Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

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Membership of the committee

Members

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Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
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Ms Alice Petrie, Legislative Research Officer

External legal adviser

Dr Aruna Sathanapally

Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must 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 (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 13 and 16 February 2017 (consideration of seven bills from this period has been deferred);[1]
- legislative instruments received between 16 December 2016 and 16 February 2017 (consideration of three legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee previously deferred its consideration of the Racial Discrimination Amendment Bill 2016, Racial Discrimination Law Amendment (Free Speech) Bill 2016 and Australian Human Rights Commission Amendment (Preliminary Assessment Process) Bill 2017 until it completed its inquiry into freedom of speech in Australia.[3] This inquiry has now been completed and the committee refers to its comments in the inquiry report in relation to these bills. The committee may choose to make further comments on these bills and an assessment of their human rights compatibility should they proceed to further stages of debate.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. 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.

3 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113; and *Report 1 of 2017* (16 February 2017) 53. See also the final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 *(Cth) and related procedures under the* Australian Human Rights Commission Act 1986 *(Cth)* (28 February 2017).
For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[4] Instruments raising human rights concerns are identified in this chapter.

1.5 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.

1.6 The committee has also concluded its examination of the previously deferred Federal Financial Relations (General purpose financial assistance) Determination No. 91 (October 2016) [F2016L01725] and Federal Financial Relations (General purpose financial assistance) Determination No. 92 (November 2016) [F2016L01938] and makes no further comment on the instruments.[5]

4 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.

5 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 17; and *Report 1 of 2017* (16 February 2017) 53.

Response required

1.7 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Purpose	Seeks to amend a number of Acts relating to the criminal law, law enforcement and background checking to: • ensure Australia can respond to requests from the International Criminal Court and international war crimes tribunals; • amend the provisions on proceeds of crime search warrants, clarify which foreign proceeds of crime orders can be registered in Australia and clarify the roles of judicial officers in domestic proceedings to produce documents or articles for a foreign country, and others of a minor or technical nature; • ensure magistrates, judges and relevant courts have sufficient powers to make orders necessary for the conduct of extradition proceedings; • ensure foreign evidence can be appropriately certified and extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay Territory; • amend the vulnerable witness protections in the *Crimes Act 1914*; • clarify the operation of the human trafficking, slavery and slavery-like offences in the *Criminal Code Act 1995*; • amend the reporting arrangements under the *War Crimes Act 1945*; • ensure the Australian Federal Police's alcohol and drug testing program and integrity framework is applied to the entire workforce and clarify processes for resignation in cases of serious misconduct or corruption; • provide additional flexibility regarding the method and timing of reports about outgoing movements of physical currency, allowing travellers departing Australia to report cross-border movements of physical currency electronically;

	• include the Australian Charities and Not-for-profits Commission in the existing list of designated agencies which have direct access to financial intelligence collected and analysed by AUSTRAC enabling it to access AUSTRAC information; • clarify use of the Australian Crime Commission's prescribed alternative name; and • permit the AusCheck scheme to provide for the conduct and coordination of background checks in relation to major national events
Portfolio	Justice
Introduced	House of Representatives, 23 November 2016
Rights	Privacy; fair trial and fair hearing (see **Appendix 2**)
Status	Seeking additional information

Proceeds of crime

1.8 Part 8 of Schedule 1 of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (the bill) seeks to amend the *International Criminal Court Act 2002* and the *International War Crimes Tribunals Act 1995* in relation to existing proceeds of crime provisions. This includes amendments to the authorisation process for proceeds of crime tools and the availability of a range of investigative and restraint tools in respect of an investigation or prosecution at the International Criminal Court (ICC), an International War Crimes Tribunal (IWCT) and to apply in the foreign context. It also seeks to enhance the process for seeking restraining orders and giving effect to forfeiture orders. The proceeds of crime provisions referred to in these Acts make use of the proceeds of crime framework established by the *Proceeds of Crime Act 2002* (POC Act).

1.9 Schedule 2 of the bill seeks to ensure that the provisions of the proceeds of crime investigative tools in the *Mutual Assistance in Criminal Matters Act 1987* (MA Act) align with and are consistent with the POC Act or are modified appropriately for the foreign context. It also seeks to clarify the types of foreign proceeds of crime orders to which the MA Act applies. It also provides that the MA Act applies to interim foreign proceeds of crime orders issued by non-judicial government bodies. The explanatory memorandum states that proposed item 33 of the bill will confirm the existing provision that the definition of 'foreign restraining order' is not limited to orders made by a court, which 'reflects the fact that in some

countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.[1]

Compatibility of the measure with fair trial and fair hearing rights

1.10 The statement of compatibility states that the amendments in Schedule 2 engage the right to a presumption of innocence, as the MA Act permits the Attorney-General to authorise a proceeds of crime authority to apply to register foreign restraining orders, which could allow a person's property to be restrained, frozen, seized or taken into official custody before a finding of guilt has been made. However, the statement of compatibility states that the proposed amendments will not limit a person's right to a presumption of innocence.[2] The statement of compatibility does not examine the compatibility of the measures in Schedule 1 with the right to a fair trial and fair hearing.

1.11 The statement of compatibility explains that the amendments are intended to ensure 'Australia can provide the fullest assistance to the ICC and IWCT in investigating and prosecuting the most serious of crimes and taking proceeds of crime action'.[3] This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to achieving that objective.

1.12 The statement of compatibility states that, in relation to the proposed amendment to the MA Act in Schedule 2, the Attorney-General's decision to assist a foreign country with registering a foreign restraining order 'will be subject to the safeguards in the MA Act, including all of the mandatory and discretionary grounds for refusal in section 8 of the MA Act' and 'the courts will retain the discretion to refuse to register the order if it is satisfied that it would be contrary to the interests of justice to do so'.[4]

1.13 It is noted that the committee has previously stated that the MA Act raises serious human rights concerns and that it would benefit from a full review of the human rights compatibility of the legislation.[5] The committee has also raised concerns regarding the POC Act. In particular, the committee has previously raised concerns about the right to a fair hearing and noted that asset confiscation may be

1 Explanatory memorandum (EM) 160.

2 EM, statement of compatibility (SOC) 21. Note the SOC also identifies that the right to privacy is engaged and justifiably limited. No comment is made in respect of this right as, based on the information provided in the SOC and the safeguards in the relevant legislation, no concerns are raised in respect of this right.

3 EM, SOC 5.

4 EM, SOC 21-22.

5 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 56-61 at 61.

considered criminal for the purposes of international human rights law, and in particular the right to a fair trial. As the committee has previously noted:

> …the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies [with] important and necessary tools in the fight against crime in Australia. Assessing the forfeiture orders under the POC Act as involving the determination of a criminal charge does not suggest that such measures cannot be taken – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the [*International Covenant on Civil and Political Rights*].[6]

1.14 The committee previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. In his recent response to the committee in respect of the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, the minister stated he did not consider it necessary to conduct an assessment of the POC Act to determine its compatibility with the right to a fair trial and fair hearing as legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the POC Act as it is amended.

1.15 Despite this, the existing human rights concerns with the POC Act and the MA Act mean that any extension of the provisions in those Acts by this bill raise similar concerns. It would therefore be of considerable assistance if these Acts were subject to a foundational human rights assessment.

1.16 In addition, the amendments in item 33 of Schedule 2 provide that an order made under the law of a foreign country—whether made by a court or not—restraining, freezing or directing the seizure or control of property is enforceable in Australia. This is so regardless of whether the person whose property is to be restrained, frozen or seized has been accorded a fair hearing before the order was made. The explanatory memorandum states that this amendment confirms the existing position that the registration of a foreign restraining order is not limited to orders made by a court, which reflects 'the fact that in some countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.[7] The explanatory memorandum states that the Attorney-General has a discretion whether to authorise the registration of orders

6 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 37-44 at 43-44.

7 EM 160 in relation to item 33 of Schedule 2 of the bill.

and may consider 'the nature of the body issuing the order' in exercising that discretion.[8]

1.17 The registration and enforcement of foreign restraining orders and foreign forfeiture orders under Australian law, without any oversight of the process by which such orders were made, raises questions about the compatibility of the measures with the right to a fair hearing and fair trial. This is particularly acute in relation to the registration of foreign restraining orders made by non-judicial bodies. While the Attorney-General retains a broad discretion to refuse to grant assistance under the MA Act, the existence of a ministerial discretion is not in itself a human rights safeguard. As the committee has previously noted, while the government may have an obligation to ensure that the law is applied in a manner that respects human rights, the law itself must also be consistent with human rights.[9] As the UN Human Rights Committee has explained:

> [t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[10]

1.18 While this bill does not substantially amend the provisions of the POC Act or the MA Act or the application process, human rights concerns remain in relation to these existing Acts. In addition, specifically providing in the bill that a foreign restraining order does not need to be made by a court raises serious concerns about the right to a fair hearing before a person's private property is frozen, seized or subject to restraint.

Committee comment

1.19 **The bill seeks to amend or expand the operation of a number of Acts in relation to the proceeds of crime. The committee reiterates its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial. The committee reiterates its previous view that both the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation. The committee draws these matters to the attention of the Parliament.**

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8 EM 160. This is based on section 8(2)(g) of the MA Act which provides that the Attorney-General may refuse a request by a foreign country for assistance if in the opinion of the Attorney-General it is appropriate in all the circumstances of the case that the assistance should not be granted.

9 See Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (27 June 2013) 56-61 at 59.

10 Human Rights Committee, *General Comment 27, Freedom of movement* (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 13.

Person awaiting surrender under extradition warrant must be committed to prison

1.20 Schedule 3 of the bill seeks to amend the *Extradition Act 1988* (Extradition Act) to provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

Compatibility of the measure with the right to liberty

1.21 The right to liberty is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. An obligation on courts to order that a person be committed to prison to await surrender under an extradition warrant engages and limits the right to liberty.

1.22 The statement of compatibility acknowledges that the right to liberty is engaged by this measure but states that the limitation on the right is reasonable and necessary 'given the serious flight risk posed in extradition matters and Australia's obligations to secure the return of alleged offenders to face justice'.[11] It also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'.[12]

1.23 Measures to ensure a person does not evade extradition are likely to be a legitimate objective for the purposes of international human rights law, and the measures appear to be rationally connected to that objective. However, in relation to whether the limitation on the right to liberty is proportionate to the objective sought to be achieved, the question arises as to why the power of the court to commit a person to prison is phrased as an *obligation* to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

1.24 The statement of compatibility states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration'.[13] It states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days.'[14] It also goes on to provide that the Extradition Act makes bail available in special circumstances which ensures that 'where

11 EM, SOC 24.

12 EM, SOC 24.

13 EM, SOC 24.

14 EM, SOC 24.

circumstances justifying bail exist, the person will not be kept in prison during the extradition process'.[15] However, it is unclear how these existing bail provisions fit with the proposed amendments which *require* the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

Committee comment

1.25 **The committee notes that a requirement on a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant engages and limits the right to liberty**.

1.26 **The preceding analysis raises the question of whether the obligation to commit to prison, without providing the court with any discretion not to order commitment to prison in individual cases, is proportionate to the objective of preventing suspects from absconding.**

1.27 **The committee therefore seeks the Minister for Justice's advice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the *Extradition Act 1988* fits with the amendments proposed by this bill.**

15 EM, SOC 24.

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* to: harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; clarify the requirements relating to notification of oral review decisions; and make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 30 November 2016
Rights	Non-refoulement; fair hearing; effective remedy (see **Appendix 2**)
Status	Seeking additional information

Background

1.28 The Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the bill) compliments the schedules to the *Tribunals Amalgamation Act 2015*,[1] which commenced on 1 July 2015. That Act merged key commonwealth merits review tribunals, including the former Migration Review Tribunal and Refugee Review Tribunal (RRT), into the Administrative Appeals Tribunal (AAT).

1.29 The bill consolidates Parts 5 and 7 of the *Migration Act 1958* (Migration Act) into an updated Part 5 of the Migration Act in respect of reviewable decisions by the Migration and Refugee Division (MRD) of the AAT.

1.30 Certain parts of the bill therefore reintroduce existing measures, some of which have previously been considered by the committee.

Limited review of decisions in respect of grant or cancellation of protection visas

1.31 Proposed section 338A, which defines a 'reviewable refugee decision', is proposed to be inserted into the Migration Act by Schedule 4, Part 1, item 34 of the bill. This new section largely mirrors the provisions contained in existing section 411 of the Act.

1.32 Proposed subsection 338A(2) defines what is a 'reviewable refugee decision', which includes a decision to refuse to grant or to cancel a protection visa. However, a

1 The committee considered the Tribunals Amalgamation Bill 2014 in its *Eighteenth Report of the 44th Parliament* (10 February 2015), and found that the bill did not raise human rights concerns.

decision to refuse to grant or to cancel a protection visa is not classified as a reviewable decision if it was made on a number of specified grounds, relating to criminal convictions or security risk assessments.[2] As such, decisions made on such grounds are not reviewable by the MRD. In addition, subsection 338A(1) provides that a number of reviewable refugee decisions are excluded from review on specified grounds, including:

- that the minister has issued a conclusive certificate in relation to the decision, on the basis that the minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the minister personally;
- that the decision is a fast track decision. A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,[3] for which a very limited form of review is available under Part 7AA of the Act.[4]

1.33 As such, there are a wide number of decisions relating to the grant or cancellation of protection visas that are either not subject to any merits review (in relation to ministerial decisions to refuse to grant or to cancel protection visas on certain grounds) or which are subject to very limited review (in the case of fast track decisions).

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2 Schedule 1, Part 1, item 34, new paragraph 338A(2)(c) applies in relation to a decision to refuse to grant a protection visa. The relevant grounds for exclusion are decisions made relying on: subsection 5H(2), which corresponds to the exclusion grounds for refugee status under article 1F of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention); subsection 36(1B), which sets out that a person cannot receive a protection visa if determined by the Australian Security Intelligence Organisation (ASIO) to be a risk to security; subsection 36(1C), which sets out that the person is excluded from the grant of a protection visa if the minister considers the person is a danger or threat to Australia's security, or is a danger to the Australian community having been convicted by final judgement of a particularly serious crime; paragraph 36(2C)(a), which excludes people from complementary protection on the basis of the exclusion grounds for refugee status under article 1F of the Refugee Convention; or paragraph 36(2C)(b) which also excludes people from complementary protection if the minister considers the person to be a danger or threat to Australia's security, or a danger to the Australian community, having been convicted by final judgment of a particularly serious crime. New paragraph 338A(2)(d) applies in relation to a decision to cancel a protection visa. The relevant grounds for exclusion are the same as those under paragraph 338(2)(c), with the addition of a further ground: that a person has been assessed by ASIO as a risk to security.

3 These include unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but before 1 January 2014 and who have not been taken to a regional processing country.

4 See the committee's comments on the human rights compatibility of the fast-track review process in Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.34 The right to non-refoulement requires 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 (see Appendix 2).[5] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.35 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.[6]

1.36 The measure engages the right to non-refoulement and the right to an effective remedy, as it fails to ensure sufficient procedural and substantive safeguards apply to ensure a person is not removed in contravention of the obligation of non-refoulement.[7] The right to non-refoulement is an absolute right, it cannot be subject to any permissible limitations.

1.37 The statement of compatibility identifies that the right to non-refoulement:

> [is] arguably engaged as the amendments go to the review of decisions made under the Migration Act, including review of decisions in relation to protection visa applicants or former protection visa holders, and may impact on whether such applicants or former visa holders, depending on the outcome of the review, may become liable for removal from Australia.[8]

1.38 The statement of compatibility provides that the amendments proposed by the bill 'preserve the existing merits review framework without removing or

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5 Australia's obligations arise under the article 33 of the Refugee Convention in respect of refugees, and also under articles 6(1) and 7 of International Covenant on Civil and Political Rights (ICCPR), article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. The non-refoulement obligations under the ICCPR and CAT 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.

6 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; and *Fourth Report of the 44th Parliament* (18 March 2014) 51.

7 See: Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 179-180, 182-183. Treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT.

8 Explanatory memorandum (EM), statement of compatibility (SOC) 45.

otherwise diminishing a visa applicant or former visa holder's access to merits review of a refusal or cancellation decision in relation to them.'[9] However, the committee's role is to examine all bills introduced into Parliament for compatibility with human rights,[10] an assessment which must take place regardless of whether the bill reflects the existing law (which may or may not have been subject to a human rights compatibility assessment when introduced).

1.39 In respect of the right to an effective remedy, the statement of compatibility states that as there is no general right or entitlement to hold a visa to enter or remain in Australia, a decision to refuse or cancel a visa is not a violation of a person's rights or freedoms. However, the statement of compatibility goes on to note that if it is considered to be a violation of rights or freedoms, judicial review is available to an aggrieved person, and as such, the measure is compatible with this right.[11]

1.40 Despite this reasoning, the committee has previously expressed its view that judicial review is not sufficient to fulfil the international standard required of 'effective review' in the context of non-refoulement decisions and, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met when effective merits review of the decision to grant or cancel a protection visa is not available.[12]

Committee comment

1.41 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.**

1.42 **The committee notes that the measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, and therefore may be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-refoulement.**

9 EM, SOC 45.

10 See section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

11 EM, SOC 46.

12 For the reasoning in support of this view, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 184.

Unfavourable inferences to be drawn by the Tribunal

1.43 Schedule 1, Part 1, item 53 of the bill proposes to insert into the Migration Act new section 358A, which sets out how the MRD is to deal with new claims or evidence in respect of refugee review decisions in relation to a protection visa. This section mirrors current section 423A of the Migration Act.

1.44 Pursuant to this proposed amendment, the MRD must draw an inference unfavourable to the credibility of the claim or evidence if the MRD is satisfied that the applicant does not have a reasonable explanation for why the claim was not raised, or evidence presented, before the reviewable refugee decision was made.

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.45 The right to non-refoulement and the right to an effective remedy have been described in detail above (see also Appendix 2).

1.46 As with the measures discussed above, the right to non-refoulement and the right to an effective remedy are engaged by this measure as it fails to introduce sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement. The right to non-refoulement is an absolute right, it cannot be subject to any permissible limitations.

1.47 The discussion of the right to non-refoulement in the statement of compatibility includes reference to the requirements of the MRD to conduct a review of the refusal or cancellation decision in accordance with the procedures in amended Part 5 of the Migration Act.[13]

1.48 The committee previously considered the requirement on the then RRT to draw an inference unfavourable to the credibility of the claim or evidence, which mirrors proposed section 358A.[14] In its consideration of then proposed section 423A, the committee found that the section was incompatible with Australia's non-refoulement obligations. The committee expressed its concern that:

> …there are insufficient procedural and substantive safeguards to ensure that this proposed provision does not result in a person being removed in contravention of non-refoulement obligations. For example, people who are fleeing persecution or have experienced physical or psychological trauma may not recount their full story initially (often due to recognised medical conditions such as post-traumatic stress disorder), or else may

13 EM, SOC 45.

14 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44. The committee also considered the 'quality of law test' in respect of the requirement on applicants to provide a 'reasonable explanation', and on the basis of information provided by the minister, subsequently found this measure to be compatible with the quality of law test for human rights purposes: Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 30-32.

> simply fail to understand what information might be important for their claim.[15]

1.49 The committee was also concerned that:

> …the proposed provision appears to be inconsistent with the fundamental nature of independent merits review and, to that end, would seem to depart from the typical character of merits review tribunals in Australia. In particular, the committee notes that the function of the RRT as a merits review tribunal is to make the 'correct and preferable' decision in a supporting context where applicants are entitled to introduce new evidence to support their applications. However, proposed section 423A would limit the RRT to facts and claims provided in the original application, and require (rather than permit) the drawing of an adverse inference as to credibility in the absence of a 'reasonable explanation' for not including those facts or claims in the original application.[16]

1.50 The requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.

Committee comment

1.51 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.**

1.52 **The committee notes that the measure limits the ability of the Administrative Appeals Tribunal to provide effective merits review of decisions relating to the grant of protection visas, and therefore may be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions. The committee therefore seeks the advice of the minister as to the compatibility of this measure with the obligation of non-refoulement.**

15 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43.

16 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44.

New procedures for the Immigration Assessment Authority

1.53 Schedule 2, Part 3 proposes to amend the Migration Act such that the minister may refer fast track reviewable decisions in relation to members of the same family unit to the Immigration Assessment Authority (IAA) for review together.[17] The amendments also enable the IAA to review two or more fast track reviewable decisions together, whether or not they were referred together.[18] Further, where fast track reviewable decisions have been referred and reviewed together, documents given by the IAA to any of the applicants will be taken to be given to each applicant.[19] The explanatory memorandum provides that this would make the IAA provisions consistent with the giving of documents provisions that currently apply to family groups in the MRD.[20]

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.54 The right to non-refoulement is engaged by the measure, as allowing for two or more fast-track decisions to be considered together may not provide effective review for the individual applicants. This concern is particularly relevant in the context of fast track review decisions by the IAA, as the committee has previously raised concerns about procedural fairness in relation to this process. These measures in that context may fail to provide sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement.

1.55 The statement of compatibility sets out that the stated objective of the measure is to 'promote administrative efficiency'.[21] However, the right to non-refoulement, including the obligation to ensure independent, effective and impartial review, is absolute, and cannot be justifiably limited.

1.56 In this regard, in the initial assessment of the introduction of the IAA in a previous committee report, it was noted that the (then proposed) system, an internal departmental review system, lacks the requisite degree of independence to ensure 'independent, effective and impartial' review under international law.[22] It was identified that this concern is most pronounced in respect of the fact that any such internal reviews by the department would be performed by the department itself,

17 Schedule 2, Part 3, item 27 inserts new subsection 473CA(2).

18 Schedule 2, Part 3, item 28 inserts new section 473DG.

19 Schedule 2, Part 3, item 33 inserts new section 473HE.

20 EM 38.

21 EM, SOC 45.

22 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

which, being the executive arm of government, would amount to executive review of executive decision making.[23]

1.57 This was subsequently reiterated in the final assessment of the introduction of the IAA. [24] It was also noted that, while judicial review is still available, it is limited to review of decisions as to whether the decision was lawful and does not consider the merits of a decision.[25] This report also discussed how the right to a fair hearing was engaged and limited by the introduction of the IAA.[26]

1.58 These concerns with the IAA process are relevant to the consideration of the proposed amendments, as the possibility that the individual merits of an applicant's claim will not be treated or considered separately further increases the existing risk of refoulement and further limits the existing limitations on the right to an effective remedy.

Committee comment

1.59 **The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.**

1.60 **The committee also notes that the right to an effective remedy, which includes the right to independent, effective and impartial review, is further limited by the proposed amendments to the Immigration Assessment Authority process, which provide that individual applications need not be treated separately.**

1.61 **Accordingly, the committee seeks the advice of the Minister for Immigration and Border Protection as to whether hearing family applications together (without the consent of the applicants) will ensure the review process under the Immigration Assessment Authority provides for effective review of such claims so as to comply with Australia's non-refoulement obligations.**

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23 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

24 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. It was noted that the fact that the reviewers are employees under the *Public Service Act 1999* affects the independence of such a review and therefore the impartiality of such a review.

25 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178.

26 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. Specifically, it was noted that: '… nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.'

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Purpose	Seeks to amend the *Native Title Act 1993* to respond to the Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 by: confirming the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); enable the registration of agreements which have been made but have not yet been registered; and ensure that area Indigenous Land Use Agreements can be registered without requiring every member of the RNTC to be a party to the agreement
Portfolio	Attorney-General
Introduced	House of Representatives, 15 February 2017
Rights	Culture; self-determination (see **Appendix 2**)
Status	Seeking additional information

Area Indigenous Land Use Agreements and the Native Title Act

1.62 The *Native Title Act 1993* (NTA) provides a legislative process by which native title groups can negotiate with other parties to form voluntary agreements in relation to the use of land and waters called Indigenous Land Use Agreements (ILUAs). Under the NTA ILUAs may be:

- over areas or land where native title has, or has not yet, been determined;
- entered into regardless of whether there is a native title claim over the area or not; or
- part of a native title determination or settled separately from a native title claim.[1]

1.63 There are a number of matters which ILUAs may cover including:

- how native title rights coexist with the rights of other people;
- who may have access to an area;
- native title holders agreeing to a future development or future acts;
- extinguishment of native title;
- compensation for any past or future act;

1 See, *Native Title Act 1993* (NTA) section 34CD.

- employment and economic opportunities for native title groups;
- issues of cultural heritage; and
- mining.[2]

1.64 When registered, ILUAs bind all parties and all native title holders to the terms of the agreement including people that have not been born at the time an ILUA was registered.[3]

1.65 Under the NTA there are three types of ILUAs:

- body corporate ILUAs are made in relation to land or waters where a registered native title body corporate exists;
- 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists; and
- alternative procedure ILUAs.[4]

1.66 The NTA specifies requirements which must be met in order for an agreement to be an 'Area ILUA'. Section 24CD of the NTA provides that all persons in the 'native title group', as defined in the section, must be parties to an Area ILUA. Under section 24CD the native title group consists of all 'registered native title claimants' (RNTC) in relation to land or waters in the area. Section 253 of the NTA defines RNTC as 'a person or persons whose name or names appear in an entry to the Register of Native Title Claims'. The RNTC is often a subset of the larger group native title claim group that may hold native title over the area.[5] Section 251A of the NTA provides for a process for authorising the making of ILUAs by the native title claim group.

1.67 The recent full bench of the Federal Court decision in *McGlade v Native Title Registrar & Ors*,[6] dealt with three main issues relating to the process of Area ILUAs:

- whether each individual member of the RNTC must be party to an area ILUA;
- whether a deceased individual member of the RNTC must be party to an Area ILUA; and
- whether an individual member of the RNTC must sign an area ILUA prior to the application for registration being made.

1.68 The court in *McGlade* held in relation to any proposed Area ILUA, if one of the persons who, jointly with others, has been authorised by the native title claim

2 See, NTA section 24CB.

3 See, NTA section 24AA(3).

4 Explanatory memorandum (EM) 2.

5 EM 2.

6 [2017] FCAFC 10 (*McGlade*).

group to be the applicant, refuses, fails or neglects, or is unable to sign a negotiated, proposed written indigenous land use agreement, for whatever reason, then the document will lack the quality of being an agreement recognised for the purposes of the NTA and will be unable to be registered.[7] Following this decision all individuals comprising the RNTC must sign the agreement otherwise it cannot be registered as an Area ILUA.

Amendments to process for Area ILUAs and validation of existing ILUAs

1.69 The Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the bill) seeks to amend the NTA to overturn aspects of the full bench of the Federal Court decision in *McGlade*[8] regarding Area ILUAs. The bill seeks to amend the process for authorising ILUAs as follows:

(a) a native title claim group authorising an ILUA under section 251A of the NTA will be able to:

  (i) nominate one or more of the members of the RNTC for the group to be party to the ILUA; or

  (ii) specify a process for determining which of the members of the RNTC for the group is, or are, to be party to the ILUA.[9]

(b) under section 251A a native title claim group will be able to choose to utilise a traditional decision-making process for authorising such matters or agree and adopt an alternative decision-making process;[10]

(c) in place of the current requirement for all members of the RNTC to be party to the agreement under section 24CD of the NTA, the mandatory parties to an ILUA would include:

  (i) the member or members of the RNTC who is or are nominated by the native title claim group, or determined using a process specified by the native title claim group, to be party to the ILUA; or

  (ii) if no such members are nominated or determined to be party to the ILUA, a majority of the members of the RNTC.[11]

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7 The decision of the full bench of the Federal Court in *McGlade* reversed the decision of Reeves J in *QGC Pty Ltd v Bygrave* (No 2) (2010) 189 FCR 412 *(Bygrave)* who held the authorisation of the ILUA by the claimant group was of paramount importance, not the signature of all of the persons comprising the applicant. Once authorised, the claimant group could decide who they wanted to sign the Area ILUA. Prior to *Bygrave* an Area ILUA would not be registered unless it was signed by all of the RNTCs.

8 [2017] FCAFC 10 (*McGlade*).

9 See proposed section 251A(2).

10 See proposed section 251A(2).

11 See proposed section 24CD(2)(a).

1.70 The bill also seeks to amend the NTA to:

(a) provide that existing Area ILUAs which have been registered on or before 2 February 2017, but do not comply with *McGlade* as they were not signed by all members of the RNTC, are valid; and

(b) enable the registration of agreements which have been made and lodged for registration on or before 2 February 2017 but do not comply with *McGlade* as they have not been signed by all members of the RNTCs.[12]

Compatibility of the measures with the right to culture

1.71 The right to culture is contained in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the International Covenant on Civil and Political Rights (ICCPR).

1.72 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. This right is separate from the right to self-determination as it is conferred on individuals (whereas the right to self-determination belongs to groups). This right has been identified as particularly applying to Indigenous communities, and includes the right for Indigenous people to use land resources, including traditional activities such as hunting and fishing and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.[13]

1.73 The proposed amendments to the process for authorising the making of Area ILUAs engage the right to culture. This is because the types of matters which may be the subject of an Area ILUA are significant and include such matters as authorisation of any future act and the extinguishment of native title rights and interests. Given that such agreements continue to operate into the future, the process by which ILUAs are authorised by native title claim groups is of great significance for the right to culture.

1.74 Under proposed section 24CD(2)(a)(ii) where no members of the RNTC are nominated or determined to be party to the ILUA, the default position is that agreement from a majority of the members of the RNTC will be sufficient for an Area ILUA to be valid. Noting that the right to culture is an individual rather than collective right, this may have the effect of limiting the right to culture of individuals who do not agree with the ILUA. Similarly, the validation of Area ILUAs that have previously been registered or are lodged for registration which have not been signed by all

12 EM 6.

13 See, UN Human Rights Committee, General Comment No. 23: The rights of minorities (1994); UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, A/55/40 (2000) and Human Rights Committee, Concluding observations on the fifth periodic report of Australia, CCPR/C/AUS/CO/5 (2009).

RNTC members could potentially limit the right to culture for individuals that do not agree to an Area ILUA.

1.75 A limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and a proportionate means of achieving this objective.

1.76 The statement of compatibility identifies that the measures engage the right to culture but notes that the NTA 'as a whole':

> …promotes the right to enjoy and benefit from culture, by establishing processes through which native title can be recognised, and providing protection for native title rights and interests. The amendments in this Bill continue to promote these rights, by providing certainty to native title claimants and holders, and third parties on the use of native title land and waters through voluntary agreements.[14]

1.77 However, the statement of compatibility does not provide an assessment of the potential limitation on the right to culture for some individuals. Nevertheless, it explains that the amendments are needed to ensure the views of the broader native title claim group are not frustrated noting that the position following *McGlade* means that if a single member of the RNTC withholds consent to be a party to the Area ILUA the ILUA cannot be registered:

> The amendments will…assist area ILUAs to be made more efficiently in cases where an agreement has been validly authorised by a group which holds or may hold native title, but one or more members of the RNTC are unable or unwilling to sign the area ILUA. This may be for a variety of reasons- an elderly member may have passed away before being able to sign, or a member may not wish to sign the agreement for personal reasons or the ILUA does not affect their country.
>
> These amendments also aim to address concerns that agreements which have been validly authorised by the broader native title group can be frustrated in circumstances when RNTC members disagree and refuse to sign. Disputes between RNTC members and the broader claim group can lead to delays and burdensome costs.[15]

1.78 The explanatory memorandum to the bill further notes that while a native title claim group may make an application under section 66B of the NTA removing a member or members of the RNTC who refuse to sign or are unable to sign 'this process can impose high costs on claim groups.'[16] These factors collectively indicate that, to the extent that the measures limit the right to culture, the measure would

14 EM 7.

15 EM 7.

16 EM 4.

appear to pursue a legitimate objective for the purposes of international human rights law.

1.79 However, while acknowledging difficulties with the current authorisation process for ILUAs, there are some questions about whether the measures are proportionate particularly noting the serious matters that ILUAs may cover (including future projects and extinguishment of native title) and the ongoing binding nature of such ILUAs into the future. The proposed amendments would allow an ILUA to be registered even where a significant minority of RNTC members disagree or refuse to sign and may have strong reasons for doing so.

1.80 Aspects of the test of proportionality are concerned with the extent of the impact on the individual by the measure but also whether there are less rights restrictive ways of achieving a legitimate objective. This may include whether reasonable scope could be given to minority views. The statement of compatibility does not address this issue.

Committee comment

1.81 **The preceding analysis raises questions about whether the measures limit the right to culture for individuals who object to the making of an Area Indigenous Land Use Agreement under the *Native Title Act 1993*. This was not addressed in the statement of compatibility.**

1.82 **The committee requests the advice of the Attorney-General as to whether the measure is a reasonable and proportionate measure for the achievement of its apparent objective and in particular:**

- **whether less rights restrictive measures would be workable;**
- **whether reasonable scope could be given for minority views; and**
- **any procedural or other safeguards to protect the right to culture for individuals.**

Compatibility of the measure with the right to self-determination

1.83 The right to self-determination is protected by article 1 of the ICCPR and article 1 of the ICESCR. The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development. It is generally understood that the right to self-determination accrues to 'peoples'.

1.84 The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.[17]

17 See, UN Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (1996).

Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to impact on them.

1.85 As acknowledged in the statement of compatibility, the principles contained in the UN Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the amendments in this bill. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context as to how human rights standards under international law apply to the particular situation of Indigenous peoples.[18] The Declaration affirms the rights of Indigenous peoples to self-determination.[19]

1.86 The proposed amendments to the authorisation process of Area ILUAs engage and appear likely to promote the collective right to self-determination, noting that a minority of members of the RNTC would be unable to frustrate the making of a ILUA which has been authorised by the native title claim group. The statement of compatibility states that the measures engage and promote the rights contained in the Declaration and the right to self-determination:

> By providing native title holders with greater discretion to determine who can be party to an agreement, these amendments emphasise the fundamental importance of authorisation to the integrity of the native title system. Authorisation processes recognise the communal character of Indigenous traditional law and custom, and ensure that decisions regarding the rights and interest of Indigenous Australians are made with traditional owners.
>
> As outlined above, these amendments also aim to promote efficient negotiation and settlement of area ILUAs, to continue to assist Indigenous Australians to access the potential social and economic benefits of native title.[20]

1.87 Acknowledging that the measures, in general, appear to promote the collective right to self-determination there are some remaining questions about whether the measures will promote the right to self-determination in all circumstances. As indicated above at [1.79], it may be considered to be important to give some scope to the reasonable expression of minority views as part of ensuring genuine agreement is reached. It this respect, it is noted that adequately consulting those most likely to be affected by such changes in accordance with the Declaration may be of particular importance.

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18 EM 8.

19 UN Declaration on the Rights of Indigenous Peoples, article 3.

20 EM 8.

Committee comment

1.88 **The preceding legal analysis indicates that the measure appears to promote the collective right to self-determination. However, the preceding legal analysis raises questions about whether the proposed amendments will promote the right to self-determination in all circumstances.**

1.89 **In relation to the compatibility of the measure with the right to self-determination, the committee requests the advice of the Attorney-General:**

- **about the extent to which the measures promote the right to self-determination in a range of circumstances;**
- **as to whether reasonable scope could be given for minority views; and**
- **as to whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes.**

Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

Purpose	Proposes to make a number of amendments to the *Therapeutic Goods Act 1989*, including to: enable the making of regulations to establish new priority pathways for faster approval of certain products, designate bodies to appraise the suitability of the manufacturing process for medical devices manufactured in Australia, and to consider whether such medical devices meet relevant minimum standards for safety and performance; allow certain unapproved therapeutic goods that are currently accessed by healthcare practitioners through applying to the secretary for approval to be more easily obtained; provide review and appeal rights for persons who apply to add new ingredients for use in listed complementary medicines; and make a number of other measures to ensure consistency across the regulation of different goods under the Act
Portfolio	Health and Aged Care
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see **Appendix 2**)
Status	Seeking additional information

Civil penalty provisions

1.90 Proposed section 41AF of the Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016 (the bill) seeks to introduce a new civil penalty provision that applies if a licence holder carrying out one or more steps in the manufacture of therapeutic goods, provides false or misleading information or documents to the secretary.

1.91 A maximum of 5 000 civil penalty units will apply to an individual who is found to contravene proposed section 41AF. Based on the rate for penalty units as it currently stands this equates to a monetary penalty of up to $900 000.[1] With changes to the rate of penalty units scheduled to increase from July 2017, the maximum penalty will be over $1 million.[2]

1 The current penalty unit rate is $180 per unit, see section 4AA of the *Crimes Act 1914*.

2 See Mid-Year Economic and Fiscal Outlook 2016-17, December 2016, Appendix A. See also Crimes Amendment (Penalty Unit) Bill 2017, which seeks to increase the amount of the Commonwealth penalty unit from $180 to $210, with effect from 1 July 2017. This bill was introduced into the House of Representatives on 16 February 2017 and considered at page 58 of this report.

Compatibility of the measure with the right to a fair trial

1.92 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; that is, proof is on the balance of probabilities.

1.93 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 purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law (see Appendix 2). 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.

1.94 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.

1.95 As noted at paragraph [1.91], a civil penalty of up to 5 000 penalty units is a substantial penalty which could result in an individual having a penalty imposed of up to $900 000. The maximum civil penalty is also substantially more than the financial penalty available under the related criminal offence provisions, which are restricted to 1 000 penalty units (or $180 000) (and/or 12 months' imprisonment).[3]

1.96 However, the statement of compatibility does not discuss the civil penalty provisions or how they engage and may limit the right to a fair trial. The committee's expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

1.97 When assessing the severity of a pecuniary penalty, regard must be had to the amount of the penalty, the nature of the industry or sector being regulated and the maximum amount of the civil penalty that may be imposed relative to the penalty that may be imposed for a corresponding criminal offence.

1.98 Having regard to these matters, the civil penalty provisions imposing a maximum of 5,000 penalty units appear to impose a particularly severe penalty and

3 Offences under proposed sections 41AD relating to false or misleading documents, or 41AE relating to misleading documents, carry a penalty of 1 000 penalty units and/or 12 months' imprisonment. Note also that an offence under proposed section 41AC carries a penalty of 400 penalty units. A person commits an offence under this section if the person has been given a notice under section 41AB; and the person omits to do an act; and the omission contravenes a requirement of the notice.

may be considered to be 'criminal' for the purposes of international human rights law.

1.99 The consequence of this would be that the civil penalty provisions in the bill must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

Committee comment

1.100 **The preceding legal analysis raises questions as to the compatibility of the measure with the right to a fair trial.**

1.101 **The committee notes that the statement of compatibility does not address the engagement of this right by the measure. The committee therefore seeks further information from the Minister for Health as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.**

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

Purpose	Seeks to enable the Secretary of the Department of Veterans' Affairs to authorise the use of computer programmes to: make decisions and determinations; exercise powers or comply with obligations; and do anything else related to making decisions and determinations or exercising powers or complying with obligations. The bill also empowers the secretary to disclose information about a particular case or class of persons to whomever the secretary determines, if it is in the public interest
Portfolio	Veterans' Affairs
Introduced	House of Representatives, 24 November 2016
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Broad public interest disclosure powers

1.102 Schedule 2 of the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the bill) inserts a provision into each of the *Military, Rehabilitation and Compensation Act 2004* (MRCA), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and *Veterans' Entitlements Act 1986* to enable the Secretary of the Department of Veterans' Affairs (DVA) to disclose information obtained by any person in the performance of their duties under those Acts, in a particular case or class of case, to such persons and for such purposes as the secretary determines, if the secretary certifies it is necessary in the public interest to do so.[1]

1.103 If the information to be disclosed is personal information, the secretary is required to notify the affected person in writing of the intention to disclose this personal information, and give the person a reasonable opportunity to provide a

1 Proposed section 409A of the *Military, Rehabilitation and Compensation Act 2004*, proposed section 151B of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed section 131A of the *Veterans' Entitlements Act 1986.*

response and consider that response.[2] The secretary will commit an offence if information is disclosed without engaging with the affected person.[3]

Compatibility of the measure with the right to privacy

1.104 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information (see Appendix 2).

1.105 Schedule 2 of the bill engages and limits the right to privacy by bestowing upon the secretary of the DVA a broad discretionary power to 'disclose any information obtained by any person in the performance in that persons duties' under the relevant act[4] 'to such persons and for such purposes as the secretary determines'.[5]

1.106 The statement of compatibility for the bill acknowledges that the right to privacy is engaged and limited by this measure, but states that to the extent that it may limit rights those limitations are reasonable, necessary and proportionate.

1.107 The explanatory memorandum sets out the objective for the proposed amendment:

> [t]he information sharing provisions, and related consequential amendments, are necessary because, with the creation of a stand-alone version of the [*Safety, Rehabilitation and Compensation Act 1988*] with application to Defence Force members, the ability of the [Military Rehabilitation and Compensation Commission] to share claims information about current serving members with either the Secretary of the Department of Defence or the Chief of the Defence Force is more limited than it is under the MRCA. These amendments will align information sharing under the DRCA with arrangements under the MRCA.[6]

1.108 The statement of compatibility also sets out the following examples of when it may be appropriate for the secretary to disclose personal information:

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2 At proposed subsection 409A(6) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(6) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed subsection 131A(6) of the *Veterans' Entitlements Act 1986.*

3 At proposed subsection 409A(7) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(7) of the *Safety, Rehabilitation and Compensation (Defence-relatedClaims) Act 1988* and proposed subsection 131A(7) of the *Veterans' Entitlements Act 1986.*

4 Namely, the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* or the *Veterans' Entitlements Act 1986*.

5 Lawful interferences with privacy must be sufficiently circumscribed in order to accord with article 17 of the International Covenant on Civil and Political Rights: UN Human Rights Committee, General Comment 16: Article 17 (Right to Privacy) (1988) paragraph [8].

6 Explanatory memorandum (EM) 11.

> …where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices.[7]

1.109 The objective of ensuring claims information about current serving members can be shared with either the Secretary of the Department of Defence or the Chief of the Defence Force would appear to seek to achieve a legitimate objective for the purposes of international human rights law.

1.110 In allowing for disclosure in this way, the measure also appears to be rationally connected to this objective.

1.111 The statement of compatibility sets out that several statutory safeguards will ensure that the secretary's powers will be exercised appropriately, including that:

- the secretary must act in accordance with rules that the minister makes about how the power is to be exercised;
- the minister cannot delegate his or her power to make rules about how the power is to be exercised to anyone;
- the secretary cannot delegate the public interest disclosure power to anyone;
- before disclosing personal information about a person, the secretary must notify the person in writing about his or her intention to disclose the information, give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person; and
- unless the secretary complies with the above requirements before disclosing personal information, he or she will commit an offence, punishable by a fine of 60 penalty units.[8]

1.112 However, these safeguards are not sufficient to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved. For example, although the secretary must act in accordance with rules made by the minister, there is no requirement on the minister to make such rules. Under the legislation as drafted, the secretary is empowered to disclose any personal information to any person with the sole criteria for the exercise of this power being that the secretary considers it to be in 'the public interest' to do so.

1.113 The absence in the primary legislation of any substantive detail as to the circumstances in which personal information can be disclosed and to whom and the absence of any obligation to make rules confining this power, together raises

7 EM, statement of compatibility (SOC) 3.

8 EM, SOC 4.

concerns as to whether the limitation on the right to privacy is proportionate to the objective being sought to be achieved.

Committee comment

1.114 **The committee notes that the measure gives the secretary the power to disclose personal information to any person on any basis so long as the secretary considers that disclosure to be in the 'public interest'. The statement of compatibility refers to rules that will govern the exercise of the secretary's broad discretionary power to disclose information. However, there is no obligation to make such rules, and their proposed content is not available to the committee. This broad discretionary power to disclose personal information raises potential concerns in relation to the right to privacy.**

1.115 **The committee therefore seeks the Minister for Veterans' Affairs' advice as to whether:**

- **there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved; and**
- **there are less restrictive ways to achieve the objective of the measure (including whether the primary legislation could set limits on the breadth of the secretary's discretionary power or, at a minimum, it could require the making of rules that set out how the power is to be exercised).**

Australian Citizenship Regulation 2016 [F2016L01916]

Purpose	Remakes existing regulations (which are sunsetting) to prescribe a number of matters in relation to citizenship
Portfolio	Immigration and Border Protection
Authorising legislation	*Australian Citizenship Act 2007*
Last day to disallow	9 May 2017
Rights	Privacy; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.116 In 2014 the committee considered the Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014.[1] This regulation relates to the form of notice of evidence of Australian citizenship (citizenship notice), which is a document that may be provided by the minister as evidence of a person's Australian citizenship.

1.117 Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of their Australian citizenship (citizenship notice). When given, that citizenship notice must be in a form prescribed by the Australian Citizenship Regulations and contain any other matter prescribed by the regulations. The Australian Citizenship Regulation 2007 (as amended in 2014) provided that the following information, among other matters, may be included on the back of a notice of evidence of citizenship:

- the applicant's legal name at time of acquisition of Australian citizenship, if different to the applicant's current legal name; and
- any other name in which a notice of evidence has previously been given.

1.118 The Australian Citizenship Regulation 2016 remakes existing regulations (which are sunsetting). It is in the same form as the amended 2007 regulation.

1.119 The committee previously concluded that the measure was incompatible with the right to privacy and the right to equality and non-discrimination. At the time, the committee noted that the measure engaged and limited the right to privacy and the right to equality and non-discrimination on the basis that listing previous names on the back of a citizenship notice may identify a transgender person who has changed their gender. As the statement of compatibility had not addressed this issue, the committee corresponded with the minister about whether the limitation

1 See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 118-120; *Twelfth report of the 44th Parliament* (24 September 2014) 50-54; and *Sixteenth report of the 44th Parliament* (25 November 2014) 29-32.

was permissible and in particular whether there was a less rights restrictive way of achieving the objectives of the measure (that is, whether the limitation was proportionate). In finding that the measure was incompatible with human rights the committee noted that other identity documents, such as passports, do not include such information so the measure did not appear to be the least rights restrictive approach as required to be a permissible limit on human rights. The committee also concluded that the fact that an individual did not have control over the recording of their previous name also affected the proportionality of the measure noting that the right to privacy includes the right to control the dissemination of information about one's private life.[2]

Releasing information concerning a person's change of name

1.120 As noted above, the Australian Citizenship Regulation 2016 is in the same form as the amended 2007 regulation, which is sunsetting, and provides that previous names may be listed on the back of a citizenship notice.

Compatibility of the current measure with the right to privacy

1.121 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information as well as the right to control the dissemination of information about one's private life.[3] By disclosing personal information through the listing of previous names on the back of a citizenship notice, the measure engages and limits the right to privacy. The current statement of compatibility recognises that this regulation engages the right to privacy; and in particular in relation to transgender people who may have changed their name, and having evidence of a previous male or female name may reveal that they have now changed their sex or gender.[4]

1.122 It is noted that proof of Australian citizenship may be required to be provided in range of situations including in the context of employment or access to services. Indirectly revealing that a person has undergone a change of sex or gender accordingly could have significant implications for that individual and could expose them to risks.

1.123 However, limitations on the right to privacy will be permissible where they are not arbitrary, they pursue a legitimate objective, are rationally connected to that

2 See Parliamentary Joint Committee on Human Rights, *Sixteenth report of the 44th Parliament* (25 November 2014) 29. Three members of the committee issued a dissenting report in relation to the conclusion that the measure was incompatible with human rights: see *Sixteenth report of the 44th Parliament* (25 November 2014) 61: Dissenting report by Senator Matthew Canavan, Mr David Gillespie MP and Mr Ken Wyatt MP.

3 See International Covenant on Civil and Political Rights (ICCPR) article 17; UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

4 Explanatory statement (ES) 5-6.

objective and are a proportionate means of achieving that objective. The statement of compatibility identifies the objective of the current measure as assisting in verifying identity and preventing identity fraud:

> The provision of details of a previous notice of evidence of citizenship on the back of a notice of evidence of citizenship assists in maintaining the integrity of Australia's identity framework. Identity integrity is essential in maintaining Australia's national security, law enforcement and economic interests. It is essential that the identities of persons accessing government or commercial services, benefits, official documents and positions of trust can be verified. False or multiple identities can and do undermine the integrity of border controls and the citizenship programme; underpin terrorist activities; finance crimes; and facilitate fraud.[5]

1.124 The statement of compatibility sets out a detailed explanation of why being able to accurately verify identity information is important including in the context of national police checks, security vetting for government positions, access to social security and credit checks by businesses.[6]

1.125 The information provided in the statement of compatibility establishes that the measure addresses a substantial and pressing concern and may be regarded as a legitimate objective for the purposes of international human rights law. Providing details of previous names on the back of a citizenship notice appears to be rationally connected to the legitimate objective of the measure.

1.126 However, some questions arise as to the proportionality of the measure. To be a proportionate limitation, a measure must be the least rights restrictive way of achieving the objective of the measure. However, it appears there could be other, less rights restrictive, ways of achieving the legitimate objective.

1.127 For example, Australian citizens by birth, Australian citizens by conferral and other categories of Australian citizens may all apply for evidence of Australian Citizenship. However, in practice, Australian citizens by birth can choose to rely on their birth certificate or the birth certificate of their parents as proof of Australian citizenship (rather than a citizenship notice).[7]

1.128 A number of state and territory jurisdictions now have provisions for individuals to change their sex and names on their birth certificates (if they meet particular criteria). For example, in New South Wales if an individual met the required criteria under Part 5A of the *Birth, Deaths and Marriages Act 1995* (NSW) they may apply to have their sex changed on their birth certificate. The new birth

5 ES 6.

6 ES 7.

7 See, for example, Department of Foreign Affairs and Trade, Confirming your Australian Citizenship at: https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/confirmingcitizenship.aspx.

certificate is not marked in any way to indicate the person's sex has been changed. If a person has changed their name since their birth was first registered, a notation stating that the birth was 'previously registered in another name' will appear on the new certificate. Access to a person's old birth certificate is restricted by legislation once the change of sex is recorded.[8]

1.129 What this means is that an Australian citizen by birth from NSW could provide proof of citizenship without having to directly reveal a change of gender, though if the person has changed their name that fact (but not the name itself) will be recorded on the birth certificate.

1.130 By contrast, an Australian citizen by conferral relying on a citizenship notice to provide proof of citizenship could not avoid any change in gender identity being disclosed. These laws operate in different jurisdictions (one is state and one is federal), but the NSW mechanism for ensuring continuity of information, without directly disclosing personal details on the face of birth certificate, indicates that there may be a less rights restrictive approach to achieving the legitimate objective of the current legislation. For example, a notation on a citizenship notice that the individual has undergone a change of name since acquiring Australian citizenship rather than including previous names would appear to be a potentially less rights restrictive approach to achieving the legitimate objective of the measure.

1.131 There is a related example in the federal sphere: Australian citizens who have an Australian passport will usually be able to rely on their passport as proof of Australian citizenship. A person who has undergone a change in name and change in gender identity is able to apply to have these changed on their passport without any notation appearing.[9] This could also indicate that there may be less rights restrictive ways of achieving the legitimate objective of the measure in respect of persons who have undergone a change of gender identity.

1.132 The statement of compatibility does not address whether having internal government records about previous names rather than having such information included on an outward facing document would be a suitable way of achieving the legitimate objective of the measure.

1.133 The Australian Government Guidelines on the recognition of Sex and Gender (guidelines) may also be relevant to assessing whether the measure is the least rights

8 NSW Registry of Births Deaths and Marriages, Information to apply to alter the register to record a change of sex at: http://www.bdm.nsw.gov.au/Documents/apply-for-record-a-change-of-sex.pdf.

9 See, for example, Department of Foreign Affairs and Trade, Sex and Gender Diverse Passport Applicants at: https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpob.aspx.

restrictive way of achieving its legitimate objective.[10] The statement of compatibility argues that the regulation complies with these guidelines and states:

> The Guidelines recognise the importance of departments ensuring the continuity of the record of an individual's identity. The Guidelines state that "only one record should be made or maintained for an individual, regardless of a change in gender or other change of personal identity" (paragraph 33 "Privacy and Retaining Records of Previous Sex and/or Gender"). Printing the previous names and dates of birth of applicants on the back of an evidence of Australian citizenship complies with this requirement to ensure the continuity of record and to maintain one record for each client.[11]

1.134 However, the guidelines also specifically direct government departments and agencies to 'ensure an individual's history of changes of sex, gender or name...is recorded and accessed only when the person's history is relevant to a decision being made.'[12] Therefore, while the guidelines provide that there should be a continuity of record of an individual's identity, this appears to be aimed at consistent internal government records rather than requiring such information to be included on an outward facing document.

1.135 In fact, this aspect of the guidelines appears to be designed to prevent unnecessary disclosures of a change in gender identity and appears potentially to be in conflict with having previous names recorded on citizenship notices. Accordingly, there is a question about whether the measure fully complies with these guidelines and, if it does not, whether this further indicates that there may be less rights restrictive ways (such as internal records) of achieving the legitimate objective of the measure.

Committee comment

1.136 **The preceding analysis raises questions about whether the measure is the least rights restrictive way of achieving its legitimate objective and the potential**

10 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) at: https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf.

11 ES 8.

12 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) at: https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf 7.

impact of the measure on vulnerable groups (that is, whether the measure is a proportionate limit on the right to privacy).

1.137 **Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of its legitimate objective including:**

- **whether a less rights restrictive approach such as notation on a citizenship notice that a person 'previously had another name' rather than listing previous names would be feasible;**
- **whether a less rights restrictive approach such as having internal government records regarding previous names would be feasible;**
- **whether the details listed on a passport (which do not list previous names) would be sufficient;**
- **whether there are or could be safeguards incorporated into the measure for people with specific concerns about having previous names listed (such as exceptions);**
- **whether the measure complies with relevant guidelines; and**
- **whether the measure provides sufficient flexibility to treat different cases differently and whether affected groups are particularly vulnerable.**

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

1.138 The right to equality and non-discrimination 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.

1.139 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[13] 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.[14]

13 The prohibited grounds of discrimination 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. The prohibited grounds of discrimination are often described as 'personal attributes'.

14 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

1.140 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected that legitimate objective and is a proportionate means of achieving that objective.[15]

1.141 The disclosure of a person's previous name may operate to have a disproportionate effect on, and therefore indirectly discriminate against, persons who have undergone sex or gender reassignment procedures, to the extent that disclosure could potentially reveal or indicate that history. Indirect discrimination arising in this way would amount to discrimination against individuals on the prohibited grounds of 'other status'. Further, the fact that some Australian citizens by birth may be able to rely on identity documents which do not reveal a change of change of gender indicates that the measure could potentially also have a disproportionate negative effect on the grounds of national origin.

1.142 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged by the measure but argues that the effect on individuals who have undergone a change of gender does not amount to unlawful discrimination:

> Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or 26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals. Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or 26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals… Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or 26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals.

1.143 However, this does not fully acknowledge that there may be circumstances where a person may be required to show proof of Australian citizenship including in circumstances such as employment (such that it is not really their choice to reveal such information). Further, while the *Sex Discrimination Act 1984* provides important

15 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

protection against discrimination on the basis of gender identity it is not a complete answer to such issues.

1.144 It is acknowledged that individuals who have undergone sex or gender reassignment are not being treated differently than other individuals; however, the issue is that the measure appears to have a disproportionate negative effect on these individuals such that it could amount to indirect discrimination. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.[16] The proportionality of this effect was not fully addressed in the statement of compatibility. While the measure pursues a legitimate objective for the purposes of international human rights law as explained above, questions arise as to whether the measure is the least rights restrictive as required to be a proportionate limit on human rights. There may also be questions about the proportionality of a measure where it impacts upon particularly vulnerable groups.

Committee comment

1.145 **This measure would appear to have a disproportionate negative effect on particular vulnerable individuals, raising questions about whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination) amounts to unlawful discrimination.**

1.146 **Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether the measure is reasonable and proportionate for the achievement of its objective and in particular the matters set out at [1.137] above.**

16 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016[F2016L01858]

Purpose	Determines classes of visas for qualifying residence exemptions pursuant to the *Social Security Act 1991*, such that a waiting period does not apply to a person who holds or was the former holder of a visa in a determined class in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	9 May 2016
Rights	Social security; adequate standard of living (see **Appendix 2**)
Status	Seeking additional information

Background

1.147 The committee first reported on the Budget Savings (Omnibus) Bill 2016 (the bill)[1] in its *Report 7 of 2016*,[2] and, following a response from the Treasurer in respect of the bill, concluded its consideration of the bill in its *Report 8 of 2016*.[3]

1.148 Schedule 10 of the bill removed the exemption from the 104-week waiting period for certain welfare payments[4] for new migrants who are family members of Australian citizens or long-term residents with the exception of permanent humanitarian entrants. The committee found that this measure could not be assessed as a proportionate limitation on the rights to social security and an adequate standard of living.[5] The Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858] (the 2016 Determination) gives effect to the changes introduced by the bill.

1 The bill passed both Houses of Parliament with amendments on 15 September 2016, and received Royal Assent on 16 September 2016.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 2-11.

3 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 57-61.

4 Namely, a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

5 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 59.

Newly arrived residents waiting period

1.149 Section 4 of the 2016 Determination revokes the Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2015 (2015 Determination), which currently determines visas for the purposes of paragraph 7(6AA)(f) of the *Social Security Act 1991* (the Act). Together with the 2015 Determination, that paragraph exempts from the waiting period certain visa holders[6] in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

1.150 The 2016 Determination puts into effect the amendments in the bill and provides that from 1 January 2017,[7] only Referred Stay (Permanent)[8] visas will be exempted from the waiting period, as prescribed in paragraph 7(6AA)(f) of the Act.

Compatibility of the measure with the right to social security and right to an adequate standard of living

1.151 This right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security (see Appendix 2).

1.152 As noted in the previous legal analysis in respect of the bill,[9] the right to social security and the right to an adequate standard of living are engaged and limited by this measure.

1.153 The statement of compatibility provides that the measure 'engages or gives effect' to the right to social security and the right to an adequate standard of living, and that:

> [a]ccess to Special Benefit will still be available for a newly arrived permanent resident who has suffered a substantial change in their circumstances, beyond their control, and are in financial hardship, after arrival. There remains no waiting period for family assistance payments for families with children, such as Family Tax Benefit.[10]

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6 See section 4 of the Social Security (Class of Visas —Qualifying Residence Exemption) Determination 2015: Subclass 100 (Partner); Subclass 110 (Interdependency); Subclass 801 (Partner); Subclass 814 (Interdependency); and Subclass 852 (Referred Stay (Permanent)).

7 At subsection 2(1).

8 At section 5.

9 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 57-61.

10 Explanatory statement, statement of compatibility 3.

1.154 The committee's previous findings in respect of the bill noted in particular that information had not been provided as to how the family members will be able to meet basic living expenses during the 104-week waiting period and what specific arrangements, if any, are open to them in situations of crisis.

1.155 The statement of compatibility in relation to the 2016 Determination states that access to Special Benefit is available for a newly arrived permanent resident where there has been a substantial change in their circumstances.

1.156 In light of the information provided in the statement of compatibility, it appears that newly arrived permanent residents would have available to them Special Benefit payments, which may serve to provide a safeguard such that these individuals could afford the necessities to maintain an adequate standard of living. This may support an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of living. However, the statement of compatibility does not detail whether such safeguards are in place for other newly arrived residents who are not permanent residents. It is also not clear what level of support Special Benefit provides or how long it would apply for.

Committee comment

1.157 **The committee notes that this instrument puts into effect amendments made by the *Budget Savings (Omnibus) Act 2016*. This Act removed the exemption from the 104-week waiting period for certain welfare payments for new migrants who are family members of Australian citizens or long-term residents (with the exception of permanent humanitarian entrants).**

1.158 **In light of the information provided in the statement of compatibility, the committee seeks advice from the Minister for Social Services as to the extent to which the Special Benefit is available to newly arrived residents who are not permanent residents and are in financial hardship and what is the level of support provided for by Special Benefit and how long they could be eligible for Special Benefit.**

Advice only

1.159 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Appropriation Bill (No. 3) 2016-2017
Appropriation Bill (No. 4) 2016-2017

Purpose	Appropriation Bill (No. 3) 2016-2017 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the Government in addition to amounts appropriated through the *Appropriation Act (No. 1) 2016-2017* and *Supply Act (No. 1) 2016-2017*; and Appropriation Bill (No. 4) 2016-2017 seeks to do so for services that are not ordinary annual services of the Government in addition to amounts appropriated through the *Appropriation Act (No. 2) 2016-2017* and *Supply Act (No. 2) 2016-2017*
Portfolio	Finance
Introduced	House of Representatives, 9 February 2017
Rights	Multiple rights (see **Appendix 2**)
Status	Advice only

Background

1.160 The committee has previously considered the human rights implications of appropriations bills in a number of reports,[1] and they have been the subject of correspondence with the Department of Finance.[2]

1.161 The committee previously reported on Appropriation Bill (No. 1) 2016-2017 and Appropriation Bill (No. 2) 2016-2017 (the earlier 2016-2017 bills) in its *Report 9 of 2016*.[3]

1 See Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) 65; *Seventh report of 2013* (5 June 2013) 21; *Third report of the 44th Parliament* (4 March 2014) 3; *Eighth report of the 44th Parliament* (24 June 2014) 5, 31; *Twentieth report of the 44th Parliament* (18 March 2015) 5; *Twenty-third report of the 44th Parliament* (18 June 2015) 13; and *Thirty-fourth report of the 44th Parliament* (23 February 2016) 2.

2 Parliamentary Joint Committee on Human Rights, *Seventh report of 2013* (5 June 2013) 21; and *Eighth report of the 44th Parliament* (18 June 2014) 32.

3 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 30-33.

Potential engagement and limitation of human rights by appropriations Acts

1.162 As previously restated in respect of the earlier 2016-2017 bills, proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4]

1.163 The committee has previously noted that:

> …the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.[5]

Compatibility of the bills with multiple rights

1.164 Like the earlier 2016-2017 bills, and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[6] The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[7] They also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[8] No further assessment of the human rights compatibility of the bills is provided.

1.165 The full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.[9]

1.166 As previously stated, while such bills present particular difficulties for human rights assessment because they generally include high-level appropriations for a wide

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4 See Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013); *Seventh report of 2013* (5 June 2013); *Third report of the 44th Parliament* (4 March 2014); and *Eighth Report of the 44th Parliament* (24 June 2014).

5 Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) 17.

6 Appropriation Bill (No. 3) 2016-2017 (Bill No. 3): explanatory statement (ES), statement of compatibility (SOC) 3. Appropriation Bill (No. 4) 2016-2017 (Bill No. 4): ES, SOC 4.

7 Bill No. 3, ES, SOC 3; Bill No. 4, ES, SOC 4.

8 Bill No. 3, ES, SOC 3; Bill No. 4, ES, SOC 4.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 30-33.

range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility.

Committee comment

1.167 **The committee notes that the statements of compatibility for the bills provide no assessment of their compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.**

1.168 **Given the difficulty of conducting measure-level assessments of appropriations bills, the committee recommends that consideration be given to developing alternative templates for assessing their human rights compatibility, drawing upon existing domestic and international precedents. Relevant factors in such an approach could include consideration of:**

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; and**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights.**

Migration Amendment (Putting Local Workers First) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* and Migration Regulations 1994 to introduce safeguards into Australia's temporary skilled migration program to improve employment opportunities for Australian citizens and permanent residents, promote the welfare of temporary migrant workers, and to facilitate compliance with occupational licensing and workplace safety regulation
Sponsor	Mr Bill Shorten MP
Introduced	House of Representatives, 28 November 2016
Rights	Privacy; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Register of work agreements

1.169 Schedule 1, item 11 of the Migration Amendment (Putting Local Workers First) Bill 2016 (the bill) proposes to insert new section 140ZL to the *Migration Act 1958* (Migration Act), to impose on the Minister for Immigration and Border Protection (the minister) an obligation to keep and publish on the Department of Immigration and Border Protection's (the department) website a register of work agreements, which includes the name of the sponsor party.

1.170 The definition of the term 'sponsor party' is proposed to be inserted into subsection 5(1) of the Migration Act by Schedule 1, item 3 of the bill, as 'a person, an unincorporated association or partnership in Australia that is a party to the work agreement (other than the Minister)'.

Compatibility of the measure with the right to privacy

1.171 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information (see Appendix 2).

1.172 Schedule 1, item 11 of the bill engages and limits the right to privacy by requiring the minister to publish on the department's website the names of natural persons who are a sponsor party to a work agreement.

1.173 The statement of compatibility does not identify that the right to privacy is engaged and limited by this measure.

1.174 A measure may justifiably limit the right to privacy if it can be shown that the measure addresses a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective. The committee's expectations

in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

Committee comment

1.175 **The committee draws the human rights implications of the bill in respect of the right to privacy to the attention of the legislation proponent and the Parliament.**

1.176 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the right to privacy.**

Exclusion of 457 visa holders residing in Australia

1.177 A number of proposed amendments to the Migration Act seek to improve employment opportunities for Australian citizens and permanent residents to the exclusion of foreign workers, including foreign workers already in Australia.

1.178 For example, Schedule 1, item 11 proposes to introduce new section 140GC to require the minister to enter a work agreement on behalf of the Commonwealth only if the minister has had regard to the extent to which the work agreement will support existing jobs for Australian citizens or permanent residents or create jobs for such individuals (new paragraph 140GC(2)(a)). This proposed new section would also require the minister to have regard to an exhaustive list of factors when entering into an agreement, such as the proportion of jobs that are likely to be offered to Australian citizens or permanent residents and 457 visa holders (new subsection 140GC(4)).

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

1.179 The right to equality and non-discrimination includes a requirement that all laws are non-discriminatory and are enforced in a non-discriminatory way (see Appendix 2). This right applies to any form of distinction, exclusion, restriction or preference which has the effect of nullifying or restricting the enjoyment of human rights or freedoms on a prohibited ground, such as national or social origin. It applies to all people within Australia's jurisdiction.

1.180 The measure engages and limits the right to equality and non-discrimination by requiring an approved sponsor to favour Australian citizens and permanent residents over foreign 457 visa holders who are in Australia and therefore within Australia's jurisdiction.

1.181 The statement of compatibility does not identify that the right to equality and non-discrimination is engaged and limited by this measure.

1.182 A measure may justifiably limit the right to equality and non-discrimination if it can be shown that the measure addresses a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

The committee's expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

Committee comment

1.183 **The committee draws the human rights implications of the bill in respect of the right to equality and non-discrimination to the attention of the legislation proponent and the Parliament.**

1.184 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the right to equality and non-discrimination.**

Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017

Purpose	The bill reintroduces the Jobs for Families Child Care Package from the Education and Training portfolio, and a range of new and previously introduced social services measures
Portfolio	Social Services
Introduced	House of Representatives, 8 February 2017
Rights	Social security; adequate standard of living; freedom of movement (see **Appendix 2**)
Status	Advice only

Background

1.185 The Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 (the bill) contains a number of reintroduced measures which have previously been examined by the committee. The following schedules to the bill have previously been found to be compatible with human rights:

- Schedule 1—Payment rates;[1]
- Schedule 2—Family tax benefit Part B rate;[2]
- Schedule 3—Family tax benefit supplements;[3]
- Schedule 4—Jobs for families child care package;[4]
- Schedule 5—Proportional payment of pensions outside Australia;[5]

1 Previously contained within the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

2 Previously contained within the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

3 Previously contained within the Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

4 Previously contained within the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

5 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

- Schedule 6—Pensioner education supplement;[6]
- Schedule 7—Education entry payment;[7]
- Schedule 8—Indexation;[8]
- Schedule 9—Closing energy supplement to new welfare recipients;[9]
- Schedule 10—Stopping the payment of the pension supplement after six weeks overseas;[10]
- Schedule 13—Ordinary Waiting Periods;[11]
- Schedule 14—Age requirements for various Commonwealth payments;[12]
- Schedule 15—Income support waiting periods;[13] and
- Schedule 16—Other waiting period amendments.[14]

1.186 The bill also seeks to introduce the following new measures, which are also compatible with Australia's international human rights obligations:

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6 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

7 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

8 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

9 Previously contained within Budget Savings (Omnibus) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 2-11.

10 Previously contained within the Social Services Legislation Amendment (Budget Repair) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

11 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October2016) 99-101.

12 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

13 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

14 Previously contained within the Social Services Legislation Amendment (Youth Employment) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 99-101.

- Schedule 11—Automation of income stream review processes; and
- Schedule 12—Seasonal horticultural work income exemption.

Paid parental leave

1.187 The bill also contains the following schedules in respect of paid parental leave (PPL):

- Schedule 17—Adjustment for primary carer pay and other amendments;[15] and
- Schedule 18— Removal of parental leave pay mandatory employer role.[16]

1.188 The measures in Schedule 17 of this bill seek to amend the PPL Act to provide that primary caregivers of newborn children will no longer receive both employer-provided primary carer leave payments and the full amount of parental leave pay under the government-provided PPL scheme. However, the proposed changes will commence from the first 1 January, 1 April, 1 July or 1 October that is nine months after the date the Act receives Royal Assent, with an earliest commencement date of 1 January 2018.[17]

Compatibility of the measure with human rights

1.189 The committee examined such measures most recently in its consideration of the Fairer Paid Parental Leave Bill 2016 (2016 bill).[18]

1.190 The previous human rights assessments of the measures contained in the 2016 bill considered that the measures engage the right to social security, work and maternity leave, and equality and non-discrimination. However, the human rights assessment of the 2016 bill noted that there were questions as to the proportionality of the reintroduced measures on the basis that it had the potential to reduce the amount of payments for expectant parents, or recent parents, who may have been anticipating both employer-provided and government-provided payments.[19]

1.191 As the current bill will no longer reduce or remove payments to parents who are already pregnant at the time of passage of the bill, they address concerns

15 Previously contained within the Fairer Paid Parental Leave Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

16 Previously contained within the Fairer Paid Parental Leave Bill 2016. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

17 Explanatory memorandum (EM) 173.

18 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016). The committee previously examined the measures contained in the Paid Parental Leave Amendment Bill 2014 (2014 bill) and Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Fifth report of the 44th Parliament* (25 March 2014) 13-16; *Eighth report of the 44th Parliament* (24 June 2014) 54-57; *Twenty-fifth report of the 44th Parliament* (11 August 2015) 47-55; and *Thirty-seventh report of the 44th Parliament* (2 May 2016) 36-44.

19 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

regarding the proportionality of the measures. The committee has concluded its observations on the 2016 bill at chapter 2.

Committee comment

1.192 **The committee draws the above analysis to the attention of the Parliament.**

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 2) [F2016L01861]

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 3) [F2016L01862]

Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 [2016L01829]

Purpose	To apply the operation of the sanctions regime under the Autonomous Sanctions Regulations 2011 and the *Charter of the United Nations Act 1945* by designating or declaring that a person is subject to the sanctions regime and by giving effect to decisions of the United Nations Security Council
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*
Last day to disallow	9 May 2017
Rights	Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see **Appendix 2**)
Status	Advice only

Background

1.193 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 2) and (No 3) are made under the *Autonomous Sanctions Act 2011*. This Act (in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations) provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime). The Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 is made under the *Charter of the United Nations Act 1945*. This Act (in conjunction with various instruments made under that Act)[1] gives

1 See in particular the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689].

the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).[2]

1.194 An initial human rights analysis of various instruments made under both sanctions regime is contained in the *Sixth report of 2013* and *Tenth report of 2013*.[3] A further detailed analysis of various instruments made under both sanctions regime is contained in the *Twenty-eighth report of the 44th Parliament* and *Thirty-third report of the 44th Parliament.*[4] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering instruments which expand the operation of the sanctions regime. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[5] The committee concluded its examination of various instruments and made a number of recommendations to ensure the compatibility of the sanctions regimes with human rights.[6]

'Freezing' of designated person's assets and prohibition on travel

1.195 On the basis that the minister is satisfied that a person or entity is associated with the Democratic People's Republic of Korea's weapons of mass-destruction program or missiles program, the instruments designate persons and entities for the purposes of the Autonomous Sanctions Regulations 2011, such that this person or entity is subject to financial sanctions, and cannot travel to, enter, or remain in Australia[7] (or their designation or declaration is continued).[8] In addition, the Charter

2 Note, together the autonomous sanctions regime and the UN Charter sanctions regime are referred to as the 'sanctions regimes'.

3 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 135-137; and *Tenth report of 2013* (26 June 2013) 13-19 and 20-22.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) 17-25.

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55.

6 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 41-55 at 53.

7 See Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 3). Section 6(1) of the Autonomous Sanctions Regulations 2011 provides that for the purposes of paragraph 10(1)(a) of the *Autonomous Sanctions Act 2011*, which empowers the minister to make regulations for the purpose of imposing sanctions, the minister may, by legislative instrument: (a) designate a person or entity mentioned in an item of the table as a designated person or entity for the country mentioned in the item; (b) declare a person mentioned in an item of the table for the purpose of preventing the person from travelling to, entering or remaining in Australia.

of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 expands the basis on which the Minister can designate a person as subject to the UN Charter sanctions regime.[9]

Compatibility of the measure with multiple human rights

1.196 As set out in the committee's previous consideration of the sanctions regimes, the measures in these instruments engage and limit multiple human rights. The statements of compatibility for these instruments do not identify the relevant human rights engaged or provide any analysis in relation to the issues identified in the committee's previous reports.

1.197 The committee has previously recognised that applying pressure to regimes and individuals with a view to ending the repression of human rights internationally is a legitimate objective that may support limitations on human rights. However, in relation to the decision to designate or declare a person under the sanctions regimes, the committee's *Report 9 of 2016* set out in detail how each of the identified safeguards in the sanctions regimes are insufficient, and why the sanctions regimes are thereby not proportionate limitations on human rights.[10]

1.198 The committee therefore made a number of recommendations to the minister in respect of the sanctions regimes.[11]

Committee comment

1.199 **The committee refers to its previous consideration of the sanctions regimes, and in particular, the recommendations made by the committee in its *Report 9 of 2016.***

1.200 **The committee notes its disappointment that the statements of compatibility for instruments expanding the operation of the sanctions regimes, in relation to the designation or declaration of a person as subject to the sanctions regime, do not address the human rights issues consistently raised by the committee in its reports since 2013.**

1.201 **The committee draws the human rights implications of the sanctions regimes, and the expansion of these regimes by the instruments under consideration, to the attention of the Parliament.**

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8 See Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 (No 2).

9 See item 11, section 4A of the Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016.

10 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 15-38, 21.

11 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 53.

Bills not raising human rights concerns

1.202 Of the bills introduced into the Parliament between 13 and 16 February 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Australian Broadcasting Corporation Amendment (Restoring Shortwave Radio) Bill 2017;
- Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2017;
- Crimes Amendment (Penalty Unit) Bill 2017;
- Disability Services Amendment (Linking Upper Age Limits for Disability Employment Services to Pension Age) Bill 2017;
- Education and Other Legislation Amendment Bill (No. 1) 2017;
- Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017;
- Infrastructure Australia Amendment (Social Sustainability) Bill 2017;
- Parliamentary Entitlements Amendment (Ending the Rorts) Bill 2017;
- Personal Property Securities Amendment (PPS Leases) Bill 2017;
- Social Security Legislation Amendment (Fair Debt Recovery) Bill 2017;
- Treasury Laws Amendment (GST Low Value Goods) Bill 2017; and
- Treasury Laws Amendment (Working Holiday Maker Employer Register) Bill 2017.

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 3**.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	Establishes a scheme to permit the continuing detention of 'high risk terrorist offenders' at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate, 15 September 2016
Rights	Liberty; freedom from arbitrary detention; right to humane treatment in detention; prohibition on retrospective criminal laws (see **Appendix 2**)
Previous reports	7 of 2016; 8 of 2016
Status	Concluded

Background

2.3 The committee initially reported on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the bill) in its *Report 7 of 2016,* and requested further information from the Attorney-General in relation to the human rights issues identified in that report.[1]

2.4 In order to conclude its assessment of the bill while it is still before the Parliament, the committee requested that the Attorney-General's response be provided by 27 October 2016. A response was not received by this date.

2.5 In the absence of this response, the committee again reported on the bill in its *Report 8 of 2016* and reiterated its previous request for further information as well as seeking an additional response from the Attorney-General as outlined below.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 12-20.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 16-26.

2.6 The committee requested that the Attorney-General's outstanding response as well as the additional response be provided by 18 November 2016. A response was still not received by this date.

2.7 However, the Attorney General's response to the committee's inquiries was received on 28 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

2.8 The bill then passed both Houses of Parliament on 1 December 2016 and received Royal Assent on 7 December 2016.

Continuing detention of persons currently imprisoned

2.9 The bill proposes to allow the Attorney-General (or a legal representative) to apply to the Supreme Court of a state or territory for an order providing for the continued detention of individuals who are imprisoned for particular offences under the *Criminal Code Act 1995* (Criminal Code).[3] The Attorney-General may also apply for an interim detention order pending the hearing of the application for a continuing detention order.[4] The effect of these orders is that a person may be detained in prison after the end of their custodial sentence.[5]

2.10 The particular offences in respect of which a person may be subject to continuing detention will include:

- international terrorist activities using explosive or lethal devices;[6]
- treason;[7] and
- a 'serious offence' under Part 5.3,[8] or an offence under Part 5.5,[9] of the Criminal Code.

2.11 Individuals who have committed crimes under these sections of the Criminal Code are referred to in the bill as 'terrorist offenders'.

2.12 The court is empowered to make a continuing detention order where:

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3 See proposed sections 105A.3 and 105A.5.

4 See proposed section 105A.9. An interim detention order can last up to 28 days.

5 See proposed section 105A.9(3).

6 Criminal Code, Schedule 1, Division 72, Subdivision A.

7 Criminal Code, Schedule 1, Division 80, Subdivision B.

8 Criminal Code, Schedule 1, Part 5.3. The offences in Part 5.3 include directing the activities of a terrorist organisation; membership of a terrorist organisation; recruiting for a terrorist organisation; training involving a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; associating with terrorist organisations; financing terrorism; and financing a terrorist.

9 Criminal Code, Schedule 1, Part 5.5. Offences under this part include incursions into foreign countries with the intention of engaging in hostile activities; engaging in a hostile activity in a foreign country; entering, or remaining in, declared areas; preparatory acts; accumulating weapons etc; providing or participating in training; and giving or receiving goods and services to promote the commission of an offence.

(a) an application has been made by the Attorney-General or their legal representative for the continuing detention of a 'terrorist offender';

(b) after having regard to certain matters,[10] the court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community; and

(c) the court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[11]

2.13 The Attorney-General bears the onus of proof in relation to the above criteria.[12] The standard of proof to be applied is the civil standard of the balance of probabilities.[13]

2.14 While each detention order is limited to a period of up to three years, further applications may be made and there is no limit on the number of applications.[14] This means that a person's detention in prison could be continued for an extended period of time.

2.15 This bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, unless it is necessary for certain matters set out in proposed section 105A.4(2).[15]

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10 Under proposed section 105A.8 the court must have regard to the following matters in deciding whether it is satisfied: (a) the safety and protection of the community; (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert; (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment; (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by: (i) the relevant state or territory corrective services; or (ii) any other person or body who is competent to assess that extent; (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs; (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while: (i) on release on parole for any offence; or (ii) subject to a continuing detention order or interim detention order; (g) the offender's criminal history (including prior convictions and findings of guilt in respect of any other offences); (h) the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender; (i) any other information as to the risk of the offender committing a serious Part 5.3 offence; (j) any other matter the court considers relevant.

11 Proposed section 105A.7.

12 Explanatory memorandum (EM) 4.

13 See proposed section 105.A.13(1).

14 Proposed section 105A.7(5) and (6).

15 Proposed section 105A.4.

2.16 The measure allows ongoing preventative detention of individuals who will have completed their custodial sentence. The previous analysis observed that the use of preventative detention, that is, detention of individuals that does not arise from criminal conviction but is imposed on the basis of future risk of offending, is a serious measure for a state to take.

2.17 While noting that the measure engages and limits a range of human rights, the focus of the initial human rights assessment was on the right to liberty, which includes the right to be free from arbitrary detention. Forms of detention that do not arise from a criminal conviction are permissible under international law, for example, the institutionalised care of persons suffering from mental illness. However, the use of such detention must be carefully controlled: it must reasonable, necessary and proportionate in all the circumstances to avoid being arbitrary, and thereby unlawful under article 9 of the International Covenant on Civil and Political Rights (ICCPR).

2.18 The initial human rights analysis noted that post-sentence preventative detention of persons who have been convicted of a criminal offence may be permissible under international human rights law in carefully circumscribed circumstances.[16] The United Nations Human Rights Committee (UNHRC) has stated that:

> …to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.[17]

2.19 The initial analysis stated that the question therefore is whether the proposed preventative detention regime is necessary and proportionate, and not arbitrary within the meaning of article 9 of the ICCPR, bearing in mind the specific guidance in relation to post-sentence preventative detention.

2.20 For the purposes of this initial analysis, it was accepted that the proposed continuing detention order regime pursues the legitimate objective of 'protecting the community from the risk of terrorist attacks',[18] and the measure is rationally

16 See: United Nations (UN) Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014)[15], [21]. See also: UN Human Rights Committee, General Comment 8: Article 9, Right to Liberty and Security of Persons (30 June 1982).

17 See, for example, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [21].

18 EM 3.

connected to this stated objective in the sense that the individual subject to an interim or continuing detention order will be incapacitated while imprisoned. However, questions arose as to whether the regime contains sufficient safeguards to ensure that preventative detention is necessary and proportionate to this objective.

2.21 The proposed continuing detention order regime shares significant features with the current continuing detention regimes that exist in New South Wales (NSW),[19] and Queensland.[20] These state regimes apply in respect of sex offenders and/or 'high risk violent offenders' and have the following elements:

- the Attorney-General or the state may apply to the Supreme Court for a continuing detention order for particular classes of offenders;[21]
- the application must be accompanied by relevant evidence;[22]
- the effect of the continuing detention order is that an offender is detained in prison after having served their custodial sentence in relation to the offence;[23]
- the court may make a continuing detention order if it is satisfied to a 'high degree of probability' that the offender poses an 'unacceptable risk' of committing particular offences;[24]
- in determining whether to make the continuing detention order, the court must have regard to a list of factors;[25]

19 The *Crimes (High Risk Offenders) Act 2006* (NSW) was first enacted in 2006 as the *Crimes (Serious Sex Offenders) Act 2006* to provide for continuing supervision and detention of people convicted of sex offences. The Act was amended in 2013 to extend the regime to people convicted of violent crimes.

20 The *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) was enacted in 2003 to provide for continuing supervision and detention of people convicted of sex offences.

21 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 5; Crimes (High Risk Offenders) Act 2006 (NSW) section 13A.

22 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 5; Crimes (High Risk Offenders) Act 2006 (NSW) section 14; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

23 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 14; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

24 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5B, 5E.

- the court must consider whether a non-custodial supervision order would be adequate to address the risk;[26]
- the term of continuing detention orders can be made for extended periods of time;[27] and
- the availability of periodic review mechanisms.[28]

2.22 As noted in the previous analysis, these continuing detention schemes were the subject of individual complaints to the UNHRC in *Fardon v Australia*,[29] and *Tillman v Australia.*[30] In *Fardon v Australia,* the author of the complaint had been convicted of sex offences in 1989 and sentenced to 14 years' imprisonment in Queensland. At the end of his sentence, the complainant was the subject of continuing detention from June 2003 to December 2006. In *Tillman v Australia* the complainant was convicted of sex offences in 1998 and sentenced to 10 years' imprisonment in NSW. At the end of his sentence, the complainant was the subject of a series of interim detention orders, and finally a continuing detention order of one year (effectively for a period from May 2007 until July 2008).

2.23 The UNHRC found that the continued detention in both cases was arbitrary in violation of article 9 of the ICCPR. In summary, the UNHRC identified the following as relevant to reaching these determinations:

- as the complainants remained incarcerated under the same prison regime the continued detention effectively amounted to a fresh term of imprisonment or new sentence. This was not permissible if a person has not been convicted of a new offence; and is contrary to the prohibition against retrospective criminal laws (article 15 of the ICCPR), particularly as in both instances the enabling legislation was enacted after the complainants were first convicted;

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25 In New South Wales (NSW) this includes community safety, medical assessments, any other information relating to the likelihood of reoffending, the offender's compliance with supervision orders and willingness to engage in assessments or rehabilitation programs, the offender's criminal history, and any other matters that the court considers relevant: see, *Crimes (High Risk Offenders) Act 2006* (NSW) section 17(4). In Queensland this includes medical reports or other information relating to the likelihood that the prisoner will reoffend, the prisoner's criminal history, the prisoner's engagement with rehabilitation programs, community safety, and any other relevant matter: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13.

26 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

27 In Queensland continuing detention orders may be indefinite; in NSW a continuing detention order may be up to five years. The court may also order further continuing detention orders against the same offender: *Crimes (High Risk Offenders) Act 2006* (NSW) sections 17(4), 18(3).

28 Crimes (High Risk Offenders) Act 2006 (NSW) section 24AC.

29 UN Human Rights Committee (1629/2007) (18 March 2010).

30 UN Human Rights Committee (1635/2007) (18 March 2010).

- the procedures for subjecting the complainants to continuing detention were civil in character, despite an effective penal sentence being imposed. The procedures therefore fell short of the minimum guarantees in criminal proceedings prescribed in article 14 of the ICCPR;
- the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic'. The application process for continuing detention orders required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' The complainants' predicted future offending was based on past conduct, for which they had already served their sentences; and
- the state should have demonstrated that the complainant could not have been rehabilitated by means other than detention which were less rights restrictive.

2.24 The UNHRC's findings and the Australian government's formal response were not referred to in the statement of compatibility.

2.25 The previous analysis stated that a number of the concerns about the NSW and Queensland schemes are relevant to an assessment of the current continuing detention proposal, including:

- individuals currently incarcerated may be subject to continuing detention contrary to the prohibition on retrospective criminal law;
- the civil standard of proof applies to proceedings (that is, the standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt);[31] and
- the difficulties arising from the court being asked to make a finding of fact in relation to the risk of future behaviour.

2.26 However, the analysis noted two points of difference to the NSW and Queensland schemes.

2.27 First, the bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, except in certain circumstances. This safeguard appears to respond to one of the bases upon which the state-level regimes were incompatible with article 9, namely, that the applicants were incarcerated within the same prison regime, and therefore their preventative detention in effect constituted a fresh term of imprisonment after they had served their sentence. However, the bill nonetheless does provide that persons subject to continuing detention orders are to

31 See proposed section 105.A.13(1). Some preventative detention regime proceedings are criminal in nature: *Dangerous Sexual Offenders Act* 2006 (WA) section 40.

be detained in prison and that there is a series of circumstances in which they may be detained in the same area or unit as those prisoners serving criminal sentences.

2.28 Second, the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[32] Accordingly, the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[33]

2.29 The initial analysis noted that this aspect of the bill appears to be a safeguard against the use of a continuing detention order in circumstances where an alternative to detention is available. However, it is not apparent from the bill how this safeguard would operate in practice including whether and how the court would be able to assess or provide for less restrictive alternatives. Under the NSW and Queensland regimes, if satisfied that a prisoner is a serious danger to the community (in Queensland) or is a high risk sex offender or high risk violent offender (in NSW), it is open to a court to make either a continuing detention order or a supervision order.[34] By contrast, the bill does not empower the court to make an order other than a continuing detention order.[35]

2.30 Further, the previous analysis noted that the proposed legislative test requires consideration of whether the continuing detention order is the least rights restrictive only at the particular point of time at which it is being contemplated by the court, at or towards the end of the sentence. It is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. Including a requirement to consider this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate, particularly that post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society.

2.31 Finally, in the proposed scheme the assessment of 'unacceptable risk' is crucial in determining whether the court is empowered to make a continuing detention order. As the risk being assessed relates to future conduct there are inherent uncertainties in what the court is being asked to determine, akin to the concerns in *Fardon v Australia* and *Tillman v Australia*. The bill provides for the court

32 Proposed section 105A.7.

33 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

34 See Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5B, 5E.

35 The bill does contain an annotation that a control order is an example of a less restrictive measure. However, this does not form part of the operative legislation.

to obtain expert evidence in reaching a determination in relation to risk, though given the nature of the task inherent uncertainties with risk assessments remain.[36]

2.32 Other jurisdictions have sought to minimise these uncertainties by recommending that a 'Risk Management Monitor' be established to undertake a range of functions including developing best practices for risk assessments; developing guidelines and standards; validating new assessment tools; providing for procedures by which experts become accredited for assessing risk; providing education and training in the assessment of risk; and developing risk management plans.[37] Such a body is intended to act as a safeguard in relation to the quality of risk assessments.

Committee's requests for further information from the Attorney-General

2.33 The committee noted that the bill contains certain safeguards which may support an assessment that the regime of continuing detention orders is necessary, reasonable and proportionate; however, its analysis raised questions regarding the adequacy of these safeguards, particularly in light of the UNHRC's determinations in relation to the state-level regimes.

2.34 Accordingly, the committee sought the advice of the Attorney-General as to the extent to which the proposed scheme addresses the specific concerns raised by the UNHRC as set out at [2.23] in respect of existing post-sentencing preventative detention regimes.

2.35 The committee further sought the advice of the Attorney-General as to how the court's consideration of less restrictive measures pursuant to proposed section 105A.7 is intended to operate in practice, including:

- what types of less restrictive measures may be considered by the court;
- what options might be available to the court to assess or make orders in relation to the provision of less restrictive alternatives; and
- whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order.

2.36 The committee also sought the advice of the Attorney-General as to the feasibility of the following recommendations:

- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);

36 See proposed section 105A.6.

37 Victorian Sentencing Advisory Council, High Risk Offenders: Post-sentence preventative detention: final report (2007) 115; NSW Sentencing Council, High-risk Violent Offenders: Sentencing and Post-Custody Management Options (2012).

- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [2.32];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

2.37 The committee did not receive a response from the Attorney-General within the requested timeframe regarding the human rights issues identified in the initial human rights assessment of the bill.

2.38 The committee therefore restated its request for advice from the Attorney-General in relation to the proposed scheme, including the specific matters set out in its previous request at [2.34], observing the concern that it was not possible to conclude that the proposed regime is compatible with the right to liberty.

2.39 The committee also sought the further advice of the Attorney-General in relation to the following possible amendments which may assist with the human rights compatibility of the scheme:

- to address concerns about whether the court would be empowered to make orders in relation to the provision of less restrictive alternatives, that the bill be amended to provide for alternative orders;
- to assist with concerns about whether continuing detention would be the least rights restrictive in an individual case, that the bill be amended to provide that, prior to making an application for a continuing detention order, the Attorney-General should be satisfied that there is no other less restrictive measure to address any risk;
- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);
- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [2.32];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

2.40 The previous legal analysis raised serious concerns in relation to the proposed continuing detention regime in the context of its assessment against international human rights law.

2.41 The requests by the committee were directed at being able to properly analyse the human rights compatibility of the proposed scheme. This included requests for advice in relation to particular recommendations which may have assisted with the human rights compatibility of the scheme. In the absence of the further advice of the Attorney-General it appeared that the continuing detention regime, in its current form, was likely to be incompatible with the right to liberty (including the right not to be subject to arbitrary detention).

Attorney-General's response

2.42 In his response dated 28 November 2016, the Attorney General states that he intends to move a number of amendments to the bill to implement certain recommendations from the Parliamentary Joint Committee on Intelligence and Security (PJCIS):

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence
- the scope of the offences to which the scheme applies be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the Criminal Code (publishing recruitment advertisements)
- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force
- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required)
- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made
- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender

- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence
- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings
- the criminal history of the offender that the Court must have regard to in making a continuing detention order is confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill
- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding
- when sentencing an offender convicted under any of the provisions of the Criminal Code to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered
- the continuing detention scheme be subject to a sunset period of 10 years after the day the Bill receives Royal Assent, and
- a control order can be applied for and obtained while an individual is in prison, but the controls imposed by that order would not apply until the person is released.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent, and
- the *Intelligence Services Act 2001* be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent.[38]

2.43 These amendments, which introduce certain additional safeguards, will improve the legislation. Some of these additional safeguards address aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case. The introduction of additional oversight mechanisms and a ten year sunset clause may also assist to improve the proportionality of the regime. This means that the committee will examine any proposed extension to the regime in ten years' time.

38 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

2.44 However, many of the concerns identified in relation to the human rights compatibility of the original bill remain in relation to the amended bill. These are set out below.

2.45 The previous human rights analysis noted that the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[39] This aspect of the bill departs from the regimes in NSW and Queensland that have been found by the UNHRC to be incompatible with the right to liberty, and the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[40] The Attorney-General's response refers to this requirement as assisting to ensure the regime is the least restrictive of human rights. However, the previous analysis identified concerns about how this requirement will work in practice and its adequacy as a safeguard. In response to the committee's request as to what types of less restrictive measures may be considered by the court, the Attorney-General points to control orders. However, as explained in the Attorney-General's response, the court will not be able to make a control order in the alternative:

> The Court that hears an application for a continuing detention order will not be able to make a control order in the alternative. This is due to the fact that currently control orders are issued by federal courts, while applications for a continuing detention order as proposed by the Bill are made to the Supreme Court of a State or Territory. There are also different applicants under each regime, and there are also different threshold requirements which must be met under the respective regimes.[41]

2.46 This gives rise to the concern that, even as amended, the proposed legislation does not enable the court to fully assess or make orders in relation to the provision of less restrictive alternatives. The Attorney-General's response appears to contemplate that this issue might be addressed in the future:

> [The] Independent National Security Legislation Monitor and PJCIS will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively. Given the detailed and complex policy and practical issues that would need to be explored about the interaction between the proposed post-sentence preventative detention scheme and the control order regime, I suggested to the PJCIS during its inquiry into the Bill that it may be better to defer a detailed consideration of how the

39 Proposed section 105A.7.

40 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

41 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

> control order scheme and the proposed scheme under the Bill interact with each other until those reviews occur. The PJCIS agreed.[42]

2.47 As this issue has not been resolved, the bill currently does not appear to ensure that continuing detention is the least rights restrictive approach in each individual case.

2.48 The committee also requested a range of further information from the Attorney-General in relation to the proposed regime. In relation to the standard of proof to be applied in relation to proceedings, the Attorney-General explains the standard as follows:

> *Civil standard of proof*
>
> The 'high degree of probability' standard is a statutory standard which indicates something beyond the traditional civil standard of proof of more probable than not. The existence of the risk of the offender committing a further serious offence must be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. This standard is modelled on the standard used by most States and Territories that have post-sentence preventative detention schemes.[43]

2.49 However, in the case of the NSW and Queensland schemes referred to above, the fact that those schemes contained a civil rather than criminal standard of proof was one of the reasons leading the UNHRC to finding the schemes to be incompatible with the right to be free from arbitrary detention. The Attorney-General's response does not explain, as requested, why the criminal standard of beyond a reasonable doubt as is provided under the *Dangerous Sexual Offenders Act 2006* (WA) section 40 would not be feasible.

2.50 One of the factors identified in the previous human rights analysis of the bill was the inherent difficulties arising from the court being asked to make a finding of 'unacceptable risk' in relation to future behaviour. In relation to the feasibility of establishing a Risk Management Monitor to assist in addressing such concerns, the Attorney-General advises that:

> *Risk Management Monitor*
>
> My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme.
>
> The implementation Working Group has developed an implementation plan in response to PJCIS Recommendation 22. The plan sets the process

42 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

43 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

> and timeframes for the development of the risk assessment tool and ongoing validation. It notes that work will be undertaken in consultation with correctional services, law enforcement and intelligence agencies, and international partners, and ongoing validation will need to be undertaken.
>
> The Working Group may consider whether a Risk Management Monitor or similar will undertake the functions set out at paragraph 1.77 of the Committee's Report 7 of 2016.[44]

2.51 Consideration of these issues going forward is to be welcomed and may improve the scheme. It would, however, be preferable to incorporate any such safeguards from the outset. A significant factor upon which the UNHRC considered that the regimes in NSW and Queensland were incompatible with the right to be free from arbitrary detention was that the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic' and required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' This was notwithstanding that courts under these regimes have access to expert evidence as will be the case under the proposed regime.

2.52 Further, the previous analysis noted that it is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. In relation to the availability of rehabilitation programs and consideration of interventions, the Attorney-General's response states:

> Access to rehabilitation programs is an important part of the scheme. When making a continuing detention order, paragraph 105A.8(e) requires the Court to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in any such programs. At present, Corrections Victoria and Corrections New South Wales provide inmates with access to prison based programs which aim to disengage individuals from advocating or using violence to further their goals or beliefs. Jurisdictions other than Victoria and New South Wales have a range of general rehabilitation programs, which are not specifically tailored to violent extremist offenders.
>
> The Commonwealth will continue to consider the availability of such programs with states and territories through the Implementation Working Group.[45]

2.53 Section 105A.8(e) contemplates that the court is to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity

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44 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

45 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

to participate and the level of the offender's participation in any such programs. However, what the proposed legislation does not require the court to consider is whether such interventions were made available and whether they were adequate. Including a requirement to consider the availability and adequacy of this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate as it would better ensure post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society. The Attorney-General's response provides some information in relation to current programs that are available in NSW and Victoria as well as noting that the government will continue to consider the availability of such programs. The sufficiency of such intervention programs going forward would be an important factor in ensuring the proposed regime is one of last resort in practice.

2.54 In relation to whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order, the Attorney-General's response provides that:

> Attorney-General's consideration of less restrictive measures
>
> Before the Attorney-General initiated an application for a continuing detention order in relation to a terrorist offender he or she would need to carefully consider all of the information before them. Consideration would also include whether there is a reasonable prospect of success, which would require the Attorney-General to consider whether the risk to the community could be appropriately managed through less restrictive means such as a control order.[46]

2.55 While the Attorney-General's response makes clear that in deciding whether to make an application for a continuing detention order the Attorney-General may consider whether the application has reasonable prospects of success and whether the risk to the community could be appropriately managed through less restrictive means such as a control order, this is not required under the proposed legislation. A requirement for the Attorney-General to consider whether there are less rights restrictive means of managing risk prior to making an application would assist to ensure that the proposed regime imposes a proportionate limit on the right to liberty.

2.56 In summary, the Attorney-General's response has pointed to some additional safeguards that will be incorporated into the bill for the proposed continuing detention scheme, which are to be welcomed. However, it appears that, notwithstanding these amendments, the continuing detention regime remains likely to be assessed as incompatible with the right to liberty (including the right not to be subject to arbitrary detention).

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46 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

Committee response

2.57 **The committee has concluded its examination of this issue.**

2.58 **The proposed continuing detention scheme engages and limits the right to liberty.**

2.59 **The UNHRC has previously found that substantially similar existing preventative detention schemes in Queensland and NSW were incompatible with the right to be free from arbitrary detention and lacked sufficient safeguards.**

2.60 **The Attorney-General's response has pointed to some additional safeguards that will be incorporated into the bill for the proposed continuing detention scheme.**

2.61 **These additional safeguards may address some aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case.**

2.62 **However, the preceding legal analysis concludes that the continuing detention regime, as amended, is likely to be incompatible with the right to liberty under international human rights law.**

2.63 **The amendments to the proposed scheme introduce a 10 year sunset period. This means that the committee will have the opportunity to examine any proposed extension to the scheme when it comes before it against the principles articulated above.**

2.64 **Noting the human rights concerns raised by the preceding legal analysis, the committee draws the human rights implications of the bill to the attention of the Parliament.**

Fairer Paid Parental Leave Bill 2016

Purpose	Proposes to amend the *Paid Parental Leave Act 2010* to provide that primary carers of newborn children will no longer receive both employer-provided primary carer leave payments and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme; and remove the requirement for employers to provide paid parental leave to eligible employees
Portfolio	Social Services
Introduced	House of Representatives, 20 October 2016
Rights	Social security; work and maternity leave; equality and non-discrimination (see **Appendix 2**)
Previous report	8 of 2016
Status	Concluded

Background

2.65 The committee has previously examined the measures contained in the Paid Parental Leave Amendment Bill 2014 (2014 bill) and Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Fifth Report of the 44th Parliament*, *Eighth Report of the 44th Parliament*, *Twenty-fifth Report of the 44th Parliament*, and *Thirty-seventh Report of the 44th Parliament*.[1]

2.66 Following the commencement of the 45th Parliament, the Fairer Paid Parental Leave Bill 2016 (the 2016 bill) was reintroduced to the House of Representatives on 20 October 2016. While key measures in the 2016 bill remain the same, there have also been some amendments to this bill (when compared to the measures in the 2015 bill).

2.67 The committee first reported on the 2016 bill in its *Report 8 of 2016*, and requested a response from the Minister for Social Services by 18 November 2016.[2]

2.68 The minister's response to the committee's inquiries was received on 18 November 2016. The response is reproduced in full at **Appendix 3**.

1 The bill reintroduces a measure previously introduced in the Paid Parental Leave Amendment Bill 2014 (2014 bill), which would remove the requirement for employers to provide paid parental leave to eligible employees. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 13-16; *Eighth Report of the 44th Parliament* (24 June 2014) 54-57. The committee then considered the Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 47-55; and *Thirty-seventh Report of the 44th Parliament* (2 May 2016) 36-44.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

Restrictions on paid parental leave scheme

2.69 The previous human rights assessment of the 2014 and 2015 bills considered that the measures engaged the rights to social security, work and maternity leave, and equality and non-discrimination. This is because under the proposed measures primary carers who receive employer-funded parental leave pay would have had their government-funded entitlements reduced or removed. In reducing the social security support available to new parents, the measure is a retrogressive measure for the purposes of international human rights law, and engages the right to social security and the right to maternity leave.[3] Further, where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of the paid parental leave scheme, reductions to this scheme under the bill would disproportionately impact upon this group and the right to equality and non-discrimination is therefore also engaged.

2.70 On the basis of further information provided by the minister, the previous human rights assessments of the 2014 and 2015 bills concluded that proposed restrictions to the paid parental leave scheme were compatible with human rights.[4]

2.71 However, the assessment of the 2016 bill noted that there were questions as to the proportionality of the reintroduced measures, despite the fact that overall the measures pursued a legitimate objective for the purposes of international human rights law.[5] The provisions in the bill would have taken effect from the first 1 January, 1 April, 1 July or 1 October after the bill received Royal Assent. This meant that under the proposed amendments, it was possible that parents who were already pregnant would no longer qualify for the PPL scheme. The 2015 bill, in comparison, had allowed a period of approximately one year from the date of introduction of the bill for the proposed measures to come into effect.

2.72 As the 2016 bill contained a significant reduction in the period of time before the provisions would take effect from that contained in the earlier versions of the bill, the committee therefore sought the advice of the Minister for Social Services as to whether the limitation was a reasonable and proportionate measure for the achievement of its stated objective, and in particular, why it is necessary to reduce the period of time before the proposed measures will enter into force.

2.73 Subsequently, on 8 February 2017, the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 was introduced into the House of Representatives. Schedule 17 of this bill also seeks to amend the PPL Act to provide that primary caregivers of newborn children will no longer receive

3 For further discussion of retrogressive measures, see *Guidance Note 1* at Appendix 4.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-seventh Report of the 44th Parliament* (2 May 2016) at [2.134], [2.149] and [2.160].

5 For discussion of the likely legitimate objective of the measure, see: Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 4.

both employer provided primary carer leave payments and the full amount of parental leave pay under the government-provided PPL scheme. However, the proposed changes will commence from the first 1 January, 1 April, 1 July or 1 October that is nine months after the date the Act receives Royal Assent, with an earliest commencement date of 1 January 2018.

2.74 As these reintroduced measures will no longer reduce or remove payments to parents who are already pregnant at the time of passage of the bill, they address the committee's previous concerns regarding the proportionality of the measures.

Committee response

2.75 **The committee thanks the Minister for Social Services for his response and has concluded its examination of this issue.**

2.76 **The committee draws its comments in relation to the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 in Chapter 1 of this report to the attention of the Parliament.**

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Purpose	Seeks to empower the Minister for Immigration and Border Protection to require that certain visa holders complete a revalidation check; provides that certain events that cause a visa that is held and not in effect to cease; and enables the use of contactless technology in the immigration clearance system
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 19 October 2016
Rights	Non-refoulement; effective remedy and liberty; equality and non-discrimination; privacy (see **Appendix 2**)
Previous reports	9 of 2016
Status	Concluded

Background

2.77 The committee first reported on the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested further information from the Minister for Immigration and Border Protection in relation to the human rights issues identified in that report.[1]

2.78 The minister's response to the committee's inquiries was received on 20 January 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Power to require revalidation check relating to a prescribed visa

2.79 Schedule 1 of the bill introduces a new revalidation check framework into the *Migration Act 1958* (Migration Act) which would provide the minister with the discretionary power to make a decision as to whether a person who holds a visa, which is prescribed for the purposes of new subsections 96B(1) or 96E(1), is required to complete a revalidation check for that visa.[2] A 'revalidation check' is 'a check as to whether there is any adverse information relating to a person who holds a visa'.[3] The scope, timing or nature of a revalidation check is otherwise not provided for by the bill. If a revalidation check is not completed, or is not passed, the affected person's visa will cease.

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 9-14.

2 Schedule 1, proposed section 96B.

3 Schedule 1, proposed section 96A(1).

2.80 If the minister thinks it is in the public interest to do so, the minister is also empowered to make a determination, by legislative instrument, for a specified class of persons who are required to complete a revalidation check.[4] This power is a personal non-compellable power and this instrument is not subject to disallowance.

2.81 A person will pass a revalidation check if the minister is satisfied there is no 'adverse information relating to the person'.[5]

2.82 The minister therefore has the power to prescribe any type of visa as being subject to the revalidation check framework. While the explanatory memorandum stated that the measures in Schedule 1 of the bill are designed to initially apply to Chinese nationals who will be granted a new 'longer validity Visitor visa',[6] the bill places no limit on the breadth of this power. Therefore, the proposed measure is not restricted to this class of visa or to any particular group of people.

2.83 The previous analysis identified that the proposed measure engages the right to non-refoulement, as it is possible that the minister's proposed powers regarding the revalidation check could apply to a visa holder or class of visa holders who hold a protection visa, and could lead to a protection visa holder failing the revalidation check and having their visa cancelled. As Schedules 1 and 2 of the bill are administrative measures that would not be reviewable by the Administrative Appeals Tribunal under Part 5 of the Migration Act, the measure also engages the right to an effective remedy. The previous analysis identified that the right to liberty and the right to protection of the family were also engaged.

2.84 As the statement of compatibility did not recognise that these rights were engaged by the measure, the committee therefore sought the advice of the Minister for Immigration and Border Protection as to:

- why there is no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check; and
- whether, in light of the broad power to prescribe any kind of visa, the measure is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.

2.85 The previous analysis also identified that the measure engages and may limit the right to equality and non-discrimination insofar as there is nothing on the face of the bill that limits the minister's powers to apply the revalidation check to this class

4 Schedule 1, proposed section 96E.

5 Schedule 1, section 96A(2). What constitutes 'adverse information' is not defined in the bill, and is intended to include 'any adverse information *relating* to the person who holds the visa', rather than simply information that is directly about that person – see: explanatory memorandum (EM) 11.

6 EM 5.

of visitor visa for Chinese nationals, contrary to the stated intended application of the provisions.

2.86 In assessing whether the measure is proportionate to managing risks to the Australian community through immigration channels, a possible legitimate objective for the purposes of international human rights law, the previous analysis noted that it is uncertain whether the bill, as currently drafted, will guarantee the right to equality and non-discrimination. This is because there is nothing in the bill that would restrict the use of the power to the stated intention,[7] and the administrative safeguards referred to in the statement of compatibility are less reliable than the protection statutory processes offer.

2.87 The committee therefore also sought the advice of the minister as to whether safeguards could be included in the legislation, such as:

- the minister's power to require a revalidation check be limited to long-term visitor visas;
- the basis upon which a revalidation check may be required be made clear in the legislation, rather than being a matter of ministerial discretion; and
- a requirement that the minister's power to require a person or classes of persons to complete a revalidation check is based on an objective assessment of an increased risk to the Australian community.

Minister's response

2.88 The minister's response addresses each of the matters set out at [2.84] in respect of the compatibility of the measure with multiple rights.

2.89 In response to the committee's question as to why there is no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check, the minister has advised that the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument, allowing for parliamentary scrutiny over the visas prescribed, and the possibility of disallowance of the instrument.

2.90 The minister also stated that at present, only the new Frequent Traveller stream of the Subclass 600 (Visitor) visa (Frequent Traveller visa) will be prescribed for the purposes of requiring a revalidation check, and this will support the trial of a new longer validity visitor visa, initially only available to Chinese nationals. The minister's response explained why there is no restriction on the class of visas that may be subject to the revalidation check:

> [f]lexibility has been provided to enable other longer validity visa products to be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Limiting the types of visas that can be prescribed would restrict the ability

7 Based on objective assessments of risk – see EM, statement of compatibility (SOC) 51.

to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.[8]

2.91 In response to the committee's question as to whether the measure is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family, the minister responded that the revalidation framework has no impact on the department's existing protection, cancellation, detention or removal frameworks, and set out that the revalidation framework does not engage Australia's non-refoulement obligations, the right to an effective remedy or the right to liberty for the following reasons:

- where an onshore visa holder does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists under the existing cancellation framework;
- an onshore visa holder will not become an unlawful non-citizen as a direct consequence of not passing a revalidation check, or failing to comply with a revalidation requirement. New subsections 96D(2) and 96H(2) of the bill provide that where an onshore visa holder does not complete or pass a revalidation check, their visa will only cease to be in effect upon departure from Australia;
- an onshore visa holder will not be detained or removed from Australia as a direct consequence of not passing a revalidation check or failing to comply with a revalidation requirement; and
- the revalidation check framework does not prevent a visa holder from applying for a protection visa if they wish to make protection claims while they are still in Australia – therefore the framework does not breach Australia's non-refoulement obligations by requiring a revalidation check, noting that the onus is on the individual to declare that they have protection claims.[9]

2.92 The minister's response also discussed the right to protection of the family, noting that currently only the new Frequent Traveller visa will be prescribed which provides only for a 3-month stay period and a cumulative stay period of no more than 12 months in any 24-month period, and that any other visa classes subject to the revalidation check would first be prescribed by a disallowable instrument.

2.93 It is noted that the prescription of the type of visa subject to a revalidation check will be done through a disallowable instrument. It is generally preferable that limits on the exercise of a broad power are included in primary legislation. However, the committee will examine any instrument that prescribes a visa for the purposes of

8 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 1.

9 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 1-2.

the revalidation check framework for compatibility with human rights. Depending on the type of visa prescribed, the instrument may engage a number of human rights (including the right to protection of the family and freedom of movement).

2.94 The minister's response also addresses each of the matters set out at [2.87] in respect of the right to equality and non-discrimination. The minister did not agree that it would be effective to include the suggested safeguards in the legislation:

- in respect of limiting the revalidation check to long-term visitor visas, the minister stated that '[f]lexibility has been provided to cater for visa products that may be developed or reformed in the future', and noted that new classes of visas made subject to a revalidation check will be prescribed through a disallowable instrument;
- in respect of clarifying the basis of the requirement for a revalidation check in legislation, the minister stated that '[f]lexibility has been provided in the legislation to reduce regulatory burden, whilst managing risks associated with newly developed or reformed visa products'. The minister stated that it is intended that a routine revalidation requirement will be conducted every two years, and that '[s]pecifying a particular interval for a routine revalidation requirement in the legislation would reduce the Department's ability to accommodate changes in government policy that reflect changing global circumstances and may result in an unintended increase in red tape for visa holders.' It was further noted that '[i]f the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation'; and
- in response to the committee's suggestion that the legislation include a requirement that the minister's power to require a person or classes of persons to complete a revalidation check be based on an objective assessment of an increased risk to the Australian community, the minister stated that it is intended this power will be exercised in circumstances requiring immediate response, and that:

> [t]he tabling provisions in new subsections 96E(3), 96E(4) and 96E(5) of the Bill ensure that the Parliament can scrutinise the Minister's decision and provide comment on such a determination through a motion of disapproval or other mechanism. This provides additional scrutiny of the Minister's decision.[10]

10 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 4.

2.95 While the flexibility that will apparently be provided by delegated legislation goes to the stated objective of the measure,[11] the minister's response does not address the discussion in the previous analysis that there is nothing in the bill that would restrict the use of the power to the stated intention,[12] and that the administrative safeguards discussed are less reliable than the protection statutory processes offer.

2.96 Further, while proposed subsections 96E(3), 96E(4) and 96E(5) of the bill allow for some oversight by Parliament of the minister's decision to require a person or classes of persons to complete a revalidation check, Parliament has no authority to prevent the minister from exercising this power. As such, as the legislation is currently drafted, the minister could exercise this power in such a way that could have a disproportionate effect on people on the basis of their nationality, religion, race or sex. These provisions are therefore insufficient to protect against a misuse of the minister's power that could have the effect of unjustifiably limiting the right to equality and non-discrimination.

Committee response

2.97 **The committee thanks the Minister for Immigration and Border Protection for his detailed response and has concluded its examination of the issue.**

2.98 **The committee considers that the minister's response has addressed the committee's concerns regarding the right to non-refoulement (the associated right to an effective remedy) and the right to liberty. In respect of other human rights, the committee accepts that the disallowance process for instruments prescribing a visa for the purposes of the revalidation check framework will allow a human rights compatibility assessment to be undertaken once a visa is prescribed.**

2.99 **The measure in section 96E is capable of operating in a manner that is incompatible with the right to equality and non-discrimination. Accordingly, the committee draws this to the attention of the Parliament.**

2.100 **The committee notes that it will continue to examine instruments made pursuant to the proposed measures in order to assess their compatibility with human rights.**

11 EM, SOC 51: namely, to '…allow Australia to appropriately manage and facilitate the travel and movement of visa holders through the provision of up to date advice on potential risks and the application of appropriate measures to reduce the possibility of exposure to risk.

12 Based on objective assessments of risk – see EM, SOC 51.

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* and the Migration Regulations 1994 to prevent 'unauthorised maritime arrivals' and 'transitory persons' who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 8 November 2016
Rights	Protection of the family; family reunion; children; equality and non-discrimination (see **Appendix 2**)
Previous report	9 of 2016
Status	Concluded

Background

2.101 The committee first reported on the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested further information from the Minister for Immigration and Border Protection in relation to the human rights issues identified in that report.[1]

2.102 The minister's response to the committee's inquiries was received on 20 January 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Permanent lifetime visa ban for classes of asylum seekers

2.103 The proposed amendments to the *Migration Act 1958* (Migration Act) would serve to prevent asylum seekers who were at least 18 years of age, and were taken to a regional processing country after 19 July 2013,[2] from making a valid application

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 15-22.

2 Regional processing countries include Republic of Nauru (Nauru) or Papua New Guinea (PNG) where off-shore immigration detention centres operate.

for an Australian visa.[3] Such asylum seekers would accordingly face a permanent lifetime ban from obtaining a visa to enter or remain in Australia. If the minister thinks that it is in the public interest to do so, pursuant to the proposed personal, discretionary, non-compellable power of the minister, the minister may determine that the proposed statutory bar to making a valid visa application does not apply to an individual or class of persons in respect of visas specified in the determination.[4]

2.104 The previous analysis identified that the bill engages the right to equality and non-discrimination by its differential treatment of 'cohorts' or groups of people in materially similar situations, that is, people making an application for a visa to enter or remain in Australia. It was noted that the statement of compatibility acknowledged that the proposed ban could amount to differential treatment.[5]

2.105 The previous analysis also noted that the ban would appear to apply a penalty on those who seek asylum and are part of the 'regional processing cohort', contrary to article 31 of the Convention Relating to the Status of Refugees and its Protocol.[6]

2.106 The previous analysis also identified that the ban may also have a disproportionate negative effect on individuals from particular national origins; nationalities; or on the basis of race, which gives rise to concerns regarding indirect discrimination on these grounds.

2.107 The previous analysis stated that, on the information available, the proposed ban does not appear to be compatible with the right to equality and non-discrimination.

2.108 The committee therefore sought the advice of the minister as to whether, in respect to the right to equality and non-discrimination, there is a rational connection

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3 Referred to as the 'regional processing cohort'. See proposed section 5(1) of the *Migration Act 1958* (Migration Act) which defines members of the 'regional processing cohort' as 'unauthorised maritime arrivals' (UMAs) and 'transitory persons' who were taken to a regional processing country after 19 July 2013. UMA is defined in section 5AA(a) of the Migration Act and includes asylum seekers who arrived in the migration zone by boat. A 'transitory person' is defined in section 5(1) of the Migration Act and includes a person who attempted to enter Australia by boat but may have been taken directly to a regional processing country without first having been taken to Australia under Part 3 of the *Maritime Powers Act 2013*.

4 See proposed sections 46A(2)(2AB)-(2AC), 46B(2)(2AA)-(2AB) and proposed section 46A(8) of the Migration Act.

5 On the basis of 'other status' under article 26 of the International Covenant on Civil and Political Rights.

6 Article 31(1) provides: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

between the limitation and the stated objective, and whether the measure is reasonable and proportionate for the achievement of that objective.

2.109 The previous analysis also identified that the measure engages and limits the right to protection of the family and rights of the child. The measure would foreseeably operate to separate families on the basis that an individual subject to the visa ban will be prevented from joining family members in Australia, including where these family members have been granted a visa to come to or remain in Australia or are Australian citizens. The measure may also impact upon children by preventing an individual subject to a visa ban from being with a child who is an Australian citizen or child who is otherwise entitled to reside in Australia.

2.110 It was noted in the previous analysis that the statement of compatibility acknowledges that the right to protection of the family and rights of the child are engaged and could be limited by the measure, but did not specifically address whether the measure is a permissible limit on the right to protection of the family or rights of the child. It was stated that, on its own, the exercise of the discretionary power by the minister is unlikely to be sufficient to ensure that the measure is a proportionate limit on the right to protection of the family in the context of a blanket visa ban.

2.111 The committee therefore sought the advice of the minister as to whether, in respect to the right to protection of the family and rights of the child, there is a rational connection between the limitation and the stated objective, and whether the measure is reasonable and proportionate for the achievement of that objective.

Minister's response

2.112 In respect of the committee's query about whether the limitation criteria applies to the right to equality and non-discrimination, the minister stated that '[p]ersonal characteristics such as race, ethnicity, nationality (other than not being an Australian citizen), religion, gender or sexual orientation are not criteria for identifying non-citizens in the affected cohort', and that the measure has already been limited insofar as it will not apply to children who were under 18 at the time they were first transferred to a regional processing country, or were born to a member of the affected cohort.[7]

2.113 The minister stated that while differential treatment of the cohort on the basis of 'other status' could amount to a distinction on a prohibited ground under international law, the government's view is that this differential treatment 'is for a legitimate purpose and based on relevant objective criteria and that it is reasonable and proportionate in the circumstances'. This is because the differential treatment is 'a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or

7 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 5.

attempting to enter Australia as a [unauthorised maritime arrival] from applying for a visa to enter Australia.'[8]

2.114 The previous analysis identified that to penalise those who seek to enter Australia illegally for the purpose of seeking asylum cannot be a legitimate objective under international law.[9] It is apparent from the minister's response that this is indeed the objective being sought by the measure, as:

> [t]he measures are aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead. People smugglers are still active in attempting to encourage illegal migration to Australia and use changes in circumstances and the ongoing media discussion as a basis for proposing the current policy is softening or will soften in the future. The measures are intended to counter this to diminish the ability for people smugglers to attract potential clients.[10]

2.115 Therefore, on the basis of the information provided in the minister's response, and as stated in the previous analysis, the proposed ban does not appear to be compatible with the right to equality and non-discrimination.

2.116 In respect of the committee's query about whether the measure is rationally connected to and proportionate to achieving the stated objective in respect of the right to protection of the family and rights of the child, the minister stated that the flexibility to personally lift the bar and consider the individual circumstances of applicants and their relationships with family members enables the government to 'ensure that it acts consistently with its obligations to families and children in Australia.'[11]

2.117 The minister further noted that the measures are intended to counter the use of people smugglers by asylum seekers in order to 'diminish the ability for people smugglers to attract potential clients.'[12]

2.118 However, as with the statement of compatibility, the minister's response does not specifically address whether the measure is a permissible limit on the right to protection of the family or rights of the child.

2.119 Therefore, and as stated in the previous analysis, the exercise of the discretionary power by the minister is unlikely to be sufficient to ensure that the

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8 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 5.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 18.

10 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 6.

11 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 6.

12 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 6.

measure is a proportionate limitation on the right to protection of the family in the context of a blanket visa ban.[13] In this respect, it is noted that the default position (without discretionary intervention by the minister) would be for families to remain separated.

Committee response

2.120 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of the issue.**

2.121 **Noting the human rights concerns raised above, the committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination, the right to protection of the family and rights of the child. The objective identified in the minister's response, that is, seeking to impose a penalty on those who seek to enter Australia for the purpose of claiming asylum, cannot be a legitimate objective for the purpose of limiting human rights under international law.**

2.122 **The committee draws the human rights implications of the proposed lifetime visa ban for certain classes of asylum seekers to the attention of the Parliament.**

13 See, *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

Privacy Amendment (Re-identification Offence) Bill 2016

Purpose	Seeks to amend the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth entities
Portfolio	Attorney-General
Introduced	Senate, 12 October 2016
Rights	Fair trial; presumption of innocence; prohibition on retrospective criminal laws (see **Appendix 2**)
Previous report	9 of 2016
Status	Concluded

Background

2.123 The committee first reported on the Privacy Amendment (Re-identification Offence) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested a response from the Attorney-General by 16 December 2016.[1]

2.124 The Attorney-General's response to the committee's inquiries was received on 21 December 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Retrospective effect of the proposed offences

2.125 The bill seeks to act as a deterrent against attempts to re-identify de-identified personal information in published government datasets. It would apply to entities (including small businesses) and individuals.[2]

2.126 Proposed sections 16D, 16E and 16F of the bill all apply to acts that were committed on or after 29 September 2016,[3] this being the date following the Attorney-General's media release that stated the government's intention to introduce a criminal offence of re-identifying de-identified government data.[4] This differs from the usual practice that legislation creating criminal offences operates prospectively from or after the Royal Assent is given to the legislation.

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 23-26.

2 Pursuant to Schedule 1, item 5, paragraph 16CA(1)(a).

3 At Schedule 1, item 5, paragraphs 16D(1)(c), 16E(1)(c) and (e) and 16F(1)(c).

4 Explanatory memorandum (EM), statement of compatibility (SOC) 9.

2.127 As proposed sections 16D and 16E of the bill would make the proposed offence provisions operate retrospectively, the absolute prohibition on retrospective criminal law is engaged.

2.128 The committee therefore sought the advice of the Attorney-General as to whether consideration has been given to amending paragraphs 16D(1)(c) and 16E(1)(c) such that the offences in these sections operate prospectively, that is, from or after the date of the Royal Assent.

Attorney-General's response

2.129 In his response, the Attorney-General stated that the government 'gave careful consideration' as to whether the proposed offences could operate prospectively from the date of Royal Assent.[5]

2.130 The Attorney-General stated that the amendments were proposed immediately in response to the recently identified vulnerability in the Department of Health's Medicare and Pharmaceutical Benefits Scheme dataset, in order for the government to 'strengthen protections for personal information against re-identification'.[6]

2.131 The Attorney-General noted:

> The release of personal information can have significant consequences for individuals which cannot be easily remedied. In particular, once personal information is made available online it is very difficult - in many cases impossible - to fully retract that information or prevent further access. Applying the offences to conduct occurring from the day after [the media release] provides a strong disincentive to entities who, upon hearing of this intention, may have been tempted to attempt re-identification of any published datasets while the Parliament considers the Bill.[7]

2.132 The Attorney-General also noted that the government took 'swift action to introduce the Bill in the Parliament at the earliest available opportunity' such that the retrospective application will only apply for a short time period.[8]

2.133 The Attorney-General stated that, given these circumstances, the government considered that these 'narrowly prescribed offences' are likely to have a

5 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 1.

6 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 1.

7 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 2.

8 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 2.

limited retrospective effect, and that entities were clearly given notice that this particular conduct would be made subject to offences from 29 September 2016.[9]

2.134 The previous legal analysis identified that the prohibition on retrospective criminal laws is absolute, which means that it can never be permissibly limited. Therefore, any criminal offence that applies retrospectively breaches the absolute prohibition on retrospective criminal liability, regardless of the reason for the retrospectivity. As a matter of human rights law, this measure is therefore incompatible with the prohibition on retrospective criminal laws.

Committee response

2.135 **The committee thanks the Attorney-General for his response, notes the detailed explanation provided, and has concluded its examination of this issue.**

2.136 **As the prohibition on retrospective criminal laws is absolute under international human rights law, the measure, in applying the criminal offences retrospectively, is incompatible with the prohibition on retrospective criminal laws.**

2.137 **The committee draws the Attorney-General's advice and the human rights implications of the retrospective criminal offences to the attention of the Parliament.**

9 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 1.

Treasury Laws Amendment (2016 Measures No. 1) Bill 2016

Purpose	Seeks to amend: the *Terrorism Insurance Act 2003* to clarify that losses attributable to terrorist attacks using chemical or biological means are covered by the terrorism insurance scheme; the *Corporations Act 2001* to provide that employee share scheme disclosure documents lodged with the Australian Securities and Investments Commission are not made publicly available for certain start-up companies, and provide protection for retail client money and property held by financial services licensees in relation to over-the-counter derivative products; the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients; and the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide income tax relief to eligible New Zealand special category visa holders who are impacted by disasters in Australia
Portfolio	Treasury
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.138 The committee first reported on the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 (the bill) in its *Report 1 of 2017*, and requested a response from the Minister for Revenue and Financial Services by 3 March 2017.[1]

2.139 The minister's response to the committee's inquiries was received on 8 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.140 Schedule 5 of the bill introduces a power into the *Corporations Act 2001* (Corporations Act) for the Australian Securities and Investments Commission to make rules by legislative instrument in relation to derivative retail client money.[2] The client money reporting rules may include a penalty amount for a rule, which must not

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 2-4.

2 Schedule 5, item 14, proposed new section 981J.

exceed $1 000 000.[3] This penalty could apply to a natural person. Failure to comply with the rules is a civil penalty provision.[4]

2.141 The initial analysis identified that the measure raised questions as to the compatibility of the measure with the right to a fair trial, insofar as civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty may be regarded as 'criminal' for the purposes of international human rights law. This was not addressed in the statement of compatibility.

2.142 The committee therefore sought the advice of the minister as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.

Minister's response

2.143 The minister's response applies the committee's *Guidance Note 2* in relation to whether the civil penalty provisions should be considered 'criminal' for the purposes of international human rights law. The minister identifies the following factors which she considers support the view that the client money penalty regime is not 'criminal' in nature:

- the $1 000 000 penalty is not a criminal penalty under Australian law;
- the penalty applies exclusively to licensees and not to the general public;
- there is no criminal sanction if there was a failure to pay the penalty; and
- the size of the maximum penalty is proportionate, 'given the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules.'[5]

2.144 In her response, the minister stated that the government considers that a maximum penalty of $1 000 000 'is appropriate given the scale of potential loss that may result from a contravention', noting that '[t]he market integrity rules have an equivalent penalty regime for the same reason.'[6]

2.145 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. However, it is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being

3 Schedule 5, item 14, proposed new subsection 981K(3).

4 See Schedule 5, item 14, proposed new subsection 981M(1) in conjunction with existing section 1317E of the *Corporations Act 2001*.

5 See Appendix 3, letter from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, to the Hon Ian Goodenough MP (received 8 March 2017) 1-2.

6 See Appendix 3, letter from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, to the Hon Ian Goodenough MP (received 8 March 2017) 1.

classified as 'civil' under Australian domestic law. Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the prohibition against double jeopardy apply.

2.146 In this particular case, on balance, although the proposed civil penalty is substantial, owing to the fact that the penalty will not apply to the general public and reflects the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules, the penalty is unlikely to be criminal in nature.

Committee response

2.147 **The committee thanks the Minister for Revenue and Financial Services for her response and has concluded its examination of this issue.**

2.148 **The committee considers that, although the proposed civil penalty is substantial, the circumstances surrounding its application suggest that it is unlikely that it would be considered criminal for the purposes of international human rights law.**

Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756]

Purpose	Provides safety protections and navigation requirements similar to those established by the *New South Wales Marine Act 1998* (NSW) to apply in the Jervis Bay Territory. Sets minimum safety equipment standards, prescribes requirements for wearing lifejackets and creates offences, including for operating vessels while under the influence of alcohol and drugs in the Jervis Bay Territory
Portfolio	Infrastructure and Regional Development
Authorising legislation	*Jervis Bay Territory Acceptance Act 1915*
Last day to disallow	20 March 2017
Rights	Presumption of innocence; liberty; privacy (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.149 The committee first reported on the Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] (the Ordinance) in its *Report 1 of 2017*, and requested a response from the Minister for Local Government and Territories by 3 March 2017.[1]

2.150 The Minister for Local Government and Territories' response to the committee's inquiries was received on 3 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Reverse legal burden of proof

2.151 Section 56 of the Ordinance makes it an offence for a person under the age of 18 to either operate a vessel in territory waters or supervise a junior operator, where there is present in his or her breath or blood the youth range prescribed concentration of alcohol. Section 63 makes it a defence for this offence if the defendant proves that, at the time the defendant was operating a vessel or supervising a juvenile operator of the vessel, the presence of alcohol in the defendant's breath or blood of the youth was not caused (in whole or in part) by either the consumption of an alcoholic beverage (other than for religious observance) or consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol. This has the effect of reversing the

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 5-12.

legal burden of proof applying to the section 56 offence pursuant to section 13.4 of the *Criminal Code Act 1995* (Criminal Code).

2.152 The previous analysis noted that the measure at section 63 of the Ordinance engages and limits the right to a fair trial by requiring the defendant to prove the legal burden. However, this was not identified in the statement of compatibility.

2.153 The previous analysis noted that the explanatory statement appeared to set out a legitimate objective for the purposes of international human rights law, namely to ensure public safety. While the explanatory statement also set out a possible basis for reversing the evidential burden of proof it did not explain why it is necessary to reverse the legal burden of proof.

2.154 Additionally, the previous analysis noted that while the explanatory statement stated that it is appropriate to reverse the legal burden of proof because of the risks to public safety posed by people affected by alcohol in charge of vessels, there was no explanation as to how reversing the legal burden of proof for the offence would be more effective in reducing such risks as opposed to having the offence in place without any reverse legal burden of proof.

2.155 The committee therefore sought the advice of the Minister for Local Government and Territories as to whether the limitation on the presumption of innocence is rationally connected to, and a proportionate approach to achieving, the stated objective.

Minister's response

2.156 The minister's response advises that the objective of the Ordinance is to 'provide a comprehensive regime for marine safety in the Jervis Bay Territory' and thereby protect the right to life. The minister's response advises that the Ordinance ensures public safety by imposing limits on the permissible level of alcohol present in the breath or blood of persons operating or supervising the operation of vessels in the Jervis Bay Territory (the territory). The minister's response notes that the Ordinance recognises that there are circumstances where such persons will inadvertently or unavoidably have alcohol in their breath or blood and that the defence in section 63 exists to allow for these circumstances.

2.157 The minister's response states that the reversal of the onus of proof in section 63 is appropriate because the circumstances set out in that section are matters that are specifically within the knowledge of the defendant. In relation to applying a legal (rather than an evidential) burden of proof, the minister states that the approach is appropriate because:

- the matters set out in section 63 relate to the purpose of the defendant's consumption of a substance, and would be difficult to prove in the negative if a lower evidential burden applied; and

- the inappropriate use of alcohol and drugs in a marine environment could cause injury or loss of life.[2]

2.158 However, the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that the fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant.[3] This statement is made in the context of evidential (rather than legal) burdens of proof: legal reversals of the burden of proof encroach even more significantly on the presumption of innocence, and the Guide has stated that placing a legal burden of proof on a defendant should be kept to a minimum.

2.159 As noted in the initial analysis, the minister's response provides information that may justify the reversal of the *evidential* burden of proof, but has not explained why it is necessary to reverse the *legal* burden of proof. The measure may therefore not be the least rights restrictive way to achieve the stated objective.

Committee response

2.160 **The committee thanks the Minister for Local Government and Territories for her response and has concluded its examination of this issue.**

2.161 **The committee notes that, while the minister's response may justify the reversal of the evidential burden with respect to the defence in section 63, it has not provided sufficient information to justify placing a legal burden on the defendant in these circumstances. The measure may therefore not be the least rights restrictive way to achieve the stated objective.**

2.162 **The committee therefore concludes that the measure, in placing the legal burden of proof on the defendant, unjustifiably limits the right to the presumption of innocence.**

Alcohol and drug testing

2.163 Section 64 of the Ordinance provides that the *Road Transport (Alcohol and Drugs) Act 1977* (Australian Capital Territory) (the ACT Act) applies in relation to a person who operates a vessel in territory waters.

2.164 As the ACT Act applies to the detection of people who drive motor vehicles after consuming alcohol or drugs, offences by those people, and measures for the treatment and rehabilitation of those people, the Ordinance sets out how the ACT Act applies specifically to vessel owners and operators.

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2 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 2.

3 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011 edition) 50.

2.165 As the Ordinance directly incorporates the law set out in the ACT Act, the previous analysis noted that, in assessing the compatibility of the Ordinance with human rights, the committee is required to assess the compatibility of the incorporated law with human rights.

2.166 The previous analysis noted that the provisions of the ACT Act engage and limit a number of rights, including the right to liberty and the right to privacy.

2.167 With respect to the right to liberty, the previous analysis noted that the statement of compatibility states that while the measure limits the right to liberty it does so 'in circumstances where the person may cause danger to others if they operate a vessel while under the influence of alcohol or drugs.'[4] While ensuring public safety is a legitimate objective for the purposes of international human rights law, the statement of compatibility does not provide further analysis of how the limitation is rationally connected, or proportionate, to the achievement of the stated objective.[5]

2.168 The previous analysis further noted that, in response to a review of the ACT Act, the ACT Human Rights Commission identified that the right not to be arbitrarily detained and arrested may be unlawfully restricted when random drug testing is not predicated on the relevant police officer having a 'reasonable suspicion' on which to ground the request for a sample to test.[6]

2.169 With respect to the right to privacy, the previous analysis noted that the measures appear to be rationally connected to the legitimate objective of ensuring public safety, but that there are questions over whether the limitation on the right to privacy is proportionate to the stated objective. The previous analysis noted that the ACT Human Rights Commission identified that where saliva and blood samples are collected, there need to be measures in place to protect against the possibility that these samples could become public knowledge through their tender in court in criminal proceedings.[7]

2.170 Further, the previous analysis noted that the statement of compatibility does not examine how other rights, such as the right to a fair trial, are engaged and limited by the measure.

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4 Explanatory statement (ES), statement of compatibility (SOC) 4.

5 ES, SOC 4. The statement does quote the UN Human Rights Committee, which states that 'sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws' – see: UN Human Rights Committee, *General Comment 35: Article 9, Right to Liberty and Security of Person* (16 December 2014) [10].

6 ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008) 3.

7 ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008) 5.

2.171 The committee therefore sought the advice of the Minister for Local Government and Territories as to the extent to which the ACT Act complies with international human rights law.

Minister's response

2.172 Noting that the ACT Act was previously subject to human rights scrutiny by the ACT Human Rights Commission, the minister's response states that it is not established practice for ACT laws applied to the Jervis Bay Territory to be scrutinised for human rights compatibility at the Commonwealth level. The minister's response advises that the rationale for incorporating ACT Act provisions that relate to road transport into provisions in the Ordinance is that officers of the Australian Federal Police are familiar with the provisions and it is desirable for similar procedures to be adopted in the marine environment for consistency.[8]

2.173 With respect to incorporated ACT measures that engage the right to liberty (by allowing police officers to take persons into custody in certain circumstances), the minister's response states that these measures are a rational and proportionate response to reduce the likelihood of persons injuring themselves and others.[9]

2.174 With respect to incorporated measures that allow alcohol and drug testing on persons operating vehicles in territory waters, the minister's response notes that random drug testing has a deterrent effect on individuals unlawfully using such substances, resulting in safety benefits accruing to the general public. The response also states that similar justifications apply to provisions that make it an offence to refuse to undergo an alcohol or drug test. The minister's response concludes that consequential behavioural changes brought about by these measures indicate that they are the least rights restrictive way to protect the public.[10]

2.175 While deterrence of behaviour that causes a risk to public safety may be a legitimate objective for the purposes of international human rights law, with respect to the right to privacy, the minister's response provides no information about what safeguards are available in the ACT Act to protect the right to privacy for persons who are subject to alcohol and drug testing.

2.176 It is noted that the ACT Act contains some safeguards relating to the collection and retention of samples. For example section 16D requires the destruction of samples and sections 13 and 13F provide precautions for privacy in relation to breath and oral fluid analysis. In addition, section 18B provides that

8 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 4.

9 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 3.

10 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 3.

samples may only be used for four restricted purposes.[11] However, section 64(2) of the Ordinance exempts section 18B of the ACT Act from applying in the territory. The minister's response does not provide information as to whether an equivalent safeguard will apply to samples taken in the territory.

Committee response

2.177 **The committee thanks the Minister for Local Government and Territories for her response and has concluded its examination of this issue.**

2.178 **However, noting the concerns raised around measures that incorporate ACT laws which limit human rights, the committee considers that the minister's response has not sufficiently addressed the question of whether the incorporation of ACT laws is the least rights restrictive approach to achieve the stated objective of the Ordinance. In order to avoid potential incompatibility with the right to privacy, the committee considers it may be appropriate if the Ordinance incorporated further safeguards around the retention, destruction and use of samples.**

Search and entry powers

2.179 Section 83 of the Ordinance empowers a police officer to board a vessel and exercise monitoring powers,[12] for the purpose of: finding out whether the Ordinance and the rules are being, or have been, complied with;[13] investigating a marine accident; conducting a marine safety operation; or asking questions about the nature and operations of the vessel.[14]

2.180 The previous analysis noted that the statement of compatibility recognises that the right to privacy is engaged by the measure,[15] and that the objective of enabling police officers to carry out investigations and enforcement activities effectively is likely to be regarded as a legitimate objective for the purposes of international human rights law. However, the previous analysis questioned whether the limitation is proportionate to the stated objective, in particular, whether it is the least rights restrictive approach.

2.181 The previous analysis noted that while the statement of compatibility provides that the search and entry powers under the Ordinance are limited to the

11 These purposes are: (a) analysis of the sample in accordance with the ACT Act; (b) research relating to drivers of motor vehicles affected by drugs, but only if identifying information about the person who provided the sample cannot be ascertained from it; (c) a proceeding for an offence of culpable driving; and (d) a proceeding for an offence against the *Road Transport (Safety and Traffic Management) Act 1999*, section 7 (furious, reckless or dangerous driving).

12 Set out at section 87.

13 Made pursuant to section 118.

14 The power to require the master of the vessel to answer questions are set out at section 86.

15 ES, SOC 4.

Australian Federal Police, and may only be exercised in limited circumstances,[16] section 92 of the Ordinance provides that a police officer may be 'assisted by other persons in exercising powers or performing functions or duties under this Part, if that assistance is necessary and reasonable'. The previous analysis noted that this would appear to allow the police to confer on *any* person the power to assist in the exercise of these coercive powers.

2.182 The previous analysis also noted that section 83 confers a range of broad purposes for the exercise of these powers that do not require the police officer to have any suspicion at all as to whether an offence or a breach of the rules may have been, or may be being, committed. The previous analysis also noted that there are no requirements that the police officer first seek the consent of the occupier before boarding and that, if consent is not granted, a warrant be sought before search and entry powers are exercised where it is reasonably practicable to do so.

2.183 The committee therefore sought the advice of the Minister for Local Government and Territories as to whether the limitation is proportionate to achieving its objective, including whether there are less rights restrictive ways to achieve the stated objective, such as:

- limiting the exercise of the powers to police officers (and not 'persons assisting' as under section 92); and
- requiring a police officer to seek the consent of the occupier of the vessel before exercising the search and entry powers; and
- if consent is not granted, ensuring the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be being complied with and to investigate accidents or conduct investigations; and
- that the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practicable to obtain a search warrant.

Minister's response

2.184 With respect to section 92, and 'persons assisting' police officers, the minister's response advises that the exercise of such a power would be 'extremely rare' in practice. The minister further states that persons assisting a police officer must at all times act at the direction of the police officer they are assisting, and that the police officer is accountable for the actions of the people from whom they have requested assistance. The minister's response concludes that she considers that, on this basis, there is no reason to limit powers under section 64 to police officers.[17]

16 Set out in subsection 83(1).

17 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 5.

2.185 It should be noted in this regard that there is no requirement in the instrument that persons assisting a police officer must act at the direction of the officer they are assisting, and the minister's response does not provide information as to the consequences of not following a police officer's direction.

2.186 With respect to search and entry powers more broadly, the minister's response states that it is reasonable to require operators of vessels to permit entry by police officers for marine safety purposes because such persons are aware that their vessels are subject to regulatory oversight and therefore implicitly accept that their compliance with regulatory requirements will be monitored, including through entry into premises, and so it is not necessary for a police officer to seek consent to enter.[18]

2.187 While it may be accepted that those operating a vessel are subject to regulatory oversight this does not mean that the owners or operators of those vessels waive their right to privacy. The minister's response refers to the Attorney-General's Department's *Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers* (the Guide) which provides that persons who obtain a licence or registration for non-residential premises can be taken to accept entry to those premises for the purposes of ensuring compliance with licensing or registration conditions. However, the minister's response does not go on to consider the next paragraph in the Guide which states that in respect of licensed premises the applicable legislation should impose as a condition of the licence consent to entry onto non-residential premises where the licensed activity happens.[19]

2.188 The Ordinance does not provide that simply by registering a vessel the owner or operator of that vessel has consented to entry for the purpose of ensuring compliance.

2.189 The minister's response also states that, while in practice the relevant powers will normally be exercised where a police officer has established that a reasonable suspicion exists, in 'exceptional rare circumstances' police officers should be able to intervene without first determining whether reasonable suspicion exists. The minister's response concludes that she does not consider it necessary for the Ordinance to require that a police officer must hold a reasonable suspicion before entering and searching a vessel as to do so may impact on the capacity of a police officer to ensure users of the territory marine environment are safe.[20]

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18 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 6.

19 Attorney General's Department, Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers, September 2011, 85.

20 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 6.

2.190 Finally, the minister's response states that, as vessels are able to leave territory waters in a short timeframe, it is generally impractical for a police officer to obtain a warrant, and that requiring a police officer to do so would 'severely limit' their capacity to undertake their safety regulatory role in a responsive manner. The minister concludes that the limitations on the right to privacy imposed by sections 83 and 92 are the least restrictive way to protect the right to life of users of the territory marine environment.[21]

2.191 While recognising the importance of public safety, and that measures pursuing a public safety objective could promote the right to life, consideration of the proportionality of measures in the Ordinance that limit human rights must balance the likelihood of an event occurring that may cause death or injury against the impact of those measures on other rights, such as the right to privacy. In this respect, the minister's response does not demonstrate how the impact of requiring a police officer to determine whether a reasonable suspicion exists or attempt to obtain a warrant where reasonable before exercising these coercive powers would so 'severely limit' the capacity of police officers to protect the safety of users of the marine environment as to limit the right to life. It therefore does not appear that the measures are the least rights restrictive approach to achieve the stated objective.

Committee response

2.192 **The committee thanks the Minister for Local Government and Territories for her response and has concluded its examination of this issue.**

2.193 **However, the committee considers that the minister's response has not sufficiently addressed the question of whether the search and entry powers are the least rights restrictive approach to achieve the stated objective of the Ordinance. In order to avoid potential incompatibility with the right to privacy, the committee considers it may be appropriate if the Ordinance:**

- **limited the exercise of the powers to police officers (and not 'persons assisting' as under section 92), or at a minimum, required that the persons assisting must act at the direction of the police officer;**
- **required a police officer to seek the consent of the occupier of the vessel before exercising the search and entry powers;**
- **if consent is not granted, ensured the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be being complied with and to investigate accidents or conduct investigations; and**

21 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 7.

- **that the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practicable to obtain a search warrant.**

Narcotic Drugs Regulation 2016 [F2016L01613]

Purpose	Makes regulations that are necessary for carrying out, or giving effect to, the regulatory framework for the licencing of the cultivation of cannabis and the production of cannabis and cannabis resins for medicinal and scientific purposes, as well as in relation to the manufacture of drugs
Portfolio	Health
Authorising legislation	*Narcotic Drugs Act 1967*
Last day to disallow	13 February 2017
Rights	Work; equality and non-discrimination (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.194 The committee first reported on the instrument in its *Report 1 of 2017*, and requested a response from the Minister for Health by 3 March 2017.[1]

2.195 The minister's response to the committee's inquiries was received on 6 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirement to only engage 'suitable persons'

2.196 The Narcotic Drugs Regulation 2016 [F2016L01613] (the regulation) implements part of the regulatory framework for licensing the cultivation, production and manufacture of medicinal cannabis under the *Narcotic Drugs Act 1967* (the Act).[2]

2.197 The regulation prescribes a class of 'unsuitable persons' whom a licence holder (with authority to cultivate, produce or manufacture medical cannabis) must take all reasonable steps not to employ or engage to carry out activities authorised by the licence.[3] These include persons who are undertaking or have undertaken treatment for drug addiction, persons who have a drug addiction, or persons who are undischarged bankrupts. In the context of employing or engaging suitable staff, the regulation also prescribes circumstances in which a person is taken not to be suitable

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 17-19.

2 Amended by the *Narcotic Drugs Amendment Act 2016* to introduce the new framework.

3 See: new subregulation 18(1), prescribed pursuant to subsection 10F(1) of the Act.

to carry out activities authorised by a cannabis licence at a particular time.[4] These include where, in the five years before the person is to be employed, the person has used illicit drugs; been convicted of a drug related offence; or been convicted of an offence against a law of the Commonwealth or a state or territory that involved theft, or that was punishable by a maximum penalty of imprisonment of three months or more.

2.198 The committee noted that the right to work and the right to equality and non-discrimination are engaged and limited by the prohibition on medicinal cannabis licence holders employing or engaging prescribed 'unsuitable persons', and the prevention of certain persons (who in the five years prior to employment or engagement have been subject to certain prescribed circumstances) from carrying out activities authorised by a cannabis licence.

2.199 As the statement of compatibility failed to discuss how the measure engages and limits the right to work and the right to equality and non-discrimination, the committee sought the advice of the Minister for Health as to whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law; how the measure is effective to achieve (that is, rationally connected to) that objective; and whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.200 In his response, the minister referred the committee to the statement of compatibility for the *Narcotic Drugs Amendment Act 2016* (Amendment Act).

2.201 In respect to the right to work, the minister referred to the discussion in the statement of compatibility for the Amendment Act regarding the statutory condition under sections 10F and 12H of the Act, which require a licence holder only employ suitable persons. The statement provided that, for the sake of the 'protection of public health and to help meet Australia's international obligation to control diversion', the provision 'is designed to address the risk of infiltration by organised crime below management level', noting that '[e]mployees will have access to highly divertible cannabis material with a high "street value"'.[5]

2.202 In respect to the right to equality and non-discrimination, the minister stated that the discrimination and prevention of 'unsuitable persons' from being employed is:

> …necessary to address the high risk of diversion of cannabis and other drugs to the illicit drug market, ensure that the medicinal cannabis products made available to the Australian patients are from licit activities

4 See: new subregulation 18(2), prescribed pursuant to subsection 10F(2) of the Act. A 'drug related offence' is defined at regulation 4.

5 See Appendix 3, letter from the Hon Greg Hunt MP, Minister for Health, to the Hon Ian Goodenough MP (received 6 March 2017) 1.

> and licit sources and comply with Australia's obligations under the Single Convention on Narcotic Drugs as they relate to limiting the risk of diversion of drugs.[6]

2.203 The protection of public health and compliance with Australia's international obligation to control diversion would appear to be a legitimate objective for the purposes of international human rights law. The minister's response provides some information as to why it is considered necessary to prescribe each particular class of people in order to achieve the legitimate objective of the measure:

> These persons will be physically handling, and will have direct access to, highly divertible cannabis material with high 'street value'. A person who has a drug addiction, is undertaking or has undertaken treatment for drug addiction, undischarged bankrupts, has used illicit drugs, been convicted for a drug related offence or been convicted of an offence that involved theft, would be unsuitable to engage in activities such as cultivation, production and manufacture of drugs.

2.204 It is acknowledged that in light of the types of circumstances that are prescribed, the nature of the industry and associated risks, it may be that each prescribed category is necessary. The minister's response further identifies that the circumstances in which a person is not taken to be suitable under subsections 18(2) and 39(2) of the regulation are limited to a period of five years, and are not indefinite. Accordingly, on balance, it appears that the measure is likely to be a proportionate limit on the right to work and the right to equality and non-discrimination.

Committee response

2.205 **The committee thanks the Minister for Health for his response and has concluded its examination of this issue.**

2.206 **The preceding analysis indicates that measure is likely to be compatible with the right to work and the right to equality and non-discrimination.**

6 See Appendix 3, letter from the Hon Greg Hunt MP, Minister for Health, to the Hon Ian Goodenough MP (received 6 March 2017), 2.

Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649]

Purpose	Amends the Parliamentary Service Determination 2013 to remove the requirement for the Commissioner to endorse a particular certification in relation to the selection process for SES vacancies, remove the requirement for the Commissioner to be satisfied that certain requirements have been met before a Secretary may give notice to an SES employee, and remove the requirement that certain employment decisions are to be notified in the Public Service Gazette
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Parliamentary Service Act 1999*
Last day to disallow	13 February 2017
Right	Privacy (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.207 The committee first reported on the instrument in its *Report 1 of 2017*, and requested a response from the Presiding Officers by 3 March 2017.[1]

2.208 The Presiding Officers' response to the committee's inquiries was received on 3 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Publishing termination decision for breach of the Code of Conduct

2.209 The Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649] (the 2016 Determination) was made partly in response to issues identified in relation to the Parliamentary Service Determination 2013 [F2013L01201] (2013 Determination).

2.210 The 2016 Determination raises similar issues to those recently considered by the committee in relation to the Australian Public Service Commissioner's Directions 2016 [F2016L01430] (the 2016 APS Directions).[2]

1 Parliamentary Joint Committee on Human Rights, Report 1 of 2017 (16 February 2017) 20-23.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2.211 The 2016 Determination, which amends the 2013 Determination, addresses many of the concerns raised by the committee in its *First Report of the 44th Parliament* in respect of the 2013 Determination about the limitation on the right to privacy and the rights of persons with disabilities (in relation to the notification of the termination of employment on the ground of physical or mental incapacity).[3] The amendments made by the 2016 Determination reflect the provisions of the 2016 APS Directions.

2.212 In its recent consideration of the 2016 APS Directions, the committee raised concerns with respect to the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette, which engages and limits the right to privacy.[4]

2.213 In his response to the committee's concerns, the Australian Public Service Commissioner (the Commissioner) committed to undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and will notify the committee of the findings by June 2017.[5]

2.214 The initial human rights analysis identified that the committee's concerns with respect to the right to privacy in the 2016 APS Directions also applied to the 2016 Determination.

2.215 Noting the advice of the Commissioner with respect to the APS Directions 2016, the committee therefore sought the advice of the Presiding Officers as to whether the 2016 Determination will also be reviewed in line with the Commissioner's review into the 2016 APS Directions.

Presiding Officers' response

2.216 The Presiding Officers' response notes that the Australian Public Service Commission is conducting a review of the necessity to gazette information in relation to termination decisions made on the grounds of a breach of the Code of Conduct.

2.217 The Presiding Officers' response notes that a further examination of the 2016 Determination will be conducted in light of the findings of this review.

Committee response

2.218 **The committee thanks the Presiding Officers for their response and has concluded its examination of this issue.**

2.219 **The committee notes that the Presiding Officers will further examine the 2016 Determination in light of the Australian Public Service Commission's review into the 2016 APS Directions.**

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3 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 157-159.

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

5 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 16.

2.220 **The committee will assess any further changes made to the 2016 Determination for their compatibility with international human rights law.**

Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656]

Purpose	Amends the Aviation Transport Security Regulations 2005 and the Maritime Transport and Offshore Facilities Security Regulations 2003 with respect to the aviation security identification card and the maritime security identification card schemes
Portfolio	Infrastructure and Regional Development
Authorising legislation	*Aviation Transport Security Act 2004* and *Maritime Transport and Offshore Facilities Security Act 2003*
Last day to disallow	13 February 2017
Right	Presumption of innocence (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.221 The committee first reported on the instrument in its *Report 1 of 2017*, and requested a response from the Minister for Infrastructure and Transport by 3 March 2017.[1]

2.222 The minister's response to the committee's inquiries was received on 3 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offences

2.223 The Aviation Transport Security Regulations 2005 [F2016C01035] and the Maritime Transport and Offshore Facilities Security Regulations 2003 [F2016C00956] (the regulations) establish the regulatory frameworks for the aviation security identification card (ASIC) and the maritime security identification card (MSIC) schemes.

2.224 Subregulation 6.06(5) of Schedule 1, Part 1 to the Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656] (the regulation) imposes a strict liability offence of 20 penalty units on an issuing body,[2] which may be a natural person, in respect of an ASIC program where the

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 24-25.

2 Defined in regulation 6.01 of the Aviation Transport Security Regulations 2005 as a person or agency that is authorised to issue ASICs; or that is a transitional issuing body.

issuing body becomes aware of a change in a specified detail,[3] and the issuing body does not, within 5 working days after becoming aware of the change, notify the Secretary in writing of the detail as changed.

2.225 An equivalent offence is imposed on an issuing body[4] by Schedule 2, Part 1, subregulation 6.07Q(5) of the regulation in respect of an MSIC plan.

2.226 Strict liability offences limit the right to be presumed innocent until proven guilty because they allow for the imposition of criminal liability without the need to prove fault. However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

2.227 The statement of compatibility for the regulation does not recognise that the right to the presumption of innocence is engaged and limited by imposing strict liability offences.

2.228 The committee drew to the attention of the minister the requirement for the preparation of statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the committee's expectations in relation to the preparation of such statements as set out in its *Guidance Note 1*.

2.229 The committee also noted that its *Guidance Note 2* sets out information specific to strict liability and absolute liability offences.

2.230 The committee therefore sought the advice of the Minister for Infrastructure and Transport as to whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law; how the measure is effective to achieve (that is, rationally connected to) that objective; and whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

3 Such as the issuing body's name, or ABN, CAN or ARBN.

4 Defined in regulation 6.07B of the Maritime Transport and Offshore Facilities Security Regulations 2003 as a person or body that is authorised to issue MSICs; or that is a transitional issuing body.

Minister's response

2.231 In his response, the minister stated that it is crucial that the Department of Infrastructure and Regional Development (the department), as the transport security regulator, has the most up-to-date contact information for issuing bodies, noting that the regulations prescribe multiple circumstances when the Secretary of the department 'must contact an issuing body, including for security-sensitive purposes.'[5] The minister also stated that:

> The requirement for issuing bodies to update their contact (or company) details is intrinsically linked to protecting aviation and maritime infrastructure from unlawful interference (including terrorism).[6]

2.232 The minister also noted that since 2012 the department had consulted with industry on changes to enhance issuing body practices, and specifically, from 2014 to 2016, consulted with industry in respect of the draft regulation. The minister noted that '[n]o issuing body expressed concern about the inclusion of the offence in the new Regulation.'[7]

2.233 Whether or not industry agrees with the changes to the regulations does not signify the compatibility of the measure with international human rights law. However, as noted above, strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective, and are a proportionate means of achieving that objective.

2.234 While not directly addressed in the minister's response, the protection of aviation and maritime infrastructure from unlawful interference, including terrorism, appears to constitute a legitimate objective for the purpose of international human rights law. Further explanation in the minister's response as to why a strict liability offence rather than a regular offence provision was necessary to address this apparent objective would have been useful to the committee in assessing the human rights compatibility of the measure including matters of proportionality.

2.235 However, on balance, given that the defence of mistake of fact will still be available, the particular context of the offences and that the penalties for these

5 See Appendix 3, letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Ian Goodenough MP (received 3 March 2017), 1.

6 See Appendix 3, letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Ian Goodenough MP (received 3 March 2017), 1.

7 See Appendix 3, letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Ian Goodenough MP (received 3 March 2017), 2.

offences impose only a fine of 20 penalty units (rather than imprisonment), it is likely that the limitation is proportionate to the objective being sought.[8]

Committee response

2.236 **The committee thanks the Minister for Infrastructure and Transport for his response and has concluded its examination of this issue.**

2.237 **On balance the committee considers that the strict liability offence in this case is likely to be compatible with the presumption of innocence.**

Mr Ian Goodenough MP

Chair

8 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 23: The application of strict liability to all physical elements of an offence is likely to be considered appropriate where the offence is not punishable by imprisonment, and the offence is punishable by a fine of up to 60 penalty units for an individual, or 300 penalty units for a body corporate.

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017;
- Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017;
- Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017;
- Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017;
- Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017;
- Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017;
- Treasury Laws Amendment (2017 Measures No. 1) Bill 2017;
- Federal Financial Relations (National Partnership payments) Determination No. 114 (December 2016) [F2017L00049];
- Federal Financial Relations (National Partnership payments) Determination No. 115 (January 2017) [F2017L00050]; and
- National Disability Insurance Scheme (Plan Management) Amendment Rules 2017 [F2017L00073].

3.2 The committee continues to defer its consideration of the following legislation:

- Code for the Tendering and Performance of Building Work 2016 [F2016L01859];[1]
- Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724];[2]
- Federal Financial Relations (National Partnership Payments) Determination No. 113 (November 2016) [F2016L01937];[3] and

1 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 53.

2 See Parliamentary Joint Committee on Human Rights, Report 10 of 2016 (30 November 2016) 17.

3 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 53.

- Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934].[4]

4 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 53.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

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

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

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

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) 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.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[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]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This 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

3 The prohibited grounds of discrimination 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. The prohibited grounds of discrimination are often described as 'personal attributes'.

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

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.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 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 its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

ATTORNEY-GENERAL

CANBERRA

27 NOV 2016

MC16-141053
MC16-141054
MC 16-142484

Mr Ian Goodenough MP
Chair, Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for the letters of 12 October 2016 from the Secretary of the Parliamentary Joint Committee on Human Rights (the Committee), Ms Toni Dawes, regarding the Committee's assessment of the *Counter-Terrorism Legislation Amendment Bill (No.1) 2016* and the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.*

In relation to the *Counter-Terrorism Legislation Amendment Bill (No.1) 2016*, I note that the Committee does not require a response, and I thank the Committee for its detailed consideration of the Bill.

In relation to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, I thank the Committee for its consideration of the compatibility of the Bill with Australia's human rights obligations and its request for additional information (first request).

I also thank you for your letter of 9 November 2016 advising that the Committee has made a second request for information in relation to the human rights compatibility of the legislation, as set out in the Committee's Report 8 of 2016.

My response below addresses both requests.

I note that the Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for inquiry. The PJCIS tabled its report on 4 November 2016. The Government has accepted all 24 of the PJCIS recommendations.

I intend to move Government amendments to the Bill in the Senate in the week commencing 28 November 2016. These amendments amend the *Criminal Code* to implement the PJCIS recommendations. The Bill has also been amended to enhance safeguards and improve the efficacy of the continuing detention scheme. The amendments provide that:

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence

- the scope of the offences to which the scheme applies be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the *Criminal Code* (publishing recruitment advertisements)

- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force

- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required)

- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made

- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender

- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence

- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings

- the criminal history of the offender that the Court must have regard to in making a continuing detention order is confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill

- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding

- when sentencing an offender convicted under any of the provisions of the *Criminal Code* to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered

- the continuing detention scheme be subject to a sunset period of 10 years after the day the Bill receives Royal Assent, and

- a control order can be applied for and obtained while an individual is in prison, but the controls imposed by that order would not apply until the person is released.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent, and

- the *Intelligence Services Act 2001* be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent

Once again, I thank the Committee for its consideration of the Bill and trust this advice is of assistance.

Yours faithfully

(George Brandis)

Encl. Response to the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report - Reports 7 and 8 of 2016,* concerning the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Response to the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Reports - Reports 7 and 8 of 2016* concerning the *Criminal Code Amendment (High Risk Terrorist Offender) Bill 2016*

The Committee has requested advice as to the extent to which the proposed scheme addresses the specific concerns raised by the United Nations Human Rights Committee (UNHRC) in its determination concerning arbitrary detention in violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) in respect of existing post-sentencing preventative detention regimes.

The right to be free from arbitrary detention

The scheme includes numerous features designed to ensure that detention is only authorised where it is non-arbitrary. I refer the Committee to paragraph 37 of the Explanatory Memorandum to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* that provides the list of comprehensive safeguards included in the scheme.

Secondly, section 105A.4 of the Bill provides for the treatment of a terrorist offender in a prison under a continuing detention order, including a requirement at subsection 105A.4(2) to house the offender separately from persons who are in prison for the purposes of serving a sentence of imprisonment, except in certain circumstances such as where the offender's treatment or accommodation arrangements could compromise the management, security and good order of the prison, for rehabilitation purposes or for the safety and protection of the community. This recognises the terrorist offender's status as person not serving a sentence of imprisonment.

I also note that the Court is not restricted to what matters it may take into account when considering an application under the scheme. Given the nature of the order, the Court is likely to consider the offender's proposed treatment and accommodation arrangements when making its decision.

Thirdly, paragraph 105A.7(1)(c) provides that the Court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'. I provide further information about this safeguard below in response to the Committee's specific questions about this measure.

Prohibition on the retrospective operation of criminal laws

The continued detention of a terrorist offender under the proposed scheme does not constitute additional punishment for their prior offending. The purpose of the proposed scheme is community protection.

When determining whether to make a continuing detention order the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community. This is the risk the person presents to the community at the end of their custodial sentence. Preventative detention imposed on this basis does not constitute a violation of the prohibition on the retrospective operation of criminal laws.

In addition, the continued detention is protective rather than punitive or retributive. The protective purpose of the scheme is reflected in numerous features including the grounds on which a continuing detention order may be made or affirmed; the matters to which the Court must have regard when making or reviewing a continuing detention order; the requirement to

consider less restrictive measures; and the requirement that the period of detention authorised by a continuing detention order be limited to a period that is reasonably necessary to prevent the unacceptable risk.

The fact that the effect of a continuing detention order or interim detention order is to commit the terrorist offender to detention in a prison does not render the detention punitive.

The right to procedural guarantees

The continued detention of terrorist offenders does not constitute a prohibited form of retrospective or double punishment. As mentioned above, the intention of the proposed scheme is not to punish but rather detain an offender for the purpose of protecting the community.

Given the above intention, the civil nature of the proceedings and the lack of a criminal charge in each case, the minimum guarantees outlined in article 14 of the ICCPR do not apply. Despite this, there are a number of important safeguards contained within the Bill to ensure fair treatment and consistency in the decision making process. It is important to highlight that the Court must be satisfied, subject to civil rules of evidence and procedure, that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a continuing detention order.

Detention on the basis of future dangerousness

Any detention under the scheme must be adequately justified. The Bill provides that for a terrorist offender to be subject to a continuing detention order, the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence if the offender was released into the community. Various forms of evidence may be admitted to assist the Court in making this assessment.

To assist the Court in making this decision, the Court may appoint a relevant expert to conduct an assessment of the risk of the offender committing a serious terrorism offence if they were released into the community. An example of an expert who may be appointed by the Court could be a person with expertise in forensic psychology or psychiatry (and in particular, recidivism) coupled with specific expertise on terrorism, radicalisation to violent extremism and countering violent extremism. The Court must have regard to the expert's report when making its decision.

Less restrictive measures

Generally

I refer the Committee to paragraph 125 of the Explanatory Memorandum for the Bill that explains that an example of a less restrictive measure is a control order under sections 104.4 and 104.14 of the *Criminal Code.*

The Court that hears an application for a continuing detention order will not be able to make a control order in the alternative. This is due to the fact that currently control orders are issued by federal courts, while applications for a continuing detention order as proposed by the Bill are made to the Supreme Court of a State or Territory. There are also different applicants under each regime, and there are also different threshold requirements which must be met under the respective regimes.

The Independent National Security Legislation Monitor and PJCIS will conduct reviews into

the control order regime by 7 September 2017 and 7 March 2018 respectively. Given the detailed and complex policy and practical issues that would need to be explored about the interaction between the proposed post-sentence preventative detention scheme and the control order regime, I suggested to the PJCIS during its inquiry into the Bill that it may be better to defer a detailed consideration of how the control order scheme and the proposed scheme under the Bill interact with each other until those reviews occur. The PJCIS agreed.

Rehabilitation as a less restrictive measure

As noted above, a less restrictive measure is a control order under the *Criminal Code*. A control order may impose obligations, prohibitions and restrictions on a person. A condition that the issuing court may impose includes a requirement that the person participate in specified counselling or education (paragraph 104.5(6)(l)), subject to their consent (see subsection 104.5(6)). Therefore it is open to the Court to consider whether this obligation under a control order would be effective in preventing the unacceptable risk.

Further, the Court must have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in such programs (paragraph 105A.8(e)). The Commonwealth will work with the States and Territories to ensure there are prison based programs to address the specific needs of this cohort to ensure their needs for rehabilitation and reintegration are met.

Attorney-General's consideration of less restrictive measures

Before the Attorney-General initiated an application for a continuing detention order in relation to a terrorist offender he or she would need to carefully consider all of the information before them. Consideration would also include whether there is a reasonable prospect of success, which would require the Attorney-General to consider whether the risk to the community could be appropriately managed through less restrictive measures such as a control order.

Civil standard of proof

The 'high degree of probability' standard is a statutory standard which indicates something beyond the traditional civil standard of proof of more probable than not. The existence of the risk of the offender committing a further serious offence must be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. This standard is modelled on the standard used by most States and Territories that have post-sentence preventative detention schemes.

Risk Management Monitor

My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme.

The implementation Working Group has developed an implementation plan in response to PJCIS Recommendation 22. The plan sets the process and timeframes for the development of the risk assessment tool and ongoing validation. It notes that work will be undertaken in consultation with correctional services, law enforcement and intelligence agencies, and international partners, and ongoing validation will need to be undertaken. The Working Group may consider whether a Risk Management Monitor or similar will undertake the functions set out at paragraph 1.77 of the Committee's Report 7 of 2016.

Availability of rehabilitation programs

Access to rehabilitation programs is an important part of the scheme. When making a continuing detention order, paragraph 105A.8(e) requires the Court to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in any such programs.

At present, Corrections Victoria and Corrections New South Wales provide inmates with access to prison based programs which aim to disengage individuals from advocating or using violence to further their goals or beliefs. Jurisdictions other than Victoria and New South Wales have a range of general rehabilitation programs, which are not specifically tailored to violent extremist offenders.

The Commonwealth will continue to consider the availability of such programs with states and territories through the Implementation Working Group.

The Hon Christian Porter MP
Minister for Social Services

18 NOV 2016

MC16-010043

Chair
Parliamentary Joint Committee on Human Rights
S1.111
P.O. BOX 6100
CANBERRA ACT 2600

Dear Chair

Thank you for your email of 9 November 2016 regarding Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016. I appreciate the time you have taken to bring these matters to my attention.

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011' report, has sought advice on whether certain components included in the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016 and the Fairer Paid Parental Leave Bill 2016 are compatible with human rights, as defined in the Act.

With regard to the Fairer Paid Parental Leave Bill 2016, the Committee has expressed concerns about the proposed period of time before the measures commence. I am aware of the concern of families in relation to this measure. The Australian Government first announced these changes in December 2015 as part of the 2015-16 Mid-Year Economic and Fiscal Outlook (MYEFO). The original commencement date for these measures was 1 July 2016, which has been delayed by six months.

The current Bill before Parliament contains changes that reflect concerns expressed about the 2015-16 Budget measure. The Government wants to better target the taxpayer-funded scheme to those who do not receive employer-provided paid parental leave, or whose employer-provided paid leave is for less than 18 weeks. The taxpayer-funded Paid Parental Leave for women without access to any employer paid parental leave remains unchanged; they receive 18 weeks at the National Minimum Wage, roughly $12,000.

All eligible parents will be guaranteed a safety net of financial support equivalent to 18 weeks of Parental Leave Pay at the rate of the National Minimum Wage. Those eligible parents with access to an employer scheme of less than 18 weeks paid leave will receive a mix of employer and taxpayer-funded paid parental leave, up to 18 weeks in total. Only those with a generous employer entitlement of 18 weeks or more will lose access to the taxpayer funded scheme (estimated to be less than 4 per cent of mothers).

With regard to the Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016, the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination. The enclosed document provides responses to the Committee's request for advice on compatibility of the Bill identified with those rights, and other matters.

I trust this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS16-004405

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your correspondence of 23 November 2016 in which information was requested on the following bills:

- *Migration Amendment (Visa Revalidation and Other Measures) Bill 2016; and*
- *Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.*

My response to your request is attached.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON 19/01/17

Attachment

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

1.48 Why is there no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check?

The classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument. There would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. If the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that instrument.

Currently, only the new Frequent Traveller stream of the Subclass 600 (Visitor) visa (Frequent Traveller visa) will be prescribed for the purposes of requiring a revalidation check. This is to support the trial of a new longer validity visitor visa that will initially only be available to Chinese nationals.

The power to prescribe which visa can be subject to the revalidation check process introduced in the *Migration Amendment (Visa Revalidation and Other Measures) Bill 2016* (the Bill) has not been limited for several reasons.

Flexibility has been provided to enable other longer validity visa products to be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Limiting the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.

As noted above, there would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. The Bill therefore provides an appropriate and reasonable balance between reducing red tape for travellers and parliamentary scrutiny.

Whether, in light of the broad power to prescribe any kind of visa, is the measure compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.

The revalidation framework is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.

The revalidation framework does not engage Australia’s non-refoulement obligations and has no impact on the Department of Immigration and Border Protection’s (the Department’s) existing protection, cancellation, detention or removal frameworks.

Prescribing a new visa for the revalidation check framework would include the requirement to separately address compatibility with Australia’s human rights obligations, because the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument. As such, this would also be subject to Parliamentary scrutiny through the disallowance process.

Australia's non-refoulement obligations

The revalidation framework does not engage Australia’s non-refoulement obligations for the following reasons:

- Where an onshore visa holder does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists under the existing cancellation framework.

- An onshore visa holder will not become an unlawful non-citizen as a direct consequence of not passing a revalidation check, or failing to comply with a revalidation requirement. New subsections 96D(2) and 96H(2) of the Bill provide that where an onshore visa holder does not complete or pass a revalidation check, their visa will only cease to be in effect upon departure from Australia.
- An onshore visa holder will not be detained or removed from Australia as a direct consequence of not passing a revalidation check or failing to comply with a revalidation requirement.
- The revalidation check framework does not prevent a visa holder from applying for a protection visa if they wish to make protection claims while they are still in Australia – therefore the framework does not breach Australia's non-refoulement obligations by requiring a revalidation check, noting that the onus is on the individual to declare that they have protection claims.

The right to an effective remedy

A person will not become an unlawful non-citizen as a direct consequence of not passing a revalidation check, or failing to comply with a revalidation requirement. In this case, the visa would only cease to be in effect upon departure from Australia.

A decision that a person does not pass a revalidation check for the visa is a decision that can be reconsidered by the Minister for Immigration and Border Protection (the Minister) or delegate. An individual who does not pass a revalidation check may subsequently pass the check during the visa period, for example, after responding to a request for further information.

Where a person does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists. If the delegate decides not to cancel the visa, this will result in the person passing the revalidation check for the visa. If the delegate decides to cancel the visa, this decision may be subject to merits review under the existing visa cancellation and review framework.

The right to liberty

As noted above, an onshore visa holder will not be detained or removed from Australia as a direct consequence of not passing a revalidation check or failing to comply with a revalidation requirement. This is because they will not become an unlawful non-citizen as a result of not passing a revalidation check, or failing to comply with a revalidation requirement.

The right to protection of the family

Currently, only the new Frequent Traveller visa will be prescribed for the purposes of requiring a revalidation check. The Frequent Traveller visa is a temporary visitor visa providing for a 3-month stay period and a cumulative stay period of no more than 12 months and in any 24-month period. It is designed to facilitate short visits to Australia for tourism or business visitor purposes.

As noted above, prescribing a new visa (including spousal or permanent resident visas) for the revalidation check framework would include the requirement to separately address compatibility with Australia's human rights obligations, because the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument. As such, this would also be subject to Parliamentary scrutiny through the disallowance process.

1.57 The committee […] seeks the advice of the Minister for Immigration and Border Protection as to whether safeguards could be included in the legislation, such as:

- **the minister's power to require a revalidation check be limited to long-term visitor visas;**

As noted above, the power to prescribe which visa can be subject to the revalidation check process has not been limited for several reasons. Flexibility has been provided to cater for visa products that may be developed or reformed in the future.

The revalidation framework may be an appropriate mechanism to manage identified risks in new or reformed products. Additionally, new classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument

Limiting the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with those visa products.

- **the basis upon which a revalidation check may be required be made clear in the legislation, rather than being a matter of ministerial discretion;**

Flexibility has been provided in the legislation to reduce regulatory burden, whilst managing risks associated with newly developed or reformed visa products.

It is intended that a routine revalidation requirement under new subsection 96B(1) of the Bill will be issued by an IT program to all Frequent Traveller visa holders at pre-determined intervals, such as every two years, during the visa period of the visa. This approach is designed to replicate the management of risk currently available in assessing multiple shorter validity visas, with less red tape for frequent travellers. Specifying a particular interval for a routine revalidation requirement in the legislation would reduce the Department's ability to accommodate changes in government policy that reflect changing global circumstances and may result in an unintended increase in red tape for visa holders.

A routine revalidation check is intended to reduce red tape for frequent travellers by removing the requirement for the visa holder to complete multiple visa applications over a 10-year period, answering the same questions and providing the same level of supporting documentation, as the original visa application.

A revalidation check will generally assess whether a visa holder continues to meet the criteria for the visa that has been granted. But, this check is not intended to be a complete reassessment of the visa holder's ability to meet the original requirements for grant of the visa. In completing the check, in the absence of any adverse information, or where there is adverse information – and it is reasonable to disregard that information – the visa would be revalidated. There is no disadvantage to the visa holder of this approach.

As noted above, there would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process because the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument If the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation.

- **a requirement that the minister's power to require a person or classes of persons to complete a revalidation check be based on an objective assessment of an increased risk to the Australian community.**

The Ministerial power in new subsection 96E(1) of the Bill provides a mechanism to manage specific, serious, or time-critical risks in relation to an identified cohort of visa holders, where the Minister determines it is in the public interest to exercise this power.

It is intended that this power be exercised in circumstances necessitating an immediate response, for example, situations where there has been an assessment of increased risk to the Australian community resulting from a significant health or national security incident.

The tabling provisions in new subsections 96E(3), 96E(4) and 96E(5) of the Bill ensure that the Parliament can scrutinise the Minister's decision and provide comment on such a determination through a motion of disapproval or other mechanism. This provides additional scrutiny of the Minister's decision.

1.74 The proposed lifetime visa ban engages the right to equality and non-discrimination.
1.75 This visa ban would appear to have a disproportionate negative effect on individuals from particular national origins or nationalities. This human rights issue was not specifically addressed in the statement of compatibility.
1.76 The committee notes that the preceding legal analysis raises questions as to whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination on the basis of national origins, nationality or race) amounts to unlawful discrimination.
1.77 The committee further notes that the proposed ban distinguishes the grant of visas between people who fall within the 'regional processing country cohort' and individuals who do not and the preceding legal analysis raises questions as to whether this may amount to direct discrimination on the basis of 'other status'.

1.78 Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the measure is reasonable and proportionate for the achievement of that objective, including how it is based on reasonable and objective criteria; whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently; whether there are any additional safeguards; and whether affected groups are particularly vulnerable.**

The Bill prevents valid visa applications from a cohort of non-citizens who are defined as being unauthorised maritime arrivals (UMA) who were over 18 years old when transferred to a regional processing country after 19 July 2013. The measure is therefore based on reasonable and objective criteria for identifying people in the affected cohort. Personal characteristics such as race, ethnicity, nationality (other than not being an Australian citizen), religion, gender or sexual orientation are not criteria for identifying non-citizens in the affected cohort. Limiting the applicability of the measure has already been taken into account, namely that the measure will not apply to children who were under 18 at the time they were first transferred to a regional processing country, or were born to a member of the affected cohort.

While the continued differential treatment of a group of non-nationals (namely, the designated regional processing cohort) could amount to a distinction on a prohibited ground under international law on the basis of 'other status', the Government is of the view that this continued differential treatment is for a legitimate purpose and based on relevant objective criteria and that it is reasonable and proportionate in the circumstances. This measure is a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or attempting to enter Australia as a UMA from applying for a visa to enter Australia.

This legislation sends a strong message to people smugglers and those considering travelling illegally to Australia by boat: Australia's borders are now stronger than ever. It is imperative that the bar apply to all visas, including tourist and business visas. Even a temporary visa can be used as a pathway to permanent residence in Australia.

The proposed amendments provide flexibility for the Minister to personally lift the application bar where the Minister considers it in the public interest to do so.
The measures are aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead. People smugglers are still active in attempting to encourage illegal migration to Australia and use changes in circumstances and the ongoing media discussion as a basis for proposing the current policy is softening or will soften in the future. The measures are intended to counter this to diminish the ability for people smugglers to attract potential clients.

1.88 The proposed lifetime visa ban engages and limits the right to protection of the family and rights of the child. The statement of compatibility has not sufficiently justified these limitations for the purposes of international human rights law.
1.89 The committee notes that the preceding legal analysis raises questions as to whether the measure is rationally connected to and a proportionate means of achieving its stated objective, so as to be compatible with the right to protection of the family and rights of the child.

1.90 Accordingly, in relation to the limitations on the right to protection of the family and rights of the child, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the limitation is a reasonable and proportionate measure for the achievement of that objective (including whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently; whether there are any additional safeguards; and whether affected groups are particularly vulnerable).**

The proposed legislative amendments will include flexibility for the Minister to personally lift the bar where the Minister thinks it is in the public interest to do so. This could include allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interests of affected children. Family unity may be one of the issues that the Minister may consider in the context of lifting the bar to allow a person to make a valid visa application under the proposed legislation. Consideration of the individual circumstances of applicants and their relationships with family members allows the Government to ensure that it acts consistently with its obligations to families and children in Australia. Well-established mechanisms already exist to bring vulnerable cases to the Minister's attention for consideration of the exercise of non-compellable personal powers.

The measures are aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead. People smugglers are still active in attempting to encourage illegal migration to Australia and use changes in circumstances and the ongoing media discussion as a basis for proposing the current policy is softening or will soften in the future. The measures are intended to counter this to diminish the ability for people smugglers to attract potential clients.

ATTORNEY-GENERAL

MC16-143309

CANBERRA

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600
<human.rights@aph.gov.au>

21 DEC 2016

Dear Mr Goodenough Ian

Thank you for the letter of 23 November 2016 in relation to Report 9 of 2016, in which the Parliamentary Joint Committee on Human Rights sought comment on the Privacy Amendment (Re-identification Offence) Bill 2016 andf the Sex Discrimination Amendment (Exemptions) Regulation 2016. My response to the issues raised by the committee is set out below.

Privacy Amendment (Re-identification Offence) Bill 2016

The committee notes that the proposed offence provisions in sections 16D and 16E of the Bill apply retrospectively to conduct occurring on or after 29 September 2016, which engages the prohibition of retrospective criminal laws. The committee requests advice as to whether consideration has been given to amending these provisions so that they operate prospectively.

The Privacy Amendment (Re-identification Offence) Bill 2016 amends the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth agencies and disclosure of re-identified information. The Bill is intended to strengthen existing privacy protections and act as a deterrent against attempts to re-identify de-identified personal information in government datasets.

Retrospective offences challenge a key element of the rule of law—that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. The Government gave careful consideration as to whether the offences in sections 16D and 16E could operate prospectively from the date of Royal Assent. However, in the circumstances the Government considers that these narrowly prescribed offences should have a limited retrospective effect.

The recently identified vulnerability in the Department of Health's Medicare and Pharmaceutical Benefits Scheme dataset brought to the Government's attention the existence of a gap in privacy legislation regarding the re-identification of de-identified data. Once aware of this gap, the Government acted immediately to strengthen protections for personal information against re-identification by introducing these offences. The offences will only take effect in relation to conduct occurring on or after 29 September 2016, which is the day after I announced the proposed amendments to the Privacy Act. This retrospective application

was made very clear in my statement of 28 September 2016. As a result of my statement, entities were clearly given notice that this particular conduct will be made subject to offences from that time.

The release of personal information can have significant consequences for individuals which cannot be easily remedied. In particular, once personal information is made available online it is very difficult—in many cases impossible—to fully retract that information or prevent further access. Applying the offences to conduct occurring from the day after I announced the Government's intention to introduce this Bill provides a strong disincentive to entities who, upon hearing of this intention, may have been tempted to attempt re-identification of any published datasets while the Parliament considers the Bill. The Government has also taken swift action to introduce the Bill in the Parliament at the earliest available opportunity to ensure the retrospective application is for a short time period only.

Sex Discrimination Amendment (Exemptions) Regulation 2016

The committee notes that the exemption from protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status engages and limits the right to equality and non-discrimination. The committee requests advice on whether extending the exemption for two Western Australian laws for a further 12 month period is effective and proportionate in achieving the stated objective of allowing states and territories adequate time to review their legislation and assess compliance with the new protections, particularly in light of the fact that an exemption has already been in place for a previous three-year period.

Western Australia indicated that a further extension of time was required to facilitate the amendment of the *Human Reproductive Technology Act* (WA) and *Surrogacy Act* (WA). Section 23 of the Human Reproductive Technology Act has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from accessing IVF procedures—including for the purpose of a surrogacy arrangement. Section 19 of the Surrogacy Act has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from seeking a parentage order for a child born under a surrogacy arrangement.

The Government does not consider that a state should continue to discriminate against people on the basis of their sexual orientation, gender identity and/or intersex status. However, the Government acknowledges that the regulation of assisted reproductive technology and surrogacy is a sensitive issue that is primarily a matter for states and territories and that the Western Australian government should be granted additional time to properly consult the Western Australian community about options for reform in this area.

The limitation is proportionate, allowing a sufficient yet not overly lengthy time for Western Australia to properly consult on options for reform to its legislation The Government has advised the Western Australia government that it does not propose any further extensions of this exemption after 31 July 2017.

I trust this information will assist you in concluding your consideration of this legislation.

Yours faithfully

(George Brandis)

Cc: <human.rights@aph.gov.au>

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Ref: MC17-001630

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

Thank you for your correspondence of 17 February 2017, concerning Schedule 5 of the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 (the Bill).

Schedule 5 of the Bill authorises the Australian Securities and Investments Commission (ASIC) to make client money rules, a contravention of which may attract a civil penalty of up to $1 million. The Committee commented in its *Human rights scrutiny report 1 of 2017* that as the maximum penalty could apply to a natural person, it may be considered 'criminal' for the purposes of international human rights law and could engage the right to a fair trial.

The Explanatory Memorandum to the Bill explains that misuse of retail client money by Australian Financial Services Licensees (licensees) can result in significant losses for retail investors and undermine confidence in Australian financial markets. For this reason, it is important that penalties in this area are sufficiently severe to have a genuine deterrent effect.

The Government considers that a maximum penalty of $1 million is appropriate given the scale of potential loss that may result from a contravention. The market integrity rules have an equivalent penalty regime for the same reason. This is further justified by the fact that problems in this area have previously occurred in relation to corporate licensees managing large amounts of client monies.

In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2 on offence provisions, civil penalties and human rights, the following factors support the view that the client money penalty regime is not criminal in nature:

- the $1 million penalty is not a criminal penalty under Australian law;
- it applies exclusively to licensees and not to the general public;

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

- there is no criminal sanction if there was a failure to pay the penalty; and
- the proportionate size of the maximum penalty, given the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules.

For these reasons, the Government considers its assessment that Schedule 5 of the Bill does not engage any of the applicable human rights or freedoms is appropriate.

The Committee has also commented on the risk of double jeopardy arising due to the operation of section 1317P of the *Corporations Act 2001* (Corporations Act), which allows criminal proceedings to be started against a person for conduct that has already resulted in a civil penalty being imposed.

I note that similar provisions are relatively common and can be found in other Commonwealth legislation, as stated in Chapter 11 of the Australian Law Reform Commission's *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95).

Substantial protection is afforded by the statutory bar in provisions such as section 1317Q of the Corporations Act which prevents evidence that has been used in civil proceedings from being used in subsequent criminal proceedings. This makes it clear that these provisions only allow criminal proceedings to be brought where new evidence comes to light following civil proceedings being started or completed. In any case, I note that section 1317P would not operate in this instance since a breach of ASIC's client money rules is not a criminal offence under Schedule 5 of the Bill.

I trust this information will be of assistance to you.

Yours sincerely

Kelly O'Dwyer

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MB17-000109

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

- 3 MAR 2017

Dear Mr Goodenough

Thank you for your letter of 17 February 2017 seeking my advice on the human rights compatibility of the *Jervis Bay Territory Marine Safety Ordinance 2016* (the Marine Ordinance), as set out in *Report 1 of 2017* of the Parliamentary Joint Committee on Human Rights (the Committee).

Ordinances made for the Jervis Bay Territory (JBT), and the external territories, are different to other types of delegated legislation at the Commonwealth level. These Ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation.

The objective of the Marine Ordinance is to establish a comprehensive legal framework for marine safety in the JBT, and in so doing protect the fundamental right to life of all users of the JBT marine environment. To achieve this goal, the Marine Ordinance imposes legal obligations on such users, and provides enforcement powers, similar to those applying in NSW and ACT. The Marine Ordinance also engages human rights, including the right to be presumed innocent, the right to privacy and the right to liberty.

I would like to take this opportunity to thank the Committee for closely examining the compatibility of the Marine Ordinance to ensure it meets Australia's human rights obligations. I provide the enclosed response to the Committee's request of information on the human rights capability of the legislation.

Thank you again for taking the time to write to me on this matter.

Yours sincerely

FIONA NASH

Encl

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7495

Jervis Bay Territory Marine Safety Ordinance 2016

The Parliamentary Joint Committee on Human Rights (the Committee), in *Report 1 of 2017*, has sought advice from the Minister for Local Government and Territories on the human rights compatibility of provisions of the *Jervis Bay Territory Marine Safety Ordinance 2016* (the Marine Ordinance).

Specifically, the Committee is seeking advice from the Minister in relation to the following:

- the rationale and proportionality of reversing the legal burden of proof in s.63 of the Marine Ordinance;
- the extent to which provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (the ACT Act), as incorporated by s.64 of the Marine Ordinance, comply with international human rights law; and
- the proportionality of search and entry powers in s.83 of the Marine Ordinance.

This document provides responses to the Committee's comments on the compatibility of the identified Marine Ordinance provisions with those rights, and other matters.

Paragraph 1.27: The Committee considers that the measure in section 63, which reverses the legal burden of proof, engages and limits the right to be presumed innocent, as it requires the defendant to prove elements of the offence. As set out above, the statement of compatibility does not justify that limitation for the purpose of international human rights law. The Committee therefore seek the advice of the Minister for Local Government and Territories as to whether the limitations on the presumption of innocence is rationally connected to, and a proportionate approach to achieving, the stated objective.

The objective of the Marine Ordinance is to provide a comprehensive regime for marine safety in the JBT, and in so doing protect the fundamental right to life (Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)) of users of the JBT marine environment. It achieves this by imposing legal obligations on such persons; such obligations engage human rights and in some circumstances limit them.

The Marine Ordinance ensures public safety by imposing limits on the level of alcohol present in the breath or blood of persons operating, or supervising the operation of, a vessel. Under s.56 of the Marine Ordinance, people under the age of 18 are not allowed to operate a vessel or supervise a juvenile operator while having a prescribed concentration of alcohol in the person's breath or blood (in effect, no alcohol is permitted). The prosecution is required to prove the elements of this offence beyond reasonable doubt.

However, the Marine Ordinance recognises that there are certain circumstances where such persons may inadvertently or unavoidably have alcohol in their breath or blood. The defence in s.63 of the Marine Ordinance, based on s.24(9) of the *Marine Safety Act 1998* (NSW) (the NSW Act), exists to allow for such circumstances, and requires the defendant to prove that the presence of the prescribed concentration of alcohol, in the defendant's breath or blood, was not caused (in whole or in part) by consumption of an alcoholic beverage (otherwise than for the purposes of religious observance) or the consumption or use of any other substance (e.g. food or medicine) for the purpose of consuming alcohol.

Section 63 reverses the onus of proof by requiring the defendant to bear the burden of establishing the existence of the relevant circumstances set out in that provision. This is appropriate because the circumstances set out in s.63 are matters that are specifically within the knowledge of the defendant, and the defendant should bear the burden of establishing the existence of these matters.

In addition, s.63 imposes a legal burden of proof in relation to these matters on the defendant. This is appropriate because the matters set out in s 63 relate to the purpose of the defendant's consumption of a substance, and would be difficult for the prosecution to prove in the negative if a lower evidential burden applied and was discharged by the defence.

The use of alcohol and drugs are known to affect judgement and response times and inappropriate use of such substances in a marine environment could cause injury or loss of life. The severe consequences of a breach of s.56 of the Marine Ordinance justify imposing a legal burden of proof on a defendant seeking to rely on the defence in s.63.

Finally, as JBT and NSW share a maritime boundary, most persons to which the Ordinance will apply also need to comply with the NSW Act, and ss.56 and 63 of the Marine Ordinance impose identical requirements as s.24(1) and (9) of the NSW Act. The application of similar provisions across jurisdictions promotes the right to equality (by reducing potential discrimination because of place of residence) and the right to freedom of movement (by reducing the regulatory cost of free movement between JBT and NSW).

As outlined above, the limitation on the presumption of innocence in this circumstance is reasonable and proportionate to achieving the stated objective of the Marine Ordinance.

Paragraph 1.42: The Committee notes that the right to liberty is engaged and limited by the measure through the reference in the Ordinance to the ACT Act but notes that the statement of compatibility does not provide an analysis of how the limitation is rationally connected to or proportionate to the achievement of the stated objective.

As stated in the statement of compatibility with human rights for the Marine Ordinance, s.64 engages the right to liberty by incorporating provisions from the ACT Act as it applies in the JBT.

Provisions incorporated from the ACT Act that limit the right to liberty include: measures enabling police officers to take persons into custody if they have a positive test result or refuse a screening test for alcohol or drugs (ss.11 and 13D of the ACT Act); and the offence of failing to remain at the place where an alcohol or drug screening test is being carried out until the test is complete (s.22B of the ACT Act).

The objective of the Marine Ordinance is to provide a comprehensive regime for marine safety in the JBT, and in so doing protect the fundamental right to life (Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)) of users of the JBT marine environment. It achieves this by imposing legal obligations on such persons and providing for the enforcement of these obligations; such provisions engage the right to liberty.

The incorporated measures from the ACT Act referred to above enable police officers to take persons into custody in circumstances where they are, or are reasonably suspected of being, under the influence of alcohol or drugs, and pose a danger to themselves and other users of the JBT marine environment.

Limiting the right to liberty by measures incorporated from the ACT Act by s.64 is assessed as a rational and proportionate response to reduce the likelihood of persons injuring themselves and others, and is a proportionate response to protect the right to life.

Paragraph 1.43: The Committee also notes that the right to privacy is engaged through the reference in the Ordinance to the ACT Act and the ACT Human Rights Commission has raised concerns with the ACT Act, in relation to the right to privacy and other rights that may be engaged and limited by the ACT Act.

The relevant provisions of the ACT Act are incorporated by the Marine Ordinance in provisions that allow police officers to conduct alcohol and drug testing on persons operating vessels in JBT waters. As noted in the explanatory statement (incorporating the Statement of Human Rights Compatibility), such testing can limit a person's right to privacy.

Under the Marine Ordinance, such testing can take place when an accident has occurred (in which case the limitation is justified on the basis that the testing is needed to ensure public safety by establishing whether alcohol or drug intake has been a factor in the accident). It can also take place randomly (in which case the limitation to the individual is justified because random testing for alcohol and drugs has a deterrent effect on individuals unlawfully using such substances, resulting in safety benefits accruing to the general public, as referred to in the explanatory statement). Similar justifications apply to provisions that make it an offence to refuse to undergo an alcohol or drug test.

In practice, the Australian Federal Police (AFP) do not have a permanent JBT marine presence and they adopt a risk management approach to the exercise of their powers under the Marine Ordinance i.e. to intervene to investigate incidents or in response to erratic or dangerous behaviour. Consequently, these powers are exercised (and human rights are limited) only in circumstances where there are reasonable grounds to limit rights to protect the public.

Measures such as random alcohol and drug testing are carried out for deterrence purposes, and the consequential behavioural changes brought about by these provisions indicate that they are the least rights restrictive way to protect the public.

Paragraph 1.44: Accordingly, the Committee seeks the advice of the Minister for Local Government and Territories as to the extent to which the ACT Act complies with international human rights law.

The JBT is a Commonwealth administered territory that has no state legislature. Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) provides that the laws (including the principles and rules of common law and equity) inforce in the ACT are in force in the JBT, so far as the laws are applicable to the JBT and are not inconsistent with an

Ordinance made under the Acceptance Act. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, which are subject to the scrutiny of the ACT legislature (and apply to the JBT without Commonwealth parliamentary scrutiny).

The ACT Act is currently in force in the JBT under s. 4A of the Acceptance Act. As the Committee notes, the ACT Act was previously subject to human rights scrutiny by the ACT Human Rights Commission. Under the JBT applied law regime, it is not established practice for applied ACT laws to also be scrutinised for human rights compatibility at the Commonwealth level.

Section 8 of the *Australian Federal Police Act 1979* requires the AFP to provide police services to the JBT. The ACT Act applies in the JBT in relation to road transport. The rationale for incorporating ACT Act provisions (via s.64 of the Marine Ordinance) in provisions that relate to the marine environment is that AFP officers are familiar with these provisions as they apply to road transport, and it is desirable for similar procedures to be adopted in the marine environment for consistency.

Section 64 of the Marine Ordinance incorporates legislation that is currently in force in the JBT that is framed for roads drug and alcohol enforcement, and applies it in a relevantly identical manner to the marine environment. Although s.64 imposes the obligations contained in the ACT Act on a different set of people (i.e. users of the marine environment), it does not affect the manner (including in a human-rights-relevant way) in which the various power and obligations in those provisions apply to those persons.

The Marine Ordinance explanatory statement (incorporating the Statement of Human Rights Compatibility), addresses how the Marine Ordinance engages the rights of liberty and privacy with respect to the measures incorporated from the ACT Act. I have provided the information above in respect of paragraphs 1.42, 1.43 and 1.44 of *Report 1 of 2017* to inform the Committee's considerations.

The measures incorporated in the Marine Ordinance from the ACT Act are appropriate and proportional to protect the right to life, and comply with international human rights law.

Paragraph 1.52: The Committee notes that the right to privacy is engaged and limited by the search and entry power contained in the Ordinance and the above analysis raises questions as to whether the measure is the least rights restrictive way to achieve the stated aim.

and

Paragraph 1.53: Accordingly, the Committee requests the advice of the Minister for Local Government and Territories as to whether the limitation is proportionate to achieving its objective, including whether there are less rights restrictive ways to achieve the stated objective, such as:

- **Limiting the exercise of the powers to police officers (and not 'persons assisting' as under section 92)**
- **Requiring a police officer to seek the consent of the occupier of the vessel before exercising the search and entry power**
- **If consent is not granted, ensuring the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be complied with and to investigate accidents or conduct investigations**
- **That the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practical to obtain a search warrant**

Section 83 of the Marine Ordinance limits the right to privacy of users of the JBT marine environment for the purpose of promoting their fundamental right to life. It does this by empowering police officers (members and special members of the AFP) to board vessels (without a warrant) for the following purposes:

- finding out if the Ordinance and rules are being, or have been, complied with;
- investigating a marine accident;
- conducting a marine safety operation; or
- asking about the nature and operation of the vessel.

Section 92 of the Marine Ordinance is a measure enabling police officers to receive assistance from other persons, if 'necessary and reasonable', to support their functions and duties. Powers exercised or functions or duties performed by persons assisting in accordance with the direction of a police officer are taken to have been exercised by the police officer.

In practice, the exercise of such a power would be extremely rare, the provision creating a contingency to, for example, enable a police officer to request assistance of the public to assist in a marine rescue to protect the life of users of the JBT marine environment. Critically, persons assisting a police officer at no time act at their own volition and must at all times act at the direction of the police officer they are assisting. The police officer is also accountable for the actions of people they have requested assistance from at all times. On this basis, I consider that there is no reason to limit powers under s.64 to police officers.

Section 83 provides that a police officer may board a domestic vessel without warrant or consent to monitor compliance, or to issue an improvement, infringement or other notice. If requested by the vessel master the officer must produce appropriate identification. While on duty in the JBT, AFP officers must wear uniforms. Section 83(4) provides caveat to producing police identification, if there is reasonable grounds that to do so would endanger a person (defence of the right to life). In such circumstances the police officer must as soon as practical after the request is made, show appropriate identification to the vessel master

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) at 8.6 (exception for licensed premises) sets out that 'a person who obtains a licence or registration for non-residential premises can be taken to accept entry to those premises by an inspector for the purpose of ensuring compliance with the licensing or registration conditions.' Similarly, where a vessel is permitted to be used in the JBT marine environment, such as upon registration under State/Territory law, it is reasonable to require the operator of such a vessel to permit entrance onto the vessel by police officers for marine safety purposes.

The regulation of domestic vessel activity to ensure the safety of users in Australian marine environments is not new and regulation has occurred under state and self-governing territory legislation across Australia for some time. Owners and operators of domestic vessels are aware that the safety requirements pertaining to domestic vessels are subject to regulatory oversight, and where their vessel is registered under State/Territory law, they are implicitly accepting that their compliance with the regulatory requirements will be monitored. Consequently, I do not consider it necessary to require a police officer to seek consent to enter a vessel under the Marine Ordinance each time the search and entry power is exercised.

The AFP do not have a permanent marine presence in JBT, and their risk management approach is to intervene to investigate incidents or respond to suspicious or dangerous behaviour where there are reasonable grounds to suspect that the Ordinance and the Rule are not being complied with. In practice, the relevant powers will normally be exercised where a police officer has established that reasonable suspicion exists. However, in exceptional rare circumstances police officers should be able to intervene without first determining whether reasonable suspicion exists to ensure users of the JBT marine environment are safe and to protect their fundamental human right to life.

Consequently, on balance, I do not consider it necessary for the legislation to specifically require that a police officer must hold a reasonable suspicion before entering and searching a vessel as to do so may impact on the capacity of a police officer to protect the fundamental human right of life.

Vessels operating in the JBT marine environment are inherently mobile. The nature of the activities undertaken by these vessels often means that they do not follow any predictable pattern or timetable. This means that AFP monitoring and compliance activities need to be undertaken as and when an opportunity presents. The JBT marine area (about 875 hectares) is relatively small and enclosed by NSW waters, however, vessels are able to leave the jurisdiction and move into NSW in a short timeframe.

In these circumstances, itis generally impractical for a police officer to obtain a warrant and to require a police officer to do so before taking necessary action would severely limit their capacity to undertake their safety regulatory role in a responsive manner. For these reasons, on balance, I consider the enforcement powers outlined in the Marine Ordinance to be appropriate and proportionate for the task. I also consider the limitations on the right to privacy imposed by ss.83 and 92 to be the least restrictive way to protect the right to life of users of the JBT marine environment.

In summary, having carefully considered the human rights matters raised by the Committee, I am satisfied that to the extent that the Marine Ordinance may limit human rights, those limitations are reasonable and proportionate and that these limitations are required to ensure a comprehensive legal framework is in place for the safety of all persons using the JBT marine environment.

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-003101

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

01 MAR 2017

Dear Chair Ian

I refer to your letter of 17 February 2017 concerning the Narcotic Drugs Regulation.

The Parliamentary Joint Committee on Human Rights (the Committee) noted that the right to work and right to equality and non-discrimination are engaged and limited by the requirement set out in the Regulation not to employ or engage prescribed 'unsuitable persons' and the prevention of persons, who in the five years prior to employment or engagement have been subject to prescribed circumstances, from carrying activities authorised by a cannabis licence.

- **Compatibility with the human right to work**

The current medicinal cannabis framework was implemented by the *Narcotic Drugs Amendment Act 2016*. The Statement of Compatibility with Human Rights (the Statement) included in the Explanatory Statement to the Bill, provided a comprehensive discussion of the human rights implication and the human rights engaged in implementing the medicinal cannabis framework. The Statement addressed the human right to work implication in relation the statutory condition under section 10F in Chapter 2 of the *Narcotic Drugs Act 1967* (the Act) and section 12H in Chapter 3 of the Act that a licence holder only employ suitable persons. According to the Statement:

> *This provision is designed to address the risk of infiltration by organised crime below management level. Employees will have access to highly divertible cannabis material with a high 'street value' and so ensuring persons that are not going to engage in illicit activities is essential to the protection of public health and to help meet Australia's international obligation to control diversion.*
>
> *Decisions on the granting or revoking a person's licence (including on the basis of a breach of the condition relating to employment of staff) are subject to review by the Minister, the Administrative Appeals Tribunal and the Federal Court. The ability to seek review of these decisions helps ensure that only those persons who do not fulfil the fit and proper persons test, or comply with licence conditions around 'suitable persons' will be prevented from holding a licence. The limits imposed by the Bill are both reasonable and proportionate to achieve a legitimate outcome.*
>
> *The right to work in Article 6(1) of the ICESCR is limited by these provisions only in so far as is necessary to reduce the risk that cannabis grown under licence will enter the black market, and are reasonable and proportionate to achieving the objective.*

For the same reason, I reiterate that the requirements set out in the Regulation for the purposes of section 10F and 12H of the Act (not to employ or engage prescribed unsuitable persons and the prevention of persons, who in the five years prior to employment or engagement have been subjected to prescribed circumstances from carrying activities authorised by a cannabis licence), are both reasonable and proportionate to achieve the legitimate outcome of ensuring that cannabis plants, cannabis, cannabis resins and other products derived from them are prevented from enter the illicit drug market, meet Australian patients demand for access to medicinal cannabis products and meet Australia's international obligations to control diversion.

- **Compatibility with the right to equality and non-discrimination**

As discussed previously sections 10F and 12H of the Act, which are the authority for the making of regulations in relation to 'unsuitable persons', are implemented to address the risk of infiltration by organised crime below management level. These persons will be physically handling, and will have direct access to, highly divertible cannabis material with high 'street value'. A person who has a drug addiction, is undertaking or has undertaken treatment for drug addiction, undischarged bankrupts, has used illicit drugs, been convicted for a drug related offence or been convicted of an offence that involved theft, would be unsuitable to engage in activities such as cultivation, production and manufacture of drugs.

However, as provided for under subsections 18(2) and 39(2) of the Regulation, the prescribed circumstances in which a person is not taken to be suitable are limited to a period of 5 years (the exclusion period) and not indefinitely. The discrimination and prevention of these types of persons from being employed are necessary to address the high risk of diversion of cannabis and other drugs to the illicit drug market, ensure that the medicinal cannabis products made available to the Australian patients are from licit activities and licit sources and comply with Australia's obligations under the Single Convention on Narcotic Drugs as they relate to limiting the risk of diversion of drugs.

In addition, decisions on the granting or revoking a person's licence are subject to internal review as well as, by the Administrative Appeals Tribunal and the Federal Court. The ability to seek review of these decisions helps ensure that only those persons who do comply with licence conditions around 'suitable persons' will be prevented from holding a licence.

The limits imposed by the Regulations are in my view both reasonable and proportionate to achieve a legitimate outcome.

I trust this information will assist the Committee in concluding your consideration of the human rights implication of the Regulation.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

PARLIAMENT OF AUSTRALIA

President of the Senate

Speaker of the House of Representatives

01 March 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House S 1 110

Dear ~~Mr Goodenough~~, Ian,

Thank you for your letter of 17 February 2017 conveying the committee's request for advice as to whether we intend to review the Parliamentary Service Amendment Determination 2016 in line with the 2016 APS Directions.

The Australian Public Service Commission is conducting a review of the necessity to gazette information in relation to termination decisions made on the grounds of breach of the Code of Conduct. We will further examine the 2016 Determination in light of this review

Yours sincerely,

SENATOR THE HON STEPHEN PARRY

THE HON TONY SMITH MP

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

02 MAR 2017

PDR ID: MC17-000683

Chair
Parliamentary Joint Committee on Human Rights
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 17 February 2017 regarding the Parliamentary Joint Committee on Human Rights (the Committee) *Report 1 of 2017.* I note that the Committee has requested a response in relation to issues identified with the Transport Security Legislation Amendment (Identity Security) Regulation 2016 (the new Regulation).

The new Regulation introduced the requirement for an issuing body to report any change in contact (or company) details to the Secretary of the Department of Infrastructure and Regional Development (my Department). It is crucial for my Department, as the transport security regulator, to have the most up-to-date information. The aviation and maritime regulations prescribe multiple circumstances when the Secretary of my Department must contact an issuing body, including for security-sensitive purposes.

For example, the Australian Security Intelligence Organisation may furnish an aviation or maritime security identification card (ASIC or MSIC) applicant with a qualified security assessment. If the Secretary is satisfied that the ASIC or MSIC applicant would constitute a threat to aviation or maritime security (respectively), the Secretary must give the issuing body a written direction not to issue an ASIC or an MSIC to the person.

The requirement for issuing bodies to update their contact (or company) details is intrinsically linked to protecting aviation and maritime infrastructure from unlawful interference (including terrorism). For this reason, failure to provide up to date information is prescribed as an offence of strict liability. I consider the new measure to be effective, reasonable, necessary and proportionate for the purposes of human rights law.

Since 2012, my Department has consulted industry on proposed regulatory changes to enhance issuing body practices. A range of regular consultations has occurred through industry-government forums including the Aviation Security Advisory Forum; the Regional Industry Consultative Meeting; the Maritime Industry Security Consultative Forum; Airport Security Committees; Cargo Working Groups and Issuing Body Forums.

Throughout 2016, the Department conducted a significant number of face-to-face meetings to discuss the new Regulation with issuing bodies, including introduction of the above-mentioned offence. In addition, the draft Regulation was released to all issuing bodies twice (in 2014 and 2016) for consultation. No issuing body expressed concern about the inclusion of the offence in the new Regulation.

I hope this information is of assistance to the Committee.

Yours sincerely

DARREN CHESTER

Appendix 4

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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

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

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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

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