Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-first report of the 44th Parliament

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Functions of the committee

The committee has the following functions under the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- 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;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- 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.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of and respect for human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for and recognition of human rights in Australia.

Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are very few absolute rights which can never be legitimately limited.[1] All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

More information on the limitation criteria and the committee's approach to its scrutiny of legislation task is set out in Guidance Note 1, which is included in this report at Appendix 2.

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

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 16 to 19 March 2015, legislative instruments received from 27 February to 5 March 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Amending Acts 1980 to 1989 Repeal Bill 2015;
- Charter of Budget Honesty Amendment (Intergenerational Report) Bill 2015;
- Food Standards Australia New Zealand Amendment Bill 2015;
- Governance of Australian Government Superannuation Schemes Legislation Amendment Bill 2015; and
- Statute Law Revision Bill (No. 2) 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human

rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015.

Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[1] Instruments raising human rights concerns are identified in this chapter.

1.10 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Deferred bills and instruments

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

- Australian Border Force Bill 2015 (deferred 18 March 2015);
- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015;
- Criminal Code Amendment (Animal Protection) Bill 2015 (deferred 3 March 2015);
- Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 (deferred 18 March 2015);
- Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2];
- Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (deferred 18 March 2015);
- Criminal Code (Terrorist Organisation—Ansar al-Islam) Regulation 2015 [F2015L00234];
- Criminal Code (Terrorist Organisation—Islamic Movement of Uzbekistan) Regulation 2015 [F2015L00235];
- Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015 [F2015L00233];
- Criminal Code (Terrorist Organisation—Lashkar-e Jhangvi) Regulation 2015 [F2015L00236];

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1 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

- Extradition (Vietnam) Regulation 2013 [F2013L01473] (deferred 10 December 2013); and
- Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461] (deferred 10 February 2015).

1.12 The following instruments have been deferred in connection with the committee's ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime:

- Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970] (deferred 2 September 2014);
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2015 (No. 1) [F2015L00224];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2015 (No. 2) [F2015L00216];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049] (deferred 11 February 2014);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2015 [F2015L00061] (deferred 3 March 2015);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2013 (No. 1) [F2013L01312] (deferred 10 December 2013);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2015 (No. 1) [F2015L00227];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Amendment List 2015 (No. 1) [F2015L00215];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2015 (No. 1) [F2015L00217];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184] (deferred 24 September 2014);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2015 (No. 1) [F2015L00218];
- Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384] (deferred 10 December 2013); and

- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701] (deferred 3 March 2015).

1.13 The following instruments have been deferred in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation:

- Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013 [F2013L02153] (deferred 10 December 2013);
- Social Security (Administration) (Declared income management area - Ceduna and surrounding region) Determination 2014 [F2014L00777] (deferred 10 February 2015);
- Social Security (Administration) (Excluded circumstances – Queensland Commission) Specification 2014 [F2015L00002] (deferred 3 March 2015)
- Social Security (Administration) (Recognised State/Territory Authority - NT Alcohol Mandatory Treatment Tribunal) Determination 2013 [F2013L01949] (deferred 10 December 2013);
- Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission Determination 2013 [F2013L02153] (deferred 11 February 2014); and
- Stronger Futures in the Northern Territory Regulation 2013 [F2013L01442] (deferred 10 December 2013).

Omnibus Repeal Day (Autumn 2015) Bill 2015

Portfolio: Prime Minister and Cabinet
Introduced: 18 March 2015

1.14 The Omnibus Repeal Day (Autumn 2015) Bill 2015 (the bill) seeks to amend or repeal legislation across seven portfolios.

1.15 The bill also includes measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements measures included in the Statute Law Revision Bill (No.1) 2015 and the Amending Acts 1980 to 1989 Repeal Bill 2015.

1.16 One of the Acts which would be repealed is the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*.

1.17 Measures raising human rights concerns or issues are set out below.

Repeal of *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*

1.18 As noted above, the bill seeks to repeal the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (the Act).

1.19 The Act contains a range of protections against discriminatory treatment of Aboriginal people. The purpose of the Act is stated to be 'preventing Discrimination in certain respects against those Peoples under laws of Queensland'.[1]

1.20 Accordingly, the committee considers that the repeal of the Act engages the right to equality and non-discrimination.

Right to equality and non-discrimination

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

1.22 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.23 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[2] which has either the purpose (called

1 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975,* section 1.

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

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

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

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

1.25 The statement of compatibility states that the proposed repeal of the Act*:*

> …does not engage any applicable human rights because the Act does not have any ongoing practical effect. The Act was enacted for the purpose of superseding certain provisions of the laws of Queensland that discriminated against Aborigines and Torres Strait Islanders. The Queensland laws targeted by the Act have since been repealed.[5]

1.26 However, as noted above, the Act contains a number of substantive provisions which may further Australia's obligations under the ICCPR and CERD in relation to the right to equality and non-discrimination. This includes, for example, section 11 which provides:

> A person shall not employ an Aboriginal or Islander in Queensland (whether on a Reserve or elsewhere) unless the terms and conditions of employment are not less favourable than they would be required to be if the employee were not an Aboriginal or Islander, and, in particular, the employee shall be entitled to be paid wages at a rate not less than the rate at which wages would be payable to him if he were not an Aboriginal or an Islander.[6]

1.27 The repeal of the Act therefore engages the right to equality and non-discrimination. While the statement of compatibility states that repealing the Act will have no substantive effect, the committee would appreciate further information to help it understand whether repealing the Act could limit any rights to equality and non-discrimination. No details have been provided in the statement of compatibility about the particular Queensland laws which the Act was designed to override.[7] In

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

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

5 Explanatory memorandum (EM) 37.

6 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975,* section 11.

7 EM 37.

particular, no details have been provided as to whether the *Racial Discrimination Act 1975* provides equivalent and sufficient protection of the right to equality and non-discrimination as is provided by the Act to be repealed.

1.28 **The committee therefore seeks the advice of the Parliamentary Secretary to the Prime Minister as to whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975*.**

1.29 **The committee also seeks the advice of the Parliamentary Secretary to the Prime Minister as to whether there are any Queensland laws which continue to apply such that the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* may not be redundant.**

Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq [F2015L00245]

Portfolio: Attorney-General
Authorising legislation: Criminal Code Act 1995
Last day to disallow: 18 June 2015

Purpose

1.30 The Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq [F2015L00245] (the regulation) makes it an offence under section 119.2 of the *Criminal Code Act 1995* (the Criminal Code) to enter, or remain in, the Mosul district in Ninewa province, Iraq.

1.31 Measures raising human rights concerns or issues are set out below.

Background

1.32 Section 119.2 of the Criminal Code makes it an offence for a person to intentionally enter, or remain in, a declared area in a foreign country where the person is reckless as to whether the area is a declared area. Under section 119.3 of the Criminal Code, the Minister for Foreign Affairs (the minister) may declare an area in a foreign country for the purposes of section 119.2 if the minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.

1.33 The committee considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) in its *Fourteenth Report of the 44th Parliament*,[1] and then subsequently the Attorney-General's response to the committee's requests for further information in its *Nineteenth Report of the 44th Parliament*.[2] The bill was passed by both Houses of Parliament and received Royal Assent on 3 November 2014. The committee also considered declared area offence provisions in its examination of the Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al‑Raqqa Province, Syria [F2014L01634] in its *Eighteenth Report of the 44th Parliament*.[3]

1.34 The committee considered that the declared area offence provisions introduced by the bill were likely to be incompatible with the right to a fair trial and

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 34-44.

2 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 56-100.

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 71-73.

the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

Determination of Mosul district as a declared area

1.35 As a result of the regulation, it is a criminal offence under section 119.2 of the Criminal Code for a person to enter, or remain in, Mosul district in the Ninewa Province, Iraq. The committee notes that the Mosul district includes the city of Mosul, one of the largest cities in Iraq, which prior to the war was home to over 1 800 000 residents.[4]

1.36 In order to prove the offence the prosecution is only required to prove that a person intentionally entered into (or remained in) Mosul district and was reckless as to whether or not it had been declared by the minister. The prosecution is not required to prove that the person had any intention to undertake a terrorist or other criminal act. A person accused of entering or remaining in Mosul district bears an evidential burden—that is, to establish a defence they must provide evidence that they were in the declared area solely for a legitimate purpose as defined by the Criminal Code.

Multiple rights

1.37 As stated above, the committee has previously concluded that the declared area offence provisions of the Criminal Code are likely to be incompatible with:

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and
- the right to equality and non-discrimination.[5]

Compatibility of the determination with multiple rights

1.38 In light of the committee's previous conclusion that the declared area offence provisions in the Criminal Code are incompatible with human rights, it follows as a matter of law that the declaration of Mosul district in Iraq for the purposes of the declared area offence provision is also likely to be incompatible with human rights.

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4 Office of the High Commissioner for Human Rights (OHCHR) and United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Office Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014*, at http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf.

5 The amendment to the declared area provisions to remove the minister's ability to declare entire countries, while welcome, does not alter the committee's initial analysis and conclusions on the bill.

1.39 While the committee acknowledges that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective for the purposes of international human rights law, the committee considers that the statement of compatibility does not provide a sufficiently detailed or evidence-based analysis to establish that the regulation pursues a legitimate objective. For example, the statement of compatibility simply states:

> The declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia's national security.
>
> …The risk of a successful terrorist attack occurring in Australia is high and the limitation imposed by the declaration is necessary to assist in the prevention of an attack on Australian soil by individuals who have gained terrorist capabilities by engaging in hostile activities with a listed terrorist organisation. This is particularly so given that ISIL is using Mosul district, Ninewa province, Iraq as a base of operations and Australians have travelled to Iraq and Syria to participate in the foreign conflict.[6]

1.40 The committee notes that proponents of legislation must provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In this respect, the committee considers that the statement of compatibility does not provide sufficient information as to the specific need for the declaration of the Mosul district as a declared area for the purposes of section 119.2 of the Criminal Code. In particular, the statement of compatibility provides no analysis of the particular threat to Australia's national security, or how any such threat is addressed by declaring the area of Mosul. Further, the statement does not say why it is not possible to rely on measures that are less restrictive of human rights, such as the existing provisions of the Criminal Code which prohibit engaging in hostile activities in foreign countries.

1.41 **As the committee has already concluded that the declared area offence provisions is incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement, and the rights to equality and non-discrimination, it follows that the declaration of the Mosul district in the Ninewa province of Iraq under that offence provision is also incompatible with those human rights.**

6 Explanatory statement 2-3.

1.42 **Notwithstanding this conclusion, the committee agrees that there is a public interest argument in declaring areas under the Criminal Code to pursue the legitimate objective of national security.**

Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 26 March 2015

Purpose

1.43 The Migration Amendment (2014 Measures No. 2) Regulation 2014 (the regulation) amends the Migration Regulations 1994 to:

- remove the prescribed period of time that an applicant outside Australia must be given to respond to a request for information or to an invitation to comment, so that the 'reasonable time' period set out in the *Migration Act 1958* (Migration Act) will apply instead;
- broaden the definition of 'managed fund' to allow the minister to specify investment products as eligible investment products for visa applicants seeking a business visa;
- make changes to the character and general visa cancellation provisions in the Migration Regulations 1994, as a consequence of the introduction of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

1.44 Measures raising human rights concerns or issues are set out below.

Background

1.45 The committee commented on the *Migration Amendment (Character and General Visa Cancellation) Act 2014* in its *Nineteenth Report of the 44th Parliament*.[1]

Criteria for grant of visa requires a statement from appropriate authority

1.46 Item 3 of Schedule 3 of the regulation prescribes additional criteria for the grant of a visa. For those visa applicants that are required to satisfy public interest criteria 4001 or 4002, if the minister requests it, an applicant must provide a statement from an appropriate authority in a country where the person resides, or used to reside, that provides evidence about whether the person has a criminal history.

1.47 The committee considers that this measure engages and may limit Australia's non-refoulement obligations and the right to liberty.

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 13-28.

Non-refoulement obligations

1.48 Australia has non-refoulement obligations under the Refugee Convention, and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[3]

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

1.50 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review, is integral to complying with non-refoulement obligations.[4]

1.51 Australia gives effect to its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa, which includes being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

Compatibility of the measure with non-refoulement obligations

1.52 Under the Migration Regulations, applicants for all visas, including protection visas,[5] are required to pass the character test (criteria 4001) and to not be assessed as a security risk by the Australian Security Intelligence Organisation (criteria 4002). This means that, while a person may engage Australia's protection obligations under the Refugee Convention, the ICCPR and CAT, they might nonetheless be denied a visa on character grounds. This regulation introduces an additional criterion, which is that the person provide evidence about whether they have a criminal history from an

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

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

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

5 See clause 866.225 of the Migration Regulations 1994.

appropriate authority in a country where the person resides or has resided.[6] The minister can exercise his or her personal non-compellable discretion to waive this requirement if satisfied it is not reasonable to require the applicant to provide the statement.

1.53 The statement of compatibility acknowledges that this provision 'may result in a greater number of visa refusal decisions for non-citizens who are in Australia'.[7] It states that the amendments do not engage Australia's non-refoulement obligations. However, it goes on to note:

> Anyone found to engage Australia's non-refoulement obligations during the cancellation decision or visa refusal decision or Ministerial Intervention processes prior to removal from Australia, will not be removed in breach of those obligations.[8]

1.54 The committee considers that the measure engages and limits the obligation of non-refoulement, as it imposes an additional condition which must be met before a visa can be granted, including a protection visa. A person may be found to be one to whom Australia owes protection obligations but, because they cannot provide evidence of whether they have a criminal history from an appropriate authority, they may not be granted a protection visa.

1.55 First, the consequence of a visa being refused is that the person is an unlawful non-citizen subject to removal from Australia. The committee notes that there is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia. Instead, the legislation imposes a duty on officers to remove unlawful non-citizens as soon as is reasonably practicable.

1.56 While the committee acknowledges the minister's commitment to ensuring no one who is found to engage our non-refoulement obligations will be removed in breach of that obligation, this will depend solely on the minister's personal non-compellable discretion. Additionally, the committee notes that Australia may have non-refoulement obligations even in circumstances where the applicant has not made a claim for protection or the person is not covered by the Refugee Convention.[9]

1.57 Second, the requirement that a person provide evidence about whether they have a criminal history from an appropriate authority in a country they may have fled could effectively provide notice to that country that the person is seeking asylum in Australia. If the person is not granted a protection visa and is returned to that

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6 See item 3 of Schedule 3, proposed new regulation 2.03AA.

7 Explanatory statement (ES), Attachment A, 6.

8 ES, Attachment A, 10.

9 See footnote 3.

country, this could itself become a basis for persecution in that country. The committee notes that in such cases the minister may exercise a personal, non-compellable discretion to waive the requirement to provide evidence about their previous criminal history. However, the committee has previously noted that administrative and discretionary safeguards are likely to be less stringent than the statutory protections in guarding against human rights breaches.

1.58 The committee considers that imposing additional criteria for the grant of a protection visa (unrelated to establishing whether the person is owed protection obligations) may limit the obligation of non-refoulement, particularly to the extent that 'independent, effective and impartial' review, including merits review, is not provided in relation to non-refoulement decisions.

1.59 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether imposing additional criteria to be satisfied before a visa can be granted, including a protection visa, complies with Australia's non-refoulement obligations under the ICCPR and the CAT.**

Right to liberty

1.60 Article 9 of the ICCPR protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

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

1.62 The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

Compatibility of the measure with the right to liberty

1.63 The statement of compatibility states that the new powers enable the Department of Immigration and Border Protection to better target those who do not cooperate with a reasonable request to provide documentation or information, through their detention and subsequent removal from Australia. It states that the amendments do not limit the right to freedom from arbitrary detention, and that they present 'a reasonable response to achieving a legitimate purpose under the ICCPR—the safety of the Australian community and integrity of the migration

programme'. It goes on to say that any questions of proportionality will be resolved by way of comprehensive policy guidelines.[10]

1.64 However, the committee considers that, imposing additional criteria for the grant of a visa such that a person recognised as a refugee may still not be granted a visa, engages and limits the prohibition against arbitrary detention. This is because a person whose visa is refused if they have not been able to provide evidence of whether they have a criminal history from an appropriate authority in their home country will be subject to mandatory immigration detention pending their removal or deportation. Where it is not possible to remove a person because, for example, they may be subject to persecution if returned to their home country or no country will accept them, that person may be subject to indefinite detention.

1.65 While the committee considers that ensuring the safety of the Australian community and the integrity of the migration program is likely to be considered a legitimate objective for the purposes of international human rights law, it is not clear that each of the measures is rationally connected to achieving that aim and whether a number of measures may be regarded as proportionate. In particular, it is unclear whether there are sufficient safeguards to ensure that the detention of persons after the exercise of the visa cancellation powers will not lead to cases of arbitrary detention. The committee considers that administrative and discretionary processes, such as policy guidelines, are likely to be less stringent than the protection of statutory processes.

1.66 **The committee therefore considers that imposing additional criteria to be satisfied before a visa can be granted, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

10 ES, Attachment A, 9.

Imposition of special return criteria—visa cannot be granted if had previously held a visa that was cancelled on character grounds

1.67 Special Return Criterion (SRC) 5001 of Schedule 5 to the Migration Regulations currently provides that a person cannot be granted a visa if they were deported from Australia or held a visa that was cancelled on certain character grounds. The regulation amends this to refer to new grounds on which a visa has been cancelled, to reflect the amendments introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*. The provision provides that such exclusion will continue to apply unless the minister personally grants a permanent visa to the person.

1.68 As this amendment expands the basis on which a person can be permanently excluded from Australia, the committee considers that this engages and limits the right to freedom of movement (own country) and the obligation to consider the best interests of the child.

Right to freedom of movement (right to return to Australia)

1.69 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter a country of which you are a citizen. The right may be restricted in certain circumstances.

1.70 The right to enter one's own country includes a right to remain in the country, return to it and enter it. There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable. Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

1.71 The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.

Compatibility of the measures with the right to freedom of movement (right to return to Australia)

1.72 The statement of compatibility does not address the compatibility of the measure with the right to freedom of movement.

1.73 The committee notes that the expanded basis on which a person is excluded from the grant of a further visa may lead to a permanent resident whose visa is cancelled being excluded from ever returning to Australia unless the minister exercises a personal, non-compellable discretion to grant a permanent visa to the person.

1.74 The committee notes that the UN Human Rights Committee has found that the deportation of a person with strong ties to Australia, following cancellation of

their visa on character grounds, may constitute a breach of the right of a permanent resident to remain in their own country.[11] The committee notes that the statement of compatibility provides no assessment of whether the expanded exclusion criteria are compatible with the right to freedom of movement, with particular reference to the cancellation of the visas of permanent residents who have lived for many years in, and have strong ties to, Australia.

1.75 **The committee therefore considers that the expansion of the exclusion criteria may limit the right to freedom of movement and specifically the right of a permanent resident to return to their 'own country'. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Obligation to consider the best interests of the child

1.76 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.

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

Compatibility of the measures with the obligation to consider the best interests of the child

1.78 The statement of compatibility notes that various measures in the regulation:

> …could result in the separation of the family unit. However, the Government's position is that the application of migration laws which consider the individual circumstances of visa applicants or visa holders and

11 *Nystrom v Australia* (Human Rights Committee, Communication No. 1557/07).

> their relationships with family members is consistent with the rights outlined above.
>
> Where a non-citizen's visa is being considered for cancellation, the rights relating to families and children will be taken into account as part of the decision and will be weighed against factors such as the risk the person presents to the Australian community.[12]

1.79 However, the statement of compatibility does not explain whether the best interests of the child, who may have had their visa cancelled as a minor and thus never able to be granted another visa to Australia, will be considered. This is a blanket exclusion which will apply unless the minister personally determines to grant a permanent visa to the person.

1.80 The decision to waive the exception and grant a permanent visa is a personal, non-compellable discretion of the minister. As the committee has previously noted, administrative and discretionary processes are less stringent than the protection of statutory processes. In the absence of a statutory requirement to consider the best interests of a child when deciding whether or not the child will be excluded from the grant of another visa, it is unclear whether the regulation may be considered as being compatible with the obligation to consider the best interests of the child.

1.81 **The committee considers that the regulation engages and limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.**

12 ES, Attachment A, 7.

Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 2 March 2015

Purpose

1.82 The Migration Amendment (Subclass 050 Visas) Regulation 2014 (the regulation) amends the Migration Regulations 1994 to provide the Minister for Immigration and Border Protection (the minister) with a discretion to apply a 'no work' condition (condition 8101) on a Bridging Visa E (BVE) granted by the minister. Previously, a 'no work' condition was mandatorily imposed on some BVEs granted by the minister and could not be imposed on others.

1.83 Measures raising human rights concerns or issues are set out below.

Discretion to apply the 'no work' condition on the grant of a BVE

1.84 The discretion to apply a no work condition on the grant of a BVE engages the right to work and the right to an adequate standard of living as well as the rights of the child. Australia's obligation under international human rights treaties applies to all individuals lawfully in Australia and not just to citizens.

Right to work

1.85 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1]

1.86 The UN Committee on Economic Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;

1 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

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

1.88 The right to work may be subject only to such limitations as are determined by law and that are compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to work

1.89 The committee considers that the regulation in part advances the right to work as compared with the situation prior to the making of the regulation. The regulation creates the possibility that some BVE visa holders will have the right to work in Australia where previously they did not have that right. Nevertheless, the committee notes that the right to work will not be afforded to all BVE holders and that a BVE holder's right to work will be at the discretion of the minister. Accordingly, the committee considers that the regulation limits the right to work.

1.90 The statement of compatibility states that the regulation:

> is a necessary measure for the welfare of democratic society as it protects the integrity of the migration programme, including by ensuring the policy intent of the programme is reflected in the behaviour of visa holders.[2]

1.91 While the committee notes that protecting the integrity of the migration programme may be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, the least rights restrictive alternative to achieve this result).

1.92 The decision to allow a BVE holder to work will be at the discretion of the minister when granting the BVE. As the committee has previously noted, administrative and discretionary processes are likely to be less stringent than the protection of statutory processes. The statement of compatibility sets out that:

> Condition 8101[the no work condition] would also generally be imposed on a BVE granted to a non-citizen who has no lawful basis to remain in Australia.

1.93 Whilst it may be reasonable to impose a no work condition on an individual who, other than for the grant of the BVE (and in the absence of any protection claims), has no lawful basis for being in Australia, the discretion granted to the minister is much broader and would apply to all classes of BVEs.

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2 Explanatory statement (ES) 3.

1.94 **The committee considers that the regulation engages and limits the right to work. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to work.**

Right to an adequate standard of living

1.95 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.96 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

1.97 Working for wages is one of the primary means through which individuals in Australia are able to obtain an adequate standard of living for themselves and their family. The committee notes that no work conditions on BVEs limit an individual's ability to ensure an adequate standard of living through employment.

1.98 The statement of compatibility acknowledges that the regulation engages the right to an adequate standard of living. The statement of compatibility explains that BVE holders who are not granted the right to work 'may nonetheless have access to financial support' such as the Community Assistance Support (CAS) programme and the Asylum Seeker Assistance Scheme (ASAS) for eligible Protection visa applicants.

1.99 The statement of compatibility states that:

> support may not be available because the person has not been assessed to have a prescribed vulnerability or (for non-citizens who have made an application for a substantive visa which has been finally determined) they are not engaging with the department to resolve their immigration status.[3]

1.100 The statement of compatibility explains that the limitation on the right to an adequate standard of living is lawful and for the general welfare of democratic society. The measure has the legitimate objective of ensuring that non-citizens are

3 ES 7.

engaging with the immigration department to resolve their visa status and that this maintains the integrity of Australia's immigration framework.

1.101 While the committee notes that protecting the integrity of the migration programme may be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective (that is, the least rights restrictive alternative to achieve this result).

1.102 The decision to allow a BVE holder to work and provide themselves with an adequate standard of living will be at the discretion of the minister when granting the BVE. The minister will not be required by statutory provisions to consider the ability of the visa applicant to maintain an adequate standard of living when deciding whether or not to impose a no work condition.

1.103 The statement of compatibility sets out the forms of support that may be available to BVE holders if they are unable to work. The statement of compatibility notes that not all individuals who are not permitted to work will be provided with support. The statement of compatibility states that this will 'generally' be because of non-cooperation with the department in resolving the individual's visa status. However, there is no statutory requirement that the minister only impose a no work condition on an individual who is not cooperating with the department. Accordingly, the regulation may impose a limitation on the right to an adequate standard of living which is not proportionate. That is, the regulation would allow the imposition of a no work condition even where an individual is cooperating and has no alternative means of financial support. A least rights restrictive approach would appear to be to limit the power to cases where there is non-cooperation or other non-compliance.

1.104 **The committee considers that the regulation engages and limits the right to an adequate standard of living. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to an adequate standard of living.**

Obligation to consider the best interests of the child

1.105 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[4]

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

4 Article 3(1).

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

Compatibility of the measure with the obligation to consider the best interests of the child

1.107 The imposition of a no work condition on the grant of a BVE holder may inhibit a parent's ability to provide for their child and accordingly the imposition of a no work condition may not be in the best interests of the child. The committee considers that any limitation on the obligation to consider the best interests of the child may have a legitimate objective, as set out above in relation to the right to work and the right to an adequate standard of living. However, the committee is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

1.108 The statement of compatibility explains that:

> I [the minister] may consider the best interests of the child when deciding whether or not to impose condition 8101 on a BVE granted under section 195A, in particular, how the inability of a parent to work may impact upon any dependent children.

1.109 The decision to allow a BVE holder to work will be at the discretion of the minister when granting the BVE. As the committee has previously noted, administrative and discretionary processes are likely to be less stringent than the protection of statutory processes. In the absence of a statutory requirement to consider the interests of a BVE holder's child when deciding whether or not to impose a no work condition, it is unclear whether the regulation may be considered compatible with the obligation to consider the best interests of the child.

1.110 **The committee considers that the regulation engages and limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.**

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426]

Portfolio: Prime Minister and Cabinet
Authorising legislation: Public Service Act 1999
Last day to disallow: 2 March 2015

Purpose

2.3 The Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 (the direction) amends the Australian Public Service Commissioner's Directions 2013 (the directions) to remove the requirement that certain employment decisions need to be notified in the Public Service *Gazette*, and makes some unrelated technical amendments.

Background

2.4 The committee reported on the directions in its *Sixth Report of 2013*.[1] The direction was introduced in October 2014 to amend the directions in response to the committee's report; and was initially reported on in the committee's *Eighteenth Report of the 44th Parliament*.[2]

Notification of termination decisions in the *Gazette*

Right to privacy

2.5 In its previous report, the committee considered that publishing termination decisions for breach of the Code of Conduct limited the right to privacy. The committee considered that the statement of compatibility did not clearly establish that the limitation was in pursuit of a legitimate objective, and therefore sought the advice of the Australian Public Service Commissioner as to:

1 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 133-134.

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 65-67.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Australian Public Service Commissioner's response

I have considered the comments of the Parliamentary Joint Committee made in its *Eighteenth Report of the 44th Parliament* that relate to Direction 2.29(l)(i). That Direction requires agencies to notify in the Public Service *Gazette* decisions to terminate the employment of an Australian Public Service (APS) employee on the grounds of breach of the Code of Conduct.

The Committee's comments have been made in the light of Article 17 of the International Covenant on Civil and Political Rights which protects people against arbitrary interference with their privacy.

Strong public interest exists in ensuring that the APS has a robust and effective Code of Conduct that sets high standards for its employees and deals properly with people that do not meet those standards. The Australian community must be confident that its public service meets exemplary standards of behaviour in the way that it serves the Government and delivers services to the community.

I believe that the balance of the public interest lies in continuing to publish in the Public Service *Gazette* decisions of this kind and that that does not represent an arbitrary interference with privacy. In coming to this view I have considered carefully the competing considerations identified by the Committee in its report as well as the arguments made in 43 submissions by agencies and other interested parties to the then Commissioner, Mr Stephen Sedgwick. In particular, I have had regard to the fact that:

- By publishing these decisions, the APS creates a public record that it deals with serious misconduct appropriately, and that there are significant penalties for misconduct. Publication helps to maintain public confidence in the good management and the integrity of the APS.
- It is not uncommon for former employees who have been terminated from their employment with the APS to seek subsequently to regain employment with the APS. If an APS agency were to rehire an employee who had recently been dismissed for serious misconduct, that would be likely to damage public confidence in the integrity of the public service and in the effectiveness of our conduct regime.

- Publishing termination of employment decisions in the Public Service *Gazette* is not a new practice. In my view it is consistent with the provisions of the *Privacy Act 1988* that allow for the disclosure of personal information either where that is authorised by law, where the affected individual has consented to the disclosure, or where the individual would reasonably expect the employing agency to disclose the information in that way.[3]

Committee response

2.6 **The committee thanks the Australian Public Service Commissioner for his response.**

2.7 The committee notes the commissioner's advice as to the public interest considerations underlying the requirement to publish information about when an Australian Public Service (APS) employee's employment has been terminated on Code of Conduct grounds.

2.8 However, while the committee notes that maintaining public confidence in the good management and integrity of the APS is likely to be a legitimate objective for the purposes of international human rights law, the committee remains concerned that the measure may not be proportionate to this objective.

2.9 The committee notes that measures limiting human rights must have a rational connection to their stated objective to be regarded as proportionate. That is, a measure must be likely to be effective in achieving the objective being sought. In this respect, the committee notes that the commissioner's response does not provide significant evidence as to how publishing personal information would achieve its stated objective of helping to ensure the APS has a robust and effective Code of Conduct. Despite this, the committee accepts that the publishing of personal information could be argued to contribute to maintaining public confidence in the APS as a public demonstration of the APS's commitment to, and enforcement of, the Code of Conduct.

2.10 However, the committee remains concerned that the measure may not be proportionate to the objective sought, specifically in relation to whether there are other, less restrictive ways to achieve the same aim.

2.11 First, the committee notes the Commissioner's advice that publishing the information in the *Gazette* is required because if 'an APS agency were to rehire an employee who had recently been dismissed for serious misconduct, that would be likely to damage public confidence in the integrity of the public service and in the effectiveness of our conduct regime'. However, while the rehiring of such an employee could well damage public confidence, the committee notes there are other

3 See Appendix 1, Letter from John Lloyd PSM, Australian Public Service Commissioner, to Senator Dean Smith (dated 4 March 2015) 1-2.

methods to determine whether a person has been dismissed from the APS than publishing their details in the *Gazette*. For example, it would be possible for the APS to maintain centralised, internal records of dismissed employees, or to use referees, to ensure that a previously dismissed employee is not rehired. Further, the committee understands that it is common for agencies and departments to require potential employees to explicitly provide information about former APS employment, including in relation to any Code of Conduct inquiries in connection with that employment. The committee also notes that if an APS employee were dismissed due to concerns relating to children or other vulnerable people, there are other checks available under existing legislation relating to working with vulnerable people that would ensure that any such issues are brought to the attention of a potential employer.

2.12 Second, the committee also notes the Commissioner's advice that publishing information in relation to termination of employment for breaches of the APS Code of Conduct demonstrates the commitment of the APS to dealing appropriately with serious misconduct, and thereby helps to maintain public confidence in the APS. However, the committee notes that it would be possible to publish this information without the need to name the affected employee (the limitation on the right to privacy occurs because the name of the person whose employment has been terminated is listed in the *Gazette*). The committee notes that the Commissioner's advice does explain why other, less rights-restrictive ways cannot be used to minimise the risks raised by the Commissioner.

2.13 The committee also notes the Commissioner's advice that publishing termination of employment decisions in the Public Service *Gazette* is a longstanding practice, and is consistent with the *Privacy Act 1988* (Privacy Act). However, the duration of the practice, and consistency with the Privacy Act, are not relevant to the requirement for the committee to assess the direction in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Further, as noted in the committee's initial analysis of the instrument, any interference with the right to privacy arising from the past practice of publishing personal information in the *Gazette* was likely to be less than it is today, given that this information is made available on a public website (with search results able to be linked to search engines).

2.14 **The committee considers that publishing details of an APS employee when their employment has been terminated on Code of Conduct grounds limits the right to privacy. While the committee accepts that maintaining public confidence in the good management and integrity of the APS is a legitimate objective, it considers that publishing this information on a publicly accessible website is not proportionate to achieving that objective, as there are other less restrictive methods available to achieve the objective. The committee is therefore unable to conclude that the measure is compatible with the right to privacy.**

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence

Australian Government
Australian Public Service Commission

Australian Public Service Commissioner

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

Dear Senator Smith

I refer to your letter of 13 February 2015 concerning the *Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014*.

I have considered the comments of the Parliamentary Joint Committee made in its *Eighteenth Report of the 44th Parliament* that relate to Direction 2.29(1)(i). That Direction requires agencies to notify in the Public Service *Gazette* decisions to terminate the employment of an Australian Public Service (APS) employee on the grounds of breach of the Code of Conduct.

The Committee's comments have been made in the light of Article 17 of the International Covenant on Civil and Political Rights which protects people against arbitrary interference with their privacy.

Strong public interest exists in ensuring that the APS has a robust and effective Code of Conduct that sets high standards for its employees and deals properly with people that do not meet those standards. The Australian community must be confident that its public service meets exemplary standards of behaviour in the way that it serves the Government and delivers services to the community.

I believe that the balance of the public interest lies in continuing to publish in the Public Service *Gazette* decisions of this kind and that that does not represent an arbitrary interference with privacy. In coming to this view I have considered carefully the competing considerations identified by the Committee in its report as well as the arguments made in 43 submissions by agencies and other interested parties to the then Commissioner, Mr Stephen Sedgwick. In particular, I have had regard to the fact that:

- By publishing these decisions, the APS creates a public record that it deals with serious misconduct appropriately, and that there are significant penalties for misconduct. Publication helps to maintain public confidence in the good management and the integrity of the APS.
- It is not uncommon for former employees who have been terminated from their employment with the APS to seek subsequently to regain employment with the APS. If an APS agency were to rehire an employee who had recently been dismissed for serious misconduct, that would be likely to damage public confidence in the integrity of the public service and in the effectiveness of our conduct regime.

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- Publishing termination of employment decisions in the Public Service *Gazette* is not a new practice. In my view it is consistent with the provisions of the *Privacy Act 1988* that allow for the disclosure of personal information either where that is authorised by law, where the affected individual has consented to the disclosure, or where the individual would reasonably expect the employing agency to disclose the information in that way.

I am grateful to the Committee for the interest that it has taken in this matter and would be happy to provide any further information if that would be helpful to its deliberations.

Yours sincerely

John Lloyd PSM
4 March 2015

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

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

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

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

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

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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

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

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

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

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

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

Strict liability and absolute liability offences

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

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

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

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

Mandatory minimum sentencing

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

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

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

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

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

Civil penalty provisions

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

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

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

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

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

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

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

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

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

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

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

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

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

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

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

When a civil penalty provision is 'criminal'

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

a) Classification of the penalty under domestic law

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

b) The nature of the penalty

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

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

c) The severity of the penalty

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

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

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

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

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

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

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

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

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

Criminal process rights and civil penalty provisions

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

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

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

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