provided with a narrow exemption from the mandatory notification requirements where compliance would prejudice an enforcement related activity. The committee considers that any limitation of the right to privacy in these circumstances is likely to be reasonable, necessary and proportionate to a legitimate objective.

Civil penalties

1.143 The bill provides that an entity which fails to notify affected individuals of a serious data breach engages in an interference with the privacy of an individual.[49] Under the Privacy Act, interferences with the privacy of an individual may attract a civil penalty where there has been a serious or repeated interference with the privacy of an individual, with a maximum penalty of 2,000 penalty units for individuals and 10,000 penalty units for bodies corporate.

1.144 The committee has previously noted even where a penalty is described as 'civil' under national or domestic law it may nonetheless be classified as 'criminal' for the purposes of human rights law. Given that the operation of the civil penalty provisions in this instance appears in a regulatory and protective context, it is arguable that the penalties are not 'criminal' in nature. Although the penalties are large, it may be argued that they are not excessive in that they apply to regulated entities and in view of the privacy interests that are being protected. The committee considers that the civil penalties that may be imposed in the context of the proposed measures do not appear to give rise to issues of incompatibility with human rights.

1.145 The committee considers that the bill does not appear to give rise to human rights concerns.

47 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

48 Article 14 of the ICCPR.

49 Proposed new subsection 13(4A), Item 3 of Schedule 1.

Statute Law Revisions Bill (No. 1) 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 19 March 2014

1.146 This bill proposes to correct technical errors that have occurred in Acts as a result of drafting and clerical mistakes and to repeal spent and obsolete provisions and Acts.[50]

1.147 The bill is accompanied by a statement of compatibility which states that it does not engage any human rights.[51]

1.148 The committee considers that the bill does not appear to give rise to human rights concerns.

50 Explanatory memorandum, p 2.

51 Statement of compatibility, p 3.

The committee has deferred its consideration of the following bills

Agriculture and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Bill 2014

Portfolio: Agriculture
Introduced: House of Representatives, 19 March 2014

1.149 This bill proposes to amend the Agriculture and Veterinary Chemicals Code Act 1994, the Agriculture and Veterinary Chemicals Legislation Amendment Act 2013, the Agricultural and Veterinary Chemicals Products (Collection of Levy Act 1994 and the Food Standards Australia New Zealand Act 1991.[1] The bill removes the requirement for agricultural chemicals and veterinary medicines re-registration by removing end dates and last renewal dates for registrations so that approvals will no longer end after a particular period and registrations may be renewed indefinitely.[2]

1.150 The bill also introduces a number of measures relating to the Australian Pesticides and Veterinary Medicines Authority's ability to secure information and obligations to provide certain information.[3]

1.151 On 20 March 2014, the Senate referred the provisions of the bill to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 16 June 2014.[4]

1.152 The committee considers that the bill may give rise to human rights concerns. The committee notes the referral of the provisions of the bill to the Senate Rural and Regional Affairs and Transport Legislation Committee, and has deferred its consideration of the bill.

1 Explanatory memorandum, p 1.

2 Statement of compatibility, p 6.

3 Explanatory memorandum, p 1.

4 Senate Standing Committee for Selection of Bills, *Report No. 3 of 2014*, 20 March 2014.

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 19 March 2014

1.153 This bill proposes to amend the *Corporations Act 2001* to reduce compliance costs imposed on the financial services industry.[5] The bill proposes a range of measures including:

- removing the need for clients to renew their ongoing fee arrangement with their adviser every two years;
- making the requirement for advisers to provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- removing paragraph 961B(2)(g) of the *Corporations Act 2001* from the list of steps an advice provider may take in order to satisfy the best interests obligation;
- amending the best interests obligation regarding the provision of scaled advice; and
- providing a targeted exemption for general advice from the ban on conflicted remuneration in certain circumstances.[6]

1.154 On 20 March 2014, the Senate referred the provisions of the bill to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 16 June 2014.[7]

1.155 The committee considers that the bill may give rise to human rights concerns. The committee notes the referral of the provisions of the bill to the Senate Finance and Public Administration Legislation Committee, and has deferred its consideration of the bill.

5 Explanatory memorandum, p 3.

6 Explanatory memorandum, p 4.

7 Senate Standing Committee for Selection of Bills, *Report No. 3 of 2014*, 20 March 2014.

Fair Work Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Overview

1.156 The committee deferred its consideration of this bill in its *Third Report of the 44th Parliament* which tabled on 4 March 2014.[8]

1.157 This bill seeks to amend the *Fair Work Act 2009* to implement elements of the *Coalition's Policy to Improve the Fair Work Laws*, including to respond to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012) review into the operation of the Fair Work Act by the Fair Work Review Panel.

1.158 The bill proposes a range of measures, including changes to the right of entry framework, new processes relating to the negotiation of single-enterprise greenfields agreements, changes to rules around individual flexibility arrangements, and a number of other measures implementing recommendations of the Fair Work Review Panel.

1.159 On 6 March 2014, the Senate referred the provisions of the bill to the Senate Education and Employment Legislation Committee for inquiry and report by 5 June 2014.[9]

1.160 The committee considers that the bill may give rise to human rights concerns. The committee notes the referral of the provisions of the bill to the Senate Education and Employment Legislation Committee, and has deferred its consideration of the bill.

8 Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament*, p 39.

9 Senate Standing Committee for Selection of Bills, *Report No. 2 of 2014*, 6 March 2014

G20 (Safety and Security) Complementary Bill 2014

Portfolio: Justice
Introduced: House of Representatives, 20 March 2014

1.161 This bill creates a new standalone Commonwealth Act intended to clarify the interaction between provisions in the *G20 (Safety and Security) Act 2013* (Qld) and existing Commonwealth legislation at the Brisbane Airport during the G20 Summit in 2014 in Queensland.[10]

1.162 The new Act will provide for specified Commonwealth aviation laws to operate concurrently with the *G20 (Safety and Security) Act 2013* (Qld), including regulations or other subordinate legislation made under Commonwealth aviation legislation. The operation of the specified Commonwealth aviation laws will be rolled back with respect to certain areas of the Brisbane Airport (a Commonwealth place) to avoid inconsistency with the Queensland G20 legislation. To the extent that they are not inconsistent with the Queensland G20 legislation, Commonwealth aviation laws will continue to apply to those areas.[11]

1.163 The committee has deferred its consideration of this bill.

10 Explanatory memorandum, p 2.

11 Explanatory memorandum, p 4.

Part 2

Legislative instruments received
1 – 7 March 2014

The committee has sought further comment in relation to the following instruments

Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026

FRLI: F2014L00224
Portfolio: Immigration and Border Protection
Tabled: House of Representatives and Senate, 6 March 2014

Summary of committee concerns

2.1 The committee seeks further information to determine the compatibility of this instrument with human rights.

Overview

2.2 This instrument operates to set the cap for the Protection (Class XA) visa (protection visa). It determines that the maximum number of protection visas that may be granted in the financial year 1 July 2013 to 30 June 2014 is 2773.[1] The instrument applies to all applicants who have applied for a protection visa, including applicants who have applied before the implementation of this cap.

2.3 The explanatory statement states that:

> The purpose of this Legislative Instrument is to support the Government's determination that no more than 2750 permanent Protection visas be granted to applicants who lawfully applied onshore under the onshore component of the 2013/2014 Humanitarian Programme. The figure of 2773 takes into account the temporary protection visas that were granted in 2013/2014.[2]

1 Section 85 of the *Migration Act 1958* provides that the Minister may determine by instrument in writing the maximum number of the visas of a specified class that may be granted in a specified financial year.

2 Explanatory statement, p 1.

Compatibility with human rights

Statement of compatibility

2.4 The instrument is not accompanied by a statement of compatibility as it is not defined as a disallowable legislative instrument within the strict meaning of section 42 of the *Legislative Instruments Act 2003*.[3]

Committee view on compatibility

2.5 The committee notes that it had commented on a similar instrument in its Second Report of the 44th Parliament.[4] That instrument was subsequently revoked by the Minister but the committee took the opportunity to outline some of the human rights issues that the instrument gave rise to, as it was legislation that had come before the Parliament.

2.6 The committee notes that a human rights compatibility assessment, addressing the committee's previously identified concerns, has not been provided for this instrument. The committee reiterates its view that legislative instruments which have the potential to limit human rights should be accompanied by a statement of compatibility, even if one is not technically required under the *Human Rights (Parliamentary Scrutiny) Act 2011*.[5]

2.7 The committee understands that there are approximately 5,800 persons in immigration detention, 3,300 people in community detention, and 22,900 people in the community on bridging visas.[6] The committee considers that to the extent that the instrument results in a freeze on processing, it may give rise to issues of compatibility with a number of human rights.

2.8 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **whether the cap of 2773 determined for this financial year has already been reached; and if so,**

---

3 Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires statements of compatibility only for legislative instruments within the meaning of section 42 of the *Legislative Instruments Act 2003*. The committee's scrutiny mandate, however, is not limited by the section 42 definition and extends to all legislative instruments: see section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4 Parliamentary Joint Committee on Human Rights (PJCHR), *Second Report of the 44th Parliament*, 11 February 2014, pp 101-102.

5 See, PJCHR, *Second Report of the 44th Parliament*, 11 February 2014, p 101, para 2.32. See also, PJCHR, *Fourth Report of the 44th Parliament*, 18 March 2014, pp 83-84, paras 3.107-3.109.

6 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, Supplementary Budget Estimates Hansard, 19 November 2013, p 37.

- **whether the capping on the issuing of protection visas to those held in immigration detention is compatible with the prohibition on arbitrary detention,[7] the right to humane treatment,[8] the right to health,[9] and children's rights;[10]**
- **whether the capping on the issuing of protection visas to those who are in the community on bridging visas is compatible with the right to work,[11] the right to social security,[12] and the right to an adequate standard of living;[13] and**
- **whether the capping on the issuing of protection visas is compatible with rights relating to the protection of the family.[14]**

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

8 Article 10 of the ICCPR.

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

10 Articles 3(1), and 37(b) of the Convention on the Rights of the Child (CRC).

11 Article 6 of the ICESCR.

12 Article 9 of the ICESCR.

13 Article 11 of the ICESCR.

14 Articles 17 and 23 of the ICCPR; articles 3(1), 10, 20 and 22 of the CRC.

Marine Order 503 (Certificates of survey — national law) Amendment 2014 (No. 1)

FRLI: F2014L00195
Portfolio: Infrastructure and Regional Development
Tabled: House of Representatives and Senate, 4 March 2014

Summary of committee concerns

2.9 The committee draws the Minister's attention to the committee's comments with regard to national cooperative schemes of legislation.

Overview

2.10 This instrument makes minor amendments to the Marine Order 503 (Certificates of survey — national law) 2013 to replace references to the Uniform Shipping Laws Code with references to the National Standard for Commercial Vessels as they apply to an application for a certificate of survey for a new vessel.

Compatibility with human rights

Statement of compatibility

2.11 The instrument is accompanied by a statement of compatibility that states that it does not engage any human rights.

Committee view on compatibility

2.12 The committee agrees that the instrument does not raise any human rights concerns in itself.

2.13 The committee notes that the instrument is made under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, which is a national law scheme. The committee has previously set out its concerns regarding areas of activity regulated under national schemes of legislation resulting from intergovernmental agreements.[1]

1 See, Parliamentary Joint Committee on Human Rights (PJCHR), *Third Report of 2013*, 13 March 2013, pp 29-36; *Sixth Report of 2013*, 15 May 2013, pp 253-254; and *Tenth Report of 2013*, 26 June 2013, pp 125 and 173. The committee notes that both the Victorian Parliament's Scrutiny of Acts and Regulations Committee and the ACT Legislative Assembly have raised concerns in relation to whether and how human rights compatibility is taken into account in the development of national cooperative legislative schemes. See, for example, Scrutiny of Acts and Regulations Committee (Victoria), comments on the *Heavy Vehicle National Law Application Bill 2013* (Alert Digest No. 6 of 2013), at pp 16-17 [2013] VicSARCAD 9 (7 May 2013) and *Practice Note 3* (2010); and ACT Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), Comments on *National Energy Retail Law (A.C.T.) Bill 2012* (ACT), *Scrutiny Report 31 May 2012*, Report 53, p 11.

2.14 The committee observed that an increasing number of areas of activity are regulated under national schemes resulting from intergovernmental agreements, and the committee noted that the legislative form of such schemes varies. In some cases the legislation of one jurisdiction is adopted by the legislatures of other jurisdictions; in others, each jurisdiction commits itself to enacting a uniform law in terms agreed at the intergovernmental level. Sometimes these arrangements involve the agreement of the parties that changes to the template law will be automatically adopted in the various jurisdictions.

2.15 The committee noted that these types of arrangements give rise to legislative scrutiny concerns, as there may be no formal agreement or procedure in place to ensure that cooperative national schemes and implementing legislation are scrutinised for human rights compatibility during their development and before they are finalised at an intergovernmental level. Following the conclusion of an intergovernmental agreement, there may be only a limited opportunity for legislative scrutiny at a time when such consideration may influence the final content of the legislation.

2.16 As with any legislation, the committee considered that the issue of compatibility with human rights should be an integral part of the development of any national scheme.

2.17 In response to the committee's views, the former Prime Minister, Ms Julia Gillard, advised that the First Parliamentary Counsel would seek the views of the States and Territories on amending the Protocol on Drafting National Uniform Legislation to refer to the Commonwealth's requirements for assessing human rights compatibility.

2.18 The committee intends to write to the Minister for Infrastructure and Regional Development:

- **to draw his attention to the previous government's undertaking that the First Parliamentary Counsel would consult with the States and Territories on amending the Protocol on Drafting National Uniform Legislation; and**
- **to request an update on progress on these matters.**

Part 3

Responses to the committee's comments on bills and legislative instruments

Consideration of responses

Adelaide Airport Curfew Amendment (Protecting Residents' Amenity) Bill 2014

Sponsor: Senator Wright
Introduced: Senate, 12 February 2014
Status: Before Senate
PJCHR comments: Third Report of 44th Parliament, tabled 4 March 2014
Response dated: 14 March 2014

Information sought by the committee

3.1 This bill seeks to strengthen the night-time curfew imposed by the *Adelaide Airport Curfew Act 2000*, to ensure that the curfew period operates between 11pm and 6am without exception.

3.2 The committee sought further information as to whether the bill was consistent with the right to work.

3.3 The Senator's response is attached.

Committee's response

3.4 The committee thanks the Senator for her response.

3.5 The response states that:

> The practical effect of the bill, should it become law, would be that four international flights each week from 6 April 2014 to 4 October 2014 would be unable to land directly in Adelaide at 5.10am, and would instead have to stop over in Melbourne.

3.6 In relation to the compatibility of the measure with the right to work, the response states:

> There are no projections which suggest that this development would result in any job losses or any impact on the local economy, to the extent that people's right to work would be affected.
>
> However, even if a limitation on the right to work were presumed to exist, this would be aimed at achieving the legitimate objective of strengthening the curfew period and therefore residents' amenity. The Committee notes in its report that this would promote the right to privacy and the right to health. Accordingly, any limitation, if found to exist, would be sufficiently rationally connected, and proportionate, to promoting that objective (and supporting those rights.)

3.7 The committee notes that, under article 6 of the International Covenant on Economic, Social and Cultural Rights, States parties are obliged to adopt policies 'to achieve ... full and productive employment, under conditions safeguarding fundamental political and economic freedoms to the individual.' As the UN Committee on Economic, Social and Cultural Rights has commented:

> The right to work requires formulation and implementation by States parties of an employment policy with a view to 'stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment.[1]

3.8 The committee notes that the right to work is not absolute and may be subject to permissible limitations provided that such limitations are aimed at a legitimate objective, and are reasonable, necessary and proportionate to that objective. The committee considers that protecting local residents' rights to privacy and health by reducing aircraft noise is a legitimate objective. However, in the absence of information regarding the likely economic benefits of the flights, and the extent to which the exclusion of those flights could affect the local economy (and accordingly the right to work), the committee regards the extent of any limitation on the right to work as uncertain. In light of the unknown economic impacts of the measure, the committee recommends that consideration be given to assessing its economic impacts to ensure that any limitations on the right to work are reasonable, necessary and proportionate to its stated objective.

1 UN Committee on Economic, Social and Cultural Rights, *General comment No 18: The right to work*, (2006), para 26.

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S.1.111
Parliament House
CANBERRA ACT 2600
Via email: Senator. Smith@aph.gov.au

Cc: human.rights@aph.gov.au

14 March 2014

Dear Senator Smith

Re: Adelaide Airport Curfew Amendment (Protecting Residents' Amenity) Bill 2014

Thank you for your letter of 4 March 2013, in relation to the above bill.

I am writing to provide clarification on some matters set out in your letter, and in the Parliamentary Joint Committee on Human Rights' *Third Report of the 44th Parliament*.

In its report, the Committee states it seeks clarification on whether the bill is consistent with the right to work, as recognised in article 6 of the International Covenant on Economic, Social and Cultural Rights.

I note, as the Committee's report notes, that the right to work is not absolute and may be subject to permissible limitations where they are aimed at a legitimate objective, and are reasonable, necessary and proportionate to that objective.

The Australian Greens, in introducing this bill, believe that its key function of removing the exceptions to the Adelaide Airport's curfew does not unreasonably limit the right to work.

The practical effect of the bill, should it become law, would be that four international flights each week from 6 April 2014 to 4 October 2014 would be unable to land directly in Adelaide at 5.10am, and would instead have to stop over in Melbourne.

There are no projections which suggest that this development would result in any job losses or any impact on the local economy, to the extent that people's right to work would be affected.

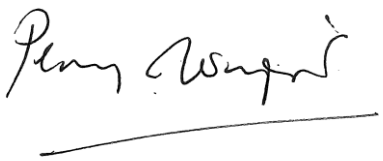
However, even if a limitation on the right to work were presumed to exist, this would be aimed at achieving the legitimate objective of strengthening the curfew period and therefore

residents' amenity. The Committee notes in its report that this would promote the right to privacy and the right to health. Accordingly, any limitation, if found to exist, would be sufficiently rationally connected, and proportionate, to promoting that objective (and supporting those rights.)

In conclusion, because the bill does not limit the right to work, and promotes the rights to privacy and health to an extent which would be proportionate with any such limitation if it did exist, the Australian Greens are of the view that this bill is compatible with Australia's human rights obligations.

I thank you for bringing these matters to my attention.

Yours sincerely



Senator Penny Wright
Australian Greens Senator for South Australia

Commonwealth Scholarships Guidelines (Education) 2013

FRLI: F2013L02070
Portfolio: Education
Tabled: House of Representatives and Senate, 12 December 2013
PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014
Response dated: 17 March 2014

Information sought by the committee

3.9 The instrument revokes the *Commonwealth Scholarships Guidelines (Education) 2010* and makes new guidelines to replace them. The new guidelines implement the 'efficiency dividend' on university funding and also set out Indigenous Commonwealth Scholarships separately from other Commonwealth Scholarships.

3.10 The committee sought further information on the impact of the 'efficiency dividend' on the right to education, including whether it would result in a reduction of funding available for, or numbers of, Commonwealth scholarships and if so, how any reduction is consistent with the right to education.

3.11 The committee also sought further information on the purpose of separating out Indigenous scholarships from other scholarships and whether the separation is consistent with the right to equality and non-discrimination.

3.12 The Minister's response appears as part of the overall response to the concerns raised by the committee in relation to this instrument and the *Higher Education (Maximum Amounts for Other Grants) Determination 2013*. The relevant extract from the Minister's response is attached.[1]

Committee's response

3.13 The committee thanks the Minister for his response.

3.14 The committee notes that this instrument is no longer in effect as it was disallowed on 17 March 2014. However, the committee sets out its final views on the instrument below.

1 Letter from The Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith, Chair PJCHR, 17 March 2014, pp 1-2.

Right to education

3.15 The committee sought further information on whether the application of the 'efficiency dividend' would result in a reduction of funding for Commonwealth Scholarships, or a reduction in the number of scholarships available and, if so, how any reduction is reasonable, necessary and proportionate to achieving a legitimate objective.

3.16 The response states that there will be no impact on the number of education scholarships available and that the actual value of scholarships in each consecutive year will continue to increase. However, the application of the 'efficiency dividend' will result in a slower rate of growth in the value of the scholarships than would otherwise have occurred.

3.17 The committee considers that, due to the fact that the measure will result in a slowing of growth in the value of scholarships, the measure constitutes a limitation or retrogressive measure with respect to the right to education, which must be justified as reasonable, necessary and proportionate to achieving a legitimate objective.

3.18 The response states that '[t]he slower rate of growth in the value of scholarships under the Higher Education Support Act 2003 (HESA) is proportionate to the policy objective of contributing to repairing the Budget'.

3.19 The committee respects the right of the government to make decisions regarding the allocation of resources and considers the need to contribute to 'repairing the budget' to be a legitimate objective. However, the response does not address how the measure is proportionate to this objective. A human rights compatibility assessment of measures reducing support in a given sector may require consideration of the impact on groups who are vulnerable or socially disadvantaged and any possible alternatives that were considered. The committee has previously commented on the importance of human rights impact assessment in the budgetary process.[2]

3.20 On the basis of the information provided, the committee is unable to conclude that the instrument is compatible with the right to education.

2 See, for example, Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament*, pp 3-5.

Right to equality and non-discrimination

3.21 The committee sought further information on the purpose of separating out Indigenous scholarships from other Commonwealth scholarships and whether the separation constitutes legitimate differential treatment consistent with the right to equality and non-discrimination.

3.22 The response states that the separation addresses the allocation of responsibility for Indigenous policies, programmes and service delivery to the Department of Prime Minister and Cabinet (PM&C), which occurred on 18 September 2013. Further, on 12 December 2013, changes to the Administrative Arrangements Order transferred policy responsibility for the Indigenous Support programme, the Indigenous Commonwealth Scholarships programme and the Indigenous Staff Scholarships Programme to PM&C. According to the response:

> [t]his separation is reasonable and proportionate to achieving the objective of ensuring that expenditure to redress the historical disadvantage experienced by indigenous people is both effective and directed to practical outcomes.

3.23 On the basis of the information provided, the committee makes no further comment on this issue. The committee notes it would have been helpful if this information had been included in the statement of compatibility.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

17 MAR 2014

Our Ref BR14-000738

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

Dear Chair

Thank you for the opportunity to respond to the Committee's *Second Report of the 44th Parliament* insofar as it relates to the *Commonwealth Scholarships Guidelines (Education) 2013* (Scholarships Guidelines) and the *Higher Education (Maximum Amounts for Other Grants) Determination 2013* (Determination).

These Instruments are compatible with human rights. I have set out the reasons for their compatibility with human rights by addressing the Committee's questions below.

Commonwealth Scholarships Guidelines (Education) 2013
Will the implementation of the efficiency dividend result in a reduction of funding for Commonwealth scholarships or a reduction in the number of scholarships available?

Under the approach being implemented in the 2013 Scholarships Guidelines, there will be no impact on the number of education scholarships available.

The actual value of scholarships in each consecutive year will continue to increase. The efficiency dividend is resulting in a slower rate of growth in the value of the scholarships than otherwise would occur.

If so, how is any reduction reasonable, necessary and proportionate to achieving a legitimate objective?

The slower rate of growth in the value of scholarships under the *Higher Education Support Act 2003* (HESA) is proportionate to the policy objective of contributing to repairing the Budget.

What is the purpose of separating out Indigenous scholarships and other scholarships in the guidelines? Is this separation reasonable and proportionate to achieving a legitimate objective and therefore does it constitute legitimate differential treatment consistent with the right to equality and non-discrimination?

On 18 September 2013, the Department of Prime Minister and Cabinet became the responsible agency for the majority of Indigenous policies, programmes and service delivery, with the aim of streamlining arrangements, reducing red tape and prioritising expenditure to achieve practical outcomes on the ground.

In the *Commonwealth Scholarships Guidelines (Education) 2010*, the Indigenous Commonwealth Scholarships and a number of former Commonwealth Scholarship programmes were provided for in Part A and Part B, respectively, of Chapter 2, Commonwealth Scholarships. The former Commonwealth Scholarships were not specifically targeted to Indigenous students and while no new scholarships are being awarded under these programs, those students awarded a scholarship prior to 2010 have continued to receive scholarship payments (i.e. they are 'grandfathered').

In the 2013 Guidelines, Indigenous Commonwealth Scholarships were separated from the old 'grandfathered' Commonwealth scholarships, becoming Chapters 2 and 4 respectively.

Separation of Indigenous Commonwealth Scholarships program from other Commonwealth Scholarships enabled new Administrative Arrangement Orders to transfer responsibility for the Indigenous Commonwealth Scholarships Program to the Department of the Prime Minister and Cabinet and for the Commonwealth Scholarships (Grandfathered) Program to be the responsibility of the Department of Education.

On 12 December 2013, an Administrative Arrangement Order was made which transferred portfolio responsibility for HESA insofar as it relates to grants to higher education providers for the Indigenous Support programme, the Indigenous Commonwealth Scholarships programme and the Indigenous Staff Scholarships Programme, to the Department of the Prime Minister and Cabinet.

This separation is reasonable and proportionate to achieving the objective of ensuring that expenditure to redress the historical disadvantage experienced by Indigenous people is both effective and directed to practical outcomes.

Higher Education (Maximum Amounts for Other Grants) Determination 2013
Does the provision of lesser amounts for certain grants constitute a limitation on the right to education or a retrogressive measure?

No. The changes to these amounts do not constitute a limitation on the right to education or a retrogressive measure.

The maximum amounts for Other Grants are updated each year to take into account Budget decisions, estimated changes to indexation parameters, and changes to the timing of payments for projects. In past years, these changes were amendments to HESA. Beginning in 2013, these changes are made by legislative instrument.

The changes in the current Determination do not affect students' access to education. The actual amount of funding available in each consecutive year will continue to increase, despite the changes to the maximum amounts. The changes to the maximum amounts do not affect the number of subsidised student places. They do not reduce the availability of income contingent loans under the Higher Education Loan Program, which enable students to defer the costs of their tuition. The changes also provide for an increase in the total funding for equity programs.

How is the reduction in funding considered reasonable, necessary and proportionate to achieving a legitimate objective?

The changes to the maximum amounts for Other Grants are proportionate to the policy objective of repairing the Budget so that higher education funding, and the educational opportunities it affords, can be sustained over the long term.

I trust the information provided is helpful.

Yours sincerely

Christopher Pyne MP

Fair Work (Registered Organisations) Amendment Bill 2013

Portfolio: Employment
Introduced: House of Representatives, 14 November 2013
Status: Before Senate
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 5 March 2014

Information sought by the committee

3.24 This bill seeks to establish the Registered Organisations Commission (ROC) (including a Registered Organisations (RO) Commissioner) and provides it with investigation and information gathering powers to monitor and regulate registered organisations (including trade unions).

3.25 The committee sought a range of further information necessary to determine whether the bill is compatible with human rights, including:

- whether the breadth of the proposed disclosure regime in the bill is necessary and proportionate to the objective of achieving better governance of registered organisations;
- whether and how the standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary';
- a request that consideration be given to deleting criterion (c) in the proposed definition of a 'serious contravention' (where a 'serious contravention' is defined as a contravention that 'is serious') and/or provision of additional guidance as to the circumstances when a contravention might be considered 'serious';
- whether the reverse burden offence in proposed new section 337AC of the bill is consistent with the presumption of innocence;
- clarification as to whether proposed new section 337AD(3) does in fact provide for derivative use immunity, as well as use immunity; and
- how the requirement for a person to have to 'claim' the right against self-incrimination in order to have it apply is consistent with the prohibition against self-incrimination.

3.26 The Minister's response is attached.

Committee's response

3.27 The committee thanks the Minister for his response.

3.28 The committee considers that the information provided has addressed most of its concerns. In particular, the committee welcomes the Minister's indication that amendments will shortly be circulated to narrow the breadth of the proposed disclosure requirements.

Threshold for exercising RO Commissioner's powers

3.29 The bill seeks to confer on the RO Commissioner a broad range of functions, including extensive investigation and information gathering powers and the ability to enforce the new rules and penalties.[1] The bill provides that the RO Commissioner has the power to do all things 'necessary or convenient' (emphasis added) for the purpose of performing his or her functions.[2]

3.30 In its comments on the bill, the committee noted that human rights standards require limitations on rights to be 'necessary' in order to be justifiable. The proposed standard appears to allow coercive actions by the RO Commissioner which are not necessary, but are convenient.

3.31 The committee notes the Minister's response that such a threshold is commonplace in legislation and that the threshold has been modelled on other like provisions in Commonwealth laws. The committee also notes the Minister's reference to case law on the term 'necessary or convenient'.

3.32 As the committee has previously noted, the fact that a provision or approach is modelled on existing provisions or approaches is not, in and of itself, a sufficient justification for limitations on rights.

3.33 The committee therefore remains concerned that the standard of 'convenient' would not appear to be fully consistent with the requirement under international human rights law that restrictions on rights be 'necessary'.

Right to be presumed innocent

3.34 The bill seeks to create an offence for concealing documents relevant to an investigation and carries a maximum penalty of five years imprisonment.[3] The bill imposes a reverse legal burden on the defendant to prove that 'the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. The offence provision is modelled on a comparable provision in the *Australian Securities and Investments Commission Act 2001*.

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1 Proposed new section 329AB, inserted by item 88, Schedule 1.

2 Proposed new section 329AC, inserted by item 88, Schedule 1.

3 Proposed new section 337AC, inserted by item 230, Schedule 2.

3.35 In its comments on the bill, the committee noted that reverse legal burden offences that impose imprisonment as a penalty involve a significant limitation on the right to be presumed innocent and require a high threshold of justification. The committee sought clarification as to whether the reverse burden offence is consistent with the right to be presumed innocent and why the less restrictive alternative of an evidential burden would not be sufficient in these circumstances.

3.36 The committee notes the Minister's response that '[t]his prohibition is very important in terms of the integrity of the investigations framework under the Bill and is central to the Bill's objectives' and that recent investigations have shown the existing framework to be 'spectacularly ineffective in both deterring inappropriate behaviour and holding wrongdoers to account'. Further, that breaches of the law in this field 'should be treated just as seriously as such conduct by company directors'.

3.37 The committee accepts the need to have a strong regulatory framework in this area. However, the response does not address the committee's question as to whether the imposition of an evidential, rather than legal, burden was considered and why an evidential burden would not be sufficient. As set out above, the committee has previously noted that the fact that a provision or approach is modelled on existing provisions or approaches is not, in and of itself, a sufficient justification for limitations on rights. In the current case, the committee considers that the requirement to prove intention in relation to the conduct which constitutes the offence goes to the core of the criminal conduct being addressed. On the basis of this concern, combined with the fact that the offence carries a maximum penalty of five years imprisonment, the committee is not satisfied that sufficient consideration has been given to whether an evidential burden only would be sufficient.

3.38 The committee therefore remains unable to conclude that the proposed offence is consistent with the right to be presumed innocent.

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

- 5 MAR 2014

Dear Senator Dean,

Thank you for your letter of 10 December 2013, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill). I apologise for the delay in responding.

Breadth of Disclosure Requirements

The Committee has sought clarification on whether the breadth of the proposed disclosure regime in the Bill is necessary and proportionate to the objective of achieving better governance of registered organisations.

The Coalition Government submits that the disclosure obligations in the Bill, as drafted, are reasonable and proportionate for the reasons set out in the Statement of Compatibility with Human Rights to the Bill. However, the Government also acknowledges that there is scope to reduce the obligations in the Bill to more closely reflect the obligations on companies and their directors in the *Corporations Act 2001*.

With this in mind, the Government has carefully considered the concerns that have been raised in the report of the Senate Education and Employment Legislation Committee. The Government takes seriously the Committee's review process and respects the legitimate concerns that have been expressed regarding potentially excessive regulation. In response to these concerns, the Government will shortly circulate amendments to the Bill to:

- amend the disclosure requirements for officers of registered organisations to more closely align them with the *Corporations Act 2001* so that the requirement to disclose material personal interests only applies to those officers whose duties relate to the financial management of the organisation
- remove the more invasive disclosure requirements for officers of registered organisations to report family members', income and assets, thereby more closely aligning with the *Corporations Act 2001*
- align the material personal interest disclosure requirements for officers of registered organisations with the *Corporations Act 2001* so that disclosures only need to be made to the governing body and not to the entire membership
- limit disclosures of related party payments to payments made above a certain prescribed threshold and with certain other exceptions, based on the exceptions in the *Corporations Act 2001* for member approval of related party transactions

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Our Ref BR13-004754

- provide the Registered Organisations Commissioner with the discretion to waive the training requirements of officers of registered organisations if the Registered Organisations Commissioner is satisfied with their level of qualification (for example if a member is a Certified and Practicing Accountant).

I also note that the concerns addressed by the Committee relate solely to obligations introduced by the previous government in the *Fair Work (Registered Organisations) Amendment Act 2012*. As a result of the proposed amendments, the disclosure obligations on registered organisations under the amended Bill will be less onerous than those that are currently imposed by the *Fair Work (Registered Organisations) Act 2009*.

Threshold for exercising Registered Organisations Commissioner's powers
The Committee has sought clarification on whether and how the standard of 'convenient' in proposed new section 329AC, inserted by item 88, Schedule 1 of the Bill, is consistent with the requirement for limitations on rights to be 'necessary'.

The provision of a power to do something 'necessary or convenient' is commonplace in legislation, particularly in the context of the making of delegated legislation and empowering a regulator or other statutory office. New section 329AC mirrors subsection 657(2) of the *Fair Work Act 2009,* which provides that the General Manager of the Fair Work Commission has power to do all things 'necessary or convenient' to be done for the purposes of performing his or her functions.

The term 'necessary or convenient' is one that has a long history in case law and is narrowly construed to confine it to the scope of the power to which it is applied. In *Shanahan v Scott* (1957) 96 CLR 245, the High Court made the following observations about the term 'necessary or convenient' in the context of the power to make delegated legislation:

> *"Such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying out or to depart from or vary the plan which the legislature has adopted to attain its ends."*

In the context of the Bill, where proposed section 329AC would give the Registered Organisations Commissioner the power to do all things necessary or convenient to be done for the purposes of performing his or her functions, the Registered Organisations Commissioner will be constrained to what his or her functions allow and will not be able to broaden the scope of his or her functions. As such, the narrow and orthodox construction of 'convenient' will not result in a lower observance of human rights.

Definition of 'serious contravention'
The Committee has requested that consideration be given to deleting criterion (c) in the definition of 'serious contravention' in proposed new section 6, inserted by item 4, Schedule 2 of the Bill, and/or that additional guidance be provided as to the circumstances when a contravention might be considered 'serious'.

In the Government's view, the test, which makes the seriousness of the relevant conduct a threshold factor for the application of higher penalties, is not open ended or circular. The mechanism of conferring on the courts a discretion to apply higher maximum pecuniary penalties for conduct constituting a 'serious contravention' as defined by the criteria in (a) – (c) of the definition of 'serious contravention' is not unclear or without precedent. Paragraph 146 of the Explanatory Memorandum to the Bill notes that the definition of a serious contravention was 'broadly modelled on subsection 1317G(1) of the *Corporations Act 2001* and it is expected that similar principles would apply.' In this respect, the body of case law developed in respect of subparagraph 1317G(1)(b)(iii) of the *Corporations Act 2001* can be drawn upon in understanding how criterion (c) of the proposed definition will operate and whether a contravention is considered a 'serious contravention' will depend on the facts of each particular matter. The Government

submits that the deletion of criterion (c) would be inconsistent with its policy objective to align obligations of registered organisations with those of corporations.

Right to be presumed innocent

The Committee has sought clarification on whether the reverse burden offence in proposed new section 337AC, inserted by item 230, Schedule 2 of the Bill, is consistent with the right to be presumed innocent. The Committee has also sought clarification on why the less restrictive alternative of an evidentiary burden would not be sufficient in these circumstances.

Although the reverse burden offence in subsection 337AC(2) limits the right to be presumed innocent under article 14(2) of the International Covenant on Civil and Political Rights, this limitation is compatible with the right because it pursues a legitimate aim and is reasonable, necessary and proportionate.

It is the Government's policy that registered organisations should be overseen by an independent regulator with powers and functions modelled on those of the Australian Securities and Investments Commission. The Government considers that this is necessary and appropriate to ensure better governance of registered organisations and to prevent fraud, financial mismanagement and inadequate democratic governance.

Section 337AC, which prohibits the concealing, destroying, mutilating or altering of documents relevant to an investigation, closely follows the offence provision in section 67 of the *Australian Securities and Investments Commission Act 2001*. This prohibition is very important in terms of the integrity of the investigations framework under the Bill and is central to the Bill's objectives. It is appropriate that proposed subsection 337AC(2) is expressed as an offence-specific defence with a legal burden of proof rather than an element of the offence as it relates to matters that are both peculiarly within the knowledge of the defendant and which would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The recent investigations of the Fair Work Commission into financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework has been spectacularly ineffective in both deterring inappropriate behaviour and holding wrongdoers to account. Having a regulatory body with powers to prevent deliberate frustrations of its investigatory functions is crucial to remedying these shortcomings and providing members of registered organisations the confidence that the governance framework is genuinely robust.

As the Committee is aware, the Government is very strongly of the view that corrupt conduct by officers of registered organisations should be treated just as seriously as such conduct by company directors. The Australian community rightly expects that breaches of the law in either of these two fields should be subject to the same consequences. This requires that the enforcement regime in each case should be largely similar.

In this context, the limitation is compatible with the right as it pursues a legitimate aim (providing for proper investigation of suspected breaches) and is reasonable, necessary and proportionate in achieving that objective.

Right against self-incrimination

The Committee has sought clarification on whether proposed new subsection 337AD(3), inserted by item 230, Schedule 2 of the Bill, does in fact provide for derivative use immunity, as well as a use immunity.

The Government confirms that proposed new subsection 337AD(3) does not provide for derivative use immunity but does provide for use immunity. In this respect, the proposed new subsection 337AD(3) closely follows the privilege against self-incrimination found in section 68 of the *Australian Securities and Investments Commission Act 2001*. As was noted in the Statement of Compatibility with Human Rights to the Bill, the Government has sought to ensure that the Registered Organisations Commissioner can effectively investigate breaches or potential breaches of the *Fair Work (Registered Organisations) Act 2009*. In order to achieve this object it is necessary for the Registered Organisations Commissioner to have information gathering powers sufficient to undertake its task. It is the Government's view that the powers of Australian Securities and Investments Commission provide a reasonable, necessary and proportionate model for the Registered Organisations Commissioner's powers.

The burden placed on investigating authorities in conducting a prosecution before the Courts is the main reason why the powers of the Australian Securities Commission (now Australian Securities and Investments Commission) were amended to remove derivative use immunity. The Explanatory Memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 provides that derivative use immunity placed:

> *"...an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity..."*[1]

Similarly, the Government considers that the absence of derivative use immunity is reasonable and necessary for the effective prosecution of matters under the *Fair Work (Registered Organisations) Act 2009*.

The Committee has also sought clarification on how the requirement for a person to have to 'claim' the right against self-incrimination (in proposed new subsection 337AD(3)) in order to have it apply is consistent with article 14(3) of the International Covenant on Civil and Political Rights.

In order to claim the use immunity, new subsection 337AD(2) provides that a person must, prior to giving information, producing a document or signing a record, state that any information that they provide may incriminate them or expose them to a penalty. By making this claim the use immunity in new subsection 337AD(3) is activated. Consistent with section 68 of the *Australian Securities and Investments Commission Act 2001*, this requirement to claim the privilege is procedurally important as it allows the Registered Organisations Commissioner to obtain all information relevant to an investigation while still protecting the claimant against the 'admissibility' of the information provided pursuant to the notice in evidence against the person in proceedings of the kind described in proposed subsection 337AD(3).

In terms of compliance with article 14(3) of the International Covenant on Civil and Political Rights, the central concern with the requirement to claim the immunity is generally that failure to claim the privilege (either forgetting or being unaware of the privilege) could result in self-incrimination. While this concern could result in circumstances where the requirement to claim the use immunity in subsection 337AD(2) is inconsistent with the right, there are important safeguards that limit the relevant risk. Proposed new subsection 335(3) provides that a person required to attend before the Registered Organisations Commissioner for questioning must be provided with a notice prior to the giving of information that:

- provides information about the 'general nature of the matters to which the investigation relates' (subsection 335(3)(a))
- informs the person that they 'may be accompanied by another person who may, but does not have to be, a lawyer' (subsection 335(3)(b))
- sets out the 'effect of section 337AD' (subsection 335(3)(c)).

As individuals are informed about the type of questions they will be asked and the effects of section 337AD, they will be aware that they are able, if necessary, to claim the use immunity. Further, the fact that a person can have a lawyer present during questioning provides the person with the additional support needed if they are unsure whether a question presented to them may elicit self-incriminating information.

Given these safeguards, the requirement to claim the privilege is consistent with article 14(3) of the International Covenant on Civil and Political Rights.

Right to a fair trial – increased penalty for civil penalty provisions

The Committee has sought clarification on whether the civil penalty provisions for 'serious contraventions' should be considered as 'criminal' for the purposes of article 14 of the International Covenant on Civil and Political Rights, given that they carry a substantial pecuniary sanction and could be applied to a broad range of individuals, including volunteers.

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[1] Corporations Legislation (Evidence) Amendment Bill 1992, Explanatory Memorandum p 1.

The Government reiterates the view expressed in the Statement of Compatibility with Human Rights to the Bill that the civil penalties should not be considered criminal penalties for the purposes of international human rights law. In addition:

- The maximum penalties for serious contraventions are subject to the threshold test in proposed section 6 and in this way will only apply to contraventions of the *Fair Work (Registered Organisations) Act 2009* that a court considers as the most egregious conduct.
- The maximum penalties for serious contraventions are also commensurate with the maximum penalties applicable under the *Corporations Act 2001*, which the Government believes to be an appropriate model for the regulation of organisations (see subsection 1317G(1) of the *Corporations Act 2001*).
- While volunteers may be subject to these penalties when acting in their capacity as officers of an organisation, these volunteers also hold a position of trust and confidence with respect to the organisation and its members and may have substantial power to influence the organisation. Members deserve to know that people who volunteer as officers will not abuse their position of trust and confidence to their benefit and to the detriment of the organisation and its members.
- Section 315 of the *Fair Work (Registered Organisations) Act 2009* provides that a court may relieve a person or organisation either wholly or partly from a liability arising because of a contravention of a civil penalty provision in circumstances where the person or organisation acted honestly and, having regard to all the circumstances of the case, the person or organisation ought fairly to be excused for the contravention. In this way, section 315 operates to counter the apparent severity of the maximum penalty and also indicates that the penalty is not so much punitive as disciplinary or regulatory in nature.

The Committee has drawn a comparison between the penalties in this Bill and those in the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 (the Carbon Tax Repeal Bill) and noted that the statement of compatibility for that Bill accepted that its civil penalties were 'criminal' for human rights purposes. I am not in a position to analyse in detail the civil penalty provisions of the Carbon Tax Repeal Bill, which is outside my portfolio and rely on my arguments as set out above.

Once again, thank you for taking the time to write to me.

Yours sincerely

ERIC ABETZ

Responses requiring no further comment

Australian Jobs (Australian Industry Participation) Rule 2014

FRLI: F2014L00125
Portfolio: Industry
Tabled: House of Representatives and Senate, 11 February 2014
PJCHR comments: Third Report of the 44th Parliament, tabled 4 March 2014
Response dated: 17 March 2014

Information sought by the committee

3.39 This instrument prescribes matters relating to Australian Industry Participation plans for the purposes of the Australian Jobs Act 2013 (the Act). This includes information that a project proponent or facility operator must provide as part of their compliance report under the Act. It also includes information that a project proponent must provide when notifying the Australian Industry Participation Authority of a preliminary trigger day for a major project.

3.40 The committee sought clarification as to whether the information required for compliance reports or for notification purposes could include personal information about individuals and, if so, the justification for any limitations on the right to privacy.

3.41 The Minister's response is attached.

Committee's response

3.42 The committee thanks the Minister for his response.

3.43 The response states that '[t]he Rule only applies to constitutional corporations, not individuals, and the information required is of a commercial nature rather than personal information'.

3.44 In light of the information provided, the committee makes no further comment on this instrument.

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

PO BOX 6022
PARLIAMENT HOUSE
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C14/1220

17 MAR 2014

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

Dear Senator Dean

Thank you for your letter of 4 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights concerning the Australian Jobs (Australian Industry Participation) Rule 2014. The Committee sought clarification as to whether the legislative instrument is compatible with the right to privacy.

The Committee specifically identified sections 7, 8 and 10 of the Australian Jobs (Australian Industry participation) Rule. The Rule only applies to constitutional corporations, not individuals, and the information required is of a commercial nature rather than personal information. A more detailed response, to assist the Committee's deliberation, on why information disclosure under the Rule does not include personal information about individuals is attached.

I trust this response will assist the Committee in determining the human rights compatibility of the Australian Jobs (Australian Industry Participation) Rule 2014. Should you have any further questions, please do not hesitate to contact me again.

Yours sincerely

Ian Macfarlane

Phone: (02) 6277 7070 Fax: (02) 6273 3662

Right to Privacy

The Committee has requested clarification on range of information required to be disclosed under the Rule, and whether such disclosure may include personal information about individuals. The specific provisions mentioned by the Committee are sections 7, 8 and 10 of the Rule.

Under the *Australian Jobs Act 2013* (the Act) a project proponent is defined as a person who is responsible for carrying out a project[1]. The Act only applies to 'designated projects' where one or more project proponents are constitutional corporations[2], a similar limitation is applied to facility operators under section 117 of the Act. The Act only applies to constitutional corporations, not individuals.

As outlined in the Act's Human Rights Compatibility Statement, information that is provided or obtained under the Act will be of a commercial nature. This principle is consistent within the Rule. The range of information being requested through the compliance reports and the notification obligations do not require personal information about individuals to be provided.

In the event that personal information is inadvertently collected or disclosed under the Rule or the Act, it will be subject to the safeguards under the *Privacy Act 1988.* It should be noted that, under Information Privacy Principle 11.3, a person, body or agency to which personal information is disclosed shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

The Australian Industry Participation Authority, who collects the information required by the Act and the Rule, is bound by the *Privacy Act 1988* and will operate in accordance with the relevant principles when dealing with personal information.

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[1] Section 5, *Australian Jobs Act 2013*
[2] Section 7, Ibid

Higher Education (Maximum Amounts for Other Grants) Determination 2013

FRLI: F2013L02165
Portfolio: Education
Tabled: House of Representatives and Senate, 11 February 2014
PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014
Response dated: 17 March 2014

Information sought by the committee

3.45 This instrument sets out the maximum amounts of grants in relation to the payment of 'other grants' to higher education providers and other eligible bodies under the *Higher Education Support Act 2003* for the 2013-2017 calendar years.

3.46 The committee sought further information on the impact of the proposed changes on the right to education and, to the extent that the instrument may involve a limitation or retrogressive measure, a statement of justification.

3.47 The Minister's response appears as part of the overall response to the concerns raised by the committee in relation to this instrument and the *Commonwealth Scholarships Guidelines (Education) 2013*. The relevant extract from the Minister's response is attached.[1]

Committee's response

3.48 The committee thanks the Minister for his response.

3.49 In its comments on the instrument, the committee noted that the purpose of the instrument was to prescribe the maximum amounts payable as 'other grants' in a given year, and that the amounts specified in the instrument for the years 2013-2017 are all lesser amounts than those currently specified in the Act for those years.[2]

3.50 The committee sought further information about whether this may constitute a limitation or a retrogressive measure with respect to the right to education and, if so, whether the reduction in funding is considered to be reasonable, necessary and proportionate to achieving a legitimate objective.

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1 Letter from The Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith, Chair PJCHR, 17 March 2014, pp 2-3.

2 See section 41-45 of the *Higher Education Support Act 2003*.

3.51 The response states that:

> The maximum amounts for Other Grants are updated each year to take into account Budget decisions, estimated changes to indexation parameters and changes to the timing of payments for projects. … The changes in the current Determination do not affect students' access to education. The actual amount of funding available in each consecutive year will continue to increase, despite changes to the maximum amounts. The changes to the maximum amounts do not affect the number of subsidised student places. They do not reduce the availability of income contingent loans under the Higher Education Loan Program, which enable students to defer the costs of their tuition. The changes also provide for an increase in the total funding for equity programs.

3.52 On the basis of the information provided, the committee makes no further comment on this instrument.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

17 MAR 2014

Our Ref BR14-000738

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

Dear Chair

Thank you for the opportunity to respond to the Committee's *Second Report of the 44th Parliament* insofar as it relates to the *Commonwealth Scholarships Guidelines (Education) 2013* (Scholarships Guidelines) and the *Higher Education (Maximum Amounts for Other Grants) Determination 2013* (Determination).

These Instruments are compatible with human rights. I have set out the reasons for their compatibility with human rights by addressing the Committee's questions below.

Commonwealth Scholarships Guidelines (Education) 2013
Will the implementation of the efficiency dividend result in a reduction of funding for Commonwealth scholarships or a reduction in the number of scholarships available?

Under the approach being implemented in the 2013 Scholarships Guidelines, there will be no impact on the number of education scholarships available.

The actual value of scholarships in each consecutive year will continue to increase. The efficiency dividend is resulting in a slower rate of growth in the value of the scholarships than otherwise would occur.

If so, how is any reduction reasonable, necessary and proportionate to achieving a legitimate objective?

The slower rate of growth in the value of scholarships under the *Higher Education Support Act 2003* (HESA) is proportionate to the policy objective of contributing to repairing the Budget.

What is the purpose of separating out Indigenous scholarships and other scholarships in the guidelines? Is this separation reasonable and proportionate to achieving a legitimate objective and therefore does it constitute legitimate differential treatment consistent with the right to equality and non-discrimination?

On 18 September 2013, the Department of Prime Minister and Cabinet became the responsible agency for the majority of Indigenous policies, programmes and service delivery, with the aim of streamlining arrangements, reducing red tape and prioritising expenditure to achieve practical outcomes on the ground.

In the *Commonwealth Scholarships Guidelines (Education) 2010*, the Indigenous Commonwealth Scholarships and a number of former Commonwealth Scholarship programmes were provided for in Part A and Part B, respectively, of Chapter 2, Commonwealth Scholarships. The former Commonwealth Scholarships were not specifically targeted to Indigenous students and while no new scholarships are being awarded under these programs, those students awarded a scholarship prior to 2010 have continued to receive scholarship payments (i.e. they are 'grandfathered').

In the 2013 Guidelines, Indigenous Commonwealth Scholarships were separated from the old 'grandfathered' Commonwealth scholarships, becoming Chapters 2 and 4 respectively.

Separation of Indigenous Commonwealth Scholarships program from other Commonwealth Scholarships enabled new Administrative Arrangement Orders to transfer responsibility for the Indigenous Commonwealth Scholarships Program to the Department of the Prime Minister and Cabinet and for the Commonwealth Scholarships (Grandfathered) Program to be the responsibility of the Department of Education.

On 12 December 2013, an Administrative Arrangement Order was made which transferred portfolio responsibility for HESA insofar as it relates to grants to higher education providers for the Indigenous Support programme, the Indigenous Commonwealth Scholarships programme and the Indigenous Staff Scholarships Programme, to the Department of the Prime Minister and Cabinet.

This separation is reasonable and proportionate to achieving the objective of ensuring that expenditure to redress the historical disadvantage experienced by Indigenous people is both effective and directed to practical outcomes.

Higher Education (Maximum Amounts for Other Grants) Determination 2013
Does the provision of lesser amounts for certain grants constitute a limitation on the right to education or a retrogressive measure?

No. The changes to these amounts do not constitute a limitation on the right to education or a retrogressive measure.

The maximum amounts for Other Grants are updated each year to take into account Budget decisions, estimated changes to indexation parameters, and changes to the timing of payments for projects. In past years, these changes were amendments to HESA. Beginning in 2013, these changes are made by legislative instrument.

The changes in the current Determination do not affect students' access to education. The actual amount of funding available in each consecutive year will continue to increase, despite the changes to the maximum amounts. The changes to the maximum amounts do not affect the number of subsidised student places. They do not reduce the availability of income contingent loans under the Higher Education Loan Program, which enable students to defer the costs of their tuition. The changes also provide for an increase in the total funding for equity programs.

How is the reduction in funding considered reasonable, necessary and proportionate to achieving a legitimate objective?

The changes to the maximum amounts for Other Grants are proportionate to the policy objective of repairing the Budget so that higher education funding, and the educational opportunities it affords, can be sustained over the long term.

I trust the information provided is helpful.

Yours sincerely

Christopher Pyne MP

Social Security Legislation Amendment (Green Army Programme) Bill 2014

Portfolio: Environment
Introduced: House of Representatives, 26 February 2014
Status: Before House of Representatives
PJCHR comments: Third Report of the 44th Parliament, tabled 4 March 2014
Response dated: 17 March 2014

Information sought by the committee

3.53 This bill seeks to make changes to the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to implement changes necessary to support the commencement of the Green Army, a voluntary initiative for young people to participate in projects protecting the environment.

3.54 The bill bars a person receiving the Green Army allowance from receiving any other social security benefit or pension. It also makes clear that Green Army Programme participants will not be considered workers or employees for the purposes of various Commonwealth laws. The committee sought further information on whether the proposed measures are compatible with the right to social security and the right to just and favourable conditions of employment.

3.55 The Minister's response is attached.

Committee's response

3.56 The committee thanks the Minister for his response.

Right to social security

3.57 The committee sought further information on whether the effect of the measure barring a person from receiving social security payments while receiving the Green Army allowance would be to reduce a person's income support and whether the Green Army allowance would be sufficient to meet minimum essential levels of social security.

3.58 The Minister's response states that the Green Army allowance is commensurate with minimum trainee hourly wage rates and sets out the amounts of income a person will receive on the Green Army allowance, as compared with other income support payments. In particular, it states that '[t] Green Army allowance is … generally higher than income support payments, such [as] Youth Allowance and Newstart Allowance'.

Right to just and favourable conditions of work

3.59 The committee sought further information on whether the measure specifying that Green Army Programme participants are not considered to be workers or employees for the purposes of certain Commonwealth laws, including the *Work Health and Safety Act 2011*, the *Safety Rehabilitation and Compensation Act 1988* and the *Fair Work Act 2009*, is compatible with the right to just and favourable working conditions. In particular, the committee sought the minister's view on the justification for excluding participants from such laws, and how participants would otherwise be protected.

3.60 The response states that, given the voluntary nature of the programme, it is not appropriate for participants to be considered employees for the purposes of these Acts. The response further states:

> Green Army Participants are not covered under the Fair Work Act because they are not considered employees. However, they will be entitled to personal leave and will be afforded all the necessary Work Health and Safety protections. The health and safety of Participants engaged in the programme will remain governed by relevant statues, regulations, by-laws and requirements of the state and territory regulations in respect to anti-discrimination and Work Health and Safety laws.

3.61 In light of the information provided, the committee makes no further comment on this bill. The committee notes it would have been helpful for such information to have been included in the statement of compatibility.

The Hon Greg Hunt MP

Minister for the Environment

MC14-007083

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

17 MAR 2014

Dear Senator Smith

I refer to your letter of 4 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the committee) seeking further clarification as outlined in the Committee's Third Report of the 44th Parliament tabled on 4 March 2014 regarding the Social Security Legislation Amendment (Green Army Programme) Bill 2014 (the Bill).

Right to social security

The committee is seeking further information as to what impact the measures in the Bill will have on the right to social security and how the measures are compatible with that right.

The Bill provides that a social security pension or social security benefit will not be payable to a person who is receiving the Green Army allowance. This is designed to ensure that people who receive Government-funded support through the Green Army Programme do not also receive similar support through the social security system. This provision mirrors long-standing social security provisions that prevent a person from double-dipping.

Full-time Participants in receipt of income support prior to entering a Green Army placement will be suspended from their income support arrangements for up to 30 weeks as they will be receiving the green army allowance instead.

The hourly rate of the Green Army allowance is commensurate with minimum trainee hourly wage rates. This is higher than the previous Green Corps programme. For example, under the Green Army Programme, a 21 year old participant will receive an hourly rate of between $14.76 and $16.45 and a fortnightly allowance of between $885.60 and $987.00. The Green Corps Programme paid a flat rate of $600.00 per fortnight. The Green Army allowance is also generally higher than income support payments, such Youth Allowance and Newstart Allowance. The basic rate of Youth Allowance for an unemployed young person aged 21 is generally between $272.80 per fortnight and $542.90 per fortnight, depending on individual circumstances (supplementary allowances, such as the Clean Energy Supplement and Rent Assistance, may also be payable in addition to the basic rate).

A comparison of possible payment rate scenarios for Newstart Allowance and Youth Allowance recipients, including relevant supplementary allowances, has found that in most cases, a full-time participant is better off receiving Green Army allowance. The exception is for a 17-19 year old Youth Allowance recipient who is single, has a youngest child aged at least eight years of age and is exempt from the activity test for Youth Allowance due to special circumstances, such as having 3 or more children, or home schooling or facilitating distance education for their child(ren).

In limited circumstances (for example, where a person has an assessed partial capacity to work due to caring responsibilities or disability), a Participant may be able to undertake a Green Army placement on a part-time basis. Part-time Participants in receipt of income support prior to their placement will be able to choose to either receive the green army allowance (pro-rata based on their part-time hours) or remain on their income support payment and receive an additional Approved Program of Work Supplement of $20.80 per fortnight, whichever best suits their circumstances. Part-time Participants who choose to receive the green army allowance will be suspended from their income support arrangements for up to 30 weeks, similar to the rules for full-time Participants.

Full-time and part-time Participants who have their income support arrangements suspended while they receive the green army allowance will have 4 weeks upon completion of their Green Army placement to reconnect with their income support arrangements without a new claim being triggered. Participants will be able to notify the Department of Human Services prior to the completion of their Green Army placement of their intention to return to income support to ensure a seamless transition with no requirement to re-claim payment. Upon timely notification by the Participant, Participants can resume their income support payment as soon as they exit the programme, provided they are still eligible.

Right to work

The committee is seeking further information on how the Bill is compatible with the right to just and favourable conditions of employment, including why it is not possible for the Bill itself to exclude part-time supervisors from the scope of the proposed exclusion from Commonwealth laws.

The Green Army Programme is not an employment programme. It offers voluntary work style experience and activities and accredited training opportunities. A number of pieces of Commonwealth legislation currently include provisions for 'employees'. The Green Army Amendment Bill clarifies that Green Army Participants are not considered employees for the purposes of these Acts.

Green Army Participants are not covered under the *Fair Work Act 2009* because they are not considered employees. However, they will be entitled to personal leave and will be afforded all the necessary Work Health and Safety protections. The health and safety of Participants engaged in the Programme will remain governed by relevant statutes, regulations, by-laws and requirements of the state and territory regulations in respect to anti-discrimination and Work Health and Safety laws.

There may be rare occasions when Green Army Team supervisors (who are considered employees) may be employed on a part-time basis. During the drafting of the Bill it was considered inappropriate to draft complex legislative clauses for an infrequent arrangement and class of persons that is yet to be prescribed. It was determined during drafting of the Bill that prescription of this arrangement was better suited via a legislative instrument.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Tertiary Education Quality and Standards Agency Amendment Bill 2014

Portfolio: Education
Introduced: House of Representatives, 27 March 2014;
Status: Before Senate
PJCHR comments: Third Report of the 44th Parliament, tabled 5 March 2014
Response dated: 17 March 2014

Information sought by the committee

3.62 The bill seeks, among other things, to amend the *Tertiary Education Quality and Standards Agency Act 2011* (the TEQSA Act) to remove the quality assessment function that the Tertiary Education Quality and Standards Agency (TEQSA) currently has so as to enable it to focus on its core activities of provider registration and course accreditation.

3.63 The committee sought further information on the means by which quality standards in tertiary education will be maintained following the removal of TEQSA's quality assessment function.

3.64 The Minister's response is attached.

Committee's response

3.65 The committee thanks the Minister for his response.

3.66 The response sets out the other mechanisms that will remain in place under the TEQSA Act to ensure that quality assurance will continue. The response also refers to other pieces of legislation and quality assurance processes which work alongside TEQSA to ensure the quality of higher education in Australia.

3.67 In light of the information provided, the committee makes no further comment on this bill.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

17 MAR 2014

Our Ref MC14-002635

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

Dear Chair

Thank you for your letter of 4 March 2014 in regards to the Tertiary Education Quality and Standards Agency (TEQSA) Amendment Bill 2014 (the Bill) and the removal of TEQSA's quality assessment function.

I welcome the opportunity to provide the Parliamentary Joint Committee on Human Rights with further information to demonstrate how the quality of Australia's education will be upheld and maintained following the removal of TEQSA's quality assessment function.

TEQSA plays a vital role in assuring the quality of Australia's higher education, and will continue to do so, through its application of the Higher Education Standards Framework (the Standards). When registering an institution or accrediting a course, TEQSA assesses and determines an institution's compliance with the Standards.

Section 134 of the *Tertiary Education Quality and Standards Agency Act 2011* (the TEQSA Act) provides TEQSA with a range of functions, including provider registration, course accreditation, compliance assessments and quality assessments. Section 60 of the TEQSA Act provides that TEQSA may undertake quality, including thematic, assessments or reviews on particular issues that may be relevant to a number of higher education institutions or courses, or broader systemic issues. While the Bill removes this "quality assessment" function, it makes no change to TEQSA's core responsibilities in relation to assuring quality.

The only quality assessment under Section 60 of the Act which TEQSA has carried out since its establishment was the widely criticised assessment of third party arrangements. On 5 April 2013, TEQSA released a survey, comprising 47 pages and 136 questions, on third party arrangements to all higher education institutions. The sector was highly critical of the methodology used and the amount of time and resources required to complete the assessment. Doubts were also raised about how the information collected could be used to improve or enhance the quality of third party arrangements. To date, TEQSA has not provided any analysis or released the results of the third party arrangements survey.

Removal of TEQSA's thematic assessment function will remove TEQSA's ability to compel institutions to participate in such assessment reviews. The independent *Review of Higher Education Regulation* (the Review) presented strong evidence to support the removal of TEQSA's quality assessment function. The Review found most higher education institutions already have robust internal processes, as required by the existing Standards to assure quality. Moreover, higher education institutions already participate in internal and external processes, such as benchmarking, setting discipline standards and professional accreditation, to assure quality. As such, it would be more effective to allow institutions to manage their own quality assurance and for TEQSA to focus on the timely delivery of its core regulatory functions of registering providers and accrediting courses.

However, the Bill will not impede TEQSA's ability to collect, analyse, interpret and disseminate information in relation to quality assurance practice and quality improvement in higher education (as provided for in the functions of the TEQSA Act under section 134). As such, TEQSA can still undertake broader quality-related work on issues that affect the sector as a whole.

Other pieces of legislation and quality assurance processes work alongside TEQSA and further underpin the quality of higher education in Australia, including:

- The Australian Qualifications Framework
- The Higher Education Standards Framework
- The *Education Services for Overseas Students Act*
- The Tuition Protection Service
- The Office of Learning and Teaching.

Together these mechanisms ensure the quality of higher education in Australia is maintained and enhanced. TEQSA's ability to deliver its part of assuring quality will be better focused through the amendments proposed in this Bill.

Thank you for bringing this matter to my attention.

Yours sincerely

Christopher Pyne MP

Appendix 1

Full list of Legislative Instruments received between 1 and 7 March 2014

Appendix 1: Full list of Legislative Instruments received by the committee between 1 and 7 March 2014

The committee considers all legislative instruments that come before either House of Parliament for compatibility with human rights. This report considers instruments received by the committee between 1 and 7 March 2014, which usually correlates with the instruments that were made or registered during that period.

Where the committee considers that an instrument does not appear to raise human rights concerns, but is accompanied by a statement of compatibility that does not fully meet the committee's expectations,[1] it will write to the relevant Minister in a purely advisory capacity providing guidance on the preparation of statements of compatibility. This is referenced in the table with an '**A**' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is not accompanied by a statement of compatibility in circumstances where it was required, the committee will write to the Minister in an advisory capacity. This is referenced in the table with an '**A***' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is exempt from the requirement for a statement of compatibility this is referenced in the table with an '**E**'.

Where the committee has commented in this report on an instrument, this is referenced in the table with a '**C**'.

Where the committee has deferred its consideration of an instrument, this is referenced in the table with a '**D**'.

Where the committee considers that an instrument does not appear to raise any human rights concerns and is accompanied by a statement of compatibility that is adequate, this is referenced in the table with an unmarked square.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[2] Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

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1 The committee has set out its expectations with regard to information that should be provided in statements of compatibility in its Practice Note 1, available at: www.aph.gov.au/joint_humanrights.

2 FRLI is found online at www.comlaw.gov.au.

In relation to determinations made under the *Defence Act 1903*, the legislative instrument may be consulted at www.defence.gov.au.

Instruments received week ending 7 March 2014

A New Tax System (Family Assistance) Act 1999	
Family Tax Benefit (Entitlement Exclusion - Newborn Upfront Payment and Newborn Supplement) Determination 2014 (No. 1) [F2014L00192]	
Australian Capital Territory (Planning and Land Management) Act 1988	
National Capital Plan - Amendment 82 - Amtech Estate [F2014L00206]	
National Capital Plan - Amendment 84 - Pialligo Section 9 Part Block 4 and Section 12 Part Block 2 [F2014L00207]	
Australian Research Council Act 2001	
Australian Research Council Funding Rules for schemes under the Discovery Program for the years 2014 and 2015 [F2014L00193]	E
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 1 of 2014) [F2014L00225]	
Charter of the United Nations Act 1945	
Charter of the United Nations (Sanctions—Central African Republic) Regulation 2014 [SLI 2014 No. 9] [F2014L00197]	
Christmas Island Act 1958	
List of Acts of the Western Australian Parliament Wholly of Partly in Force in Christmas Island pursutant to s. 8A, Christmas Island Act 1958 in the period 10 September 2013 to 21 February 2014 and not in previous lists	
Civil Aviation Safety Regulations 1998	
CASA ADCX 004/14 — Repeal of Airworthiness Directives [F2014L00220]	
Cocos (Keeling) Islands Act 1955	
List of Acts of the Western Australian Parliament Wholly of Partly in Force in Cocos (Keeling) Islands pursutant to s. 8A, Cocos (Keeling) Islands Act 1955 in the period 10 September 2013 to 21 February 2014 and not in previous lists	
Corporations Act 2001	
ASIC Class Order [CO 14/25] [F2014L00204]	
ASIC Class Order [CO 14/26] [F2014L00205]	
ASIC Class Order [CO 14/55] [F2014L00210]	
ASIC Class Order [14/128] [F2014L00211]	
Defence Act 1903	
Defence Determination 2014/10 - Deployment allowance, East Timor peace enforcement allowance and international campaign allowance – amendment	
Defence Determination 2014/11 -Salary rate for training and salary non-reduction – amendment	
Defence Determination 2014/12 - Higher duties and transport contributions – amendment	

Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - South Australian Marine Scalefish Fishery (24/02/2014) (deletion) [F2014L00200]	
Amendment of List of Exempt Native Specimens - South Australian Marine Scalefish Fishery (24/02/2014) (inclusion) [F2014L00201]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trap and Line Fishery (04/03/2014) [F2014L00222]	
Family Law Act 1975	
Family Law (Bilateral Arrangements—Intercountry Adoption) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 7] [F2014L00213]	
Financial Management and Accountability Act 1997	
Financial Management and Accountability Amendment (2014 Measures No. 2) Regulation 2014 [SLI 2014 No. 11] [F2014L00199]	
FMA Act Determination 2014/04 — Section 32 (Transfer of Functions from Immigration to Social Services) [F2014L00221]	E
Health Insurance Act 1973	
Health Insurance (General Medical Services Table) Amendment (Various Measures) Regulation 2014 [SLI 2014 No. 10] [F2014L00202]	
Health Insurance (Allied Health Services) Amendment Determination 2014 (No. 1) [F2014L00203]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 11 of 2014) [F2014L00217]	
Higher Education Support Act 2003 - VET Provider Approval (No. 13 of 2014) [F2014L00218]	
Marine Safety (Domestic Commercial Vessel) National Law Act 2012	
Marine Order 503 (Certificates of survey — national law) Amendment 2014 (No. 1) [F2014L00195]	C
Membership of the Council Statute 2010	
Membership of the Council (Heads of Faculties and Research Schools) Rules 2014 [F2014L00196]	E
Migration Act 1958	
Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026 [F2014L00224]	C E
Migration Act 1958 - Determination of Daily Maintenance Amounts for Persons in Detention - IMMI 14/008 [F2014L00226]	E
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Specified Place - IMMI 14/021 [F2014L00190]	E
Migration Regulations 1994 - Specification of a Class of Persons - IMMI 14/019 [F2014L00212]	E
Migration Regulations 1994 - Specification of a Class of Persons - IMMI 14/020 [F2014L00214]	E
Migration Regulations 1994 - Specification of a Class of Persons - IMMI 14/022 [F2014L00215]	E

National Health Act 1953	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 2) - PB 12 of 2014 [F2014L00191]	
National Health (Epworth Private Hospitals Paperless Prescribing and Claiming Trial) Special Arrangement 2014 - PB 16 of 2014 [F2014L00194]	
National Health (Botulinum Toxin Program) Special Arrangement Amendment Instrument 2014 (No. 1) - PB 13 of 2014 [F2014L00198]	
National Health (Growth Hormone Program) Special Arrangement Amendment Instrument 2014 (No. 1) - PB 14 of 2014 [F2014L00208]	
Privacy Amendment (Enhancing Privacy Protection) Act 2012	
Privacy Amendment (External Dispute Resolution Scheme—Transitional) Regulation 2014 [SLI 2014 No. 8] [F2014L00219]	
Social Security Act 1991	
Social Security (Exempt Lump Sum) (Thalidomide Class Action Payment) Determination 2014 [F2014L00223]	
Taxation Administration Act 1953	
Taxation Administration Act 1953 - Nil rate determination and exemption from lodging Minerals Resource Rent Tax (MRRT) Instalment Liability Notices - Instrument (No. 1) 2014 [F2014L00209]	
Telecommunications (Carrier Licence Charges) Act 1997	
Telecommunications (Carrier Licence Charges) Act 1997 - Determination under paragraph 15(1)(b) No. 1 of 2014 [F2014L00216]	

The committee considered 42 legislative instruments